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Original Citation.

Division of Classification

In your reply refer to
C. D. No. 37099

POST OFFICE DEPARTMENT
THIRD ASSISTANT POSTMASTER GENERAL
Washington 25, D. C.

September 11, 1943.

Publisher, "Esquire",
919 N. Michigan Avenue,
Chicago, Illinois.

Sir:

Pursuant to the rules of practice adopted and issued by the Postmaster General April 21, 1942, Order No. 17193, herewith enclosed, you are hereby notified that, in accordance with 31 Stat. 1107 (39 U. S. C. sec. 232), you will be granted a hearing in Room 3237 of the Office of the Postmaster General, Washington, D. C., at 10:00 A. M., September 28, 1943, to show cause why the authorization of the admission of the "Esquire" magazine to the second-class of mail matter, and the accordance to the "Esquire" magazine of second-class mailing privileges, under 20 Stat. 359 (39 U. S. C. secs. 224 and 226), should not be suspended, annulled, or revoked, upon the grounds:

(a) That it is nonmailable within the meaning of 35 Stat. 1129 (18 U. S. C. 334), in that issues dated January, February, March, April, May, June, July, August, and September, 1943, have contained matters described and portrayed as set forth in Exhibit "A" attached hereto of an obscene, lewd and lascivious character; and other matter of a similar or related nature;

and upon the further ground:

(b) That because of the inclusion of such matter in the publication it has not fulfilled the qualifications of second-class mailing privileges established by the Fourth Condition of 20 Stat. 359 (39 U. S. C. sec. 226);

and upon the further ground:

(c) That it is not a mailable newspaper or other mailable periodical publication of the second class of mailable matter as it, in a generally uniform and systematic manner, publishes nonmailable matter in that in issues dated January, February, March, April, May, June, July, August, and September, 1943, it has included matter such as is cited in Paragraph (a) hereof.

Failure of the publication to make appearance at the time and place fixed for hearing will be deemed to be a waiver of the right to a hearing and as authorizing the Postmaster General forthwith to issue an order suspending, annulling, or revoking the second-class mailing privileges.

Yours very truly,

(signed) RAMSEY S. BLACK,
Third Assistant Postmaster General.

Enclosure—Rules of Practice.
By Registered Mail.

EXHIBIT A ANNEXED TO ORIGINAL CITATION.

Division of Classification

In your reply refer to
C. D. No.

POST OFFICE DEPARTMENT
THIRD ASSISTANT POSTMASTER GENERAL
Washington

EXHIBIT A

TO ACCOMPANY LETTER DATED September 11, 1943, TO PUBLISHER "ESQUIRE" MAGAZINE, CHICAGO, ILLINOIS, IN CONNECTION WITH HEARING ON REVOCATION OF SECOND-CLASS MAILING PRIVILEGE.

January, 1943 issue

Pages 83 and 119. Story entitled "Those Star and Garter Blues."
Page 97. Picture entitled "January."
Page 98. Picture entitled "February."
Page 99. Picture entitled "March."
Page 100. Picture entitled "April."
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Page 103. Picture entitled "July."
Page 106. Picture entitled "October."
Page 107. Picture entitled "November."
Page 108. Picture entitled "December."

February, 1943 issue

Page 34. Picture entitled "The Varga Girl."

March, 1943 issue

Page 36. Picture entitled "The Varga Girl."

Exhibit A Annexed to Original Citation.

April, 1943 issue

Page 38. Picture and poem entitled "Peace, It's Wonderful."

May, 1943 issue

Page 38. Picture entitled "The Varga Girl."

Pages 86 and 87. Pictures 29, 30, 31 and 32 and accompanying text of "The Exploits of Esky."

June, 1943 issue

Page 34. Picture entitled "The Varga Girl."

July, 1943 issue

Page 76. Picture entitled "Broadway for the Boys."

Page 146. Pictures bearing an advertisement of "Esky buy-products."

August, 1943 issue

Page 10. Letter to editor bearing caption "Considered Opinion."

Page 38. Picture entitled "The Varga Girl."

Page 89. Picture bearing statement "Paste Your Face Here."

September, 1943 issue

Page 38. Picture entitled "The Varga Girl."

Amended Citation.

Division of Classification

In your reply refer to
C. D. No. 37099

13

POST OFFICE DEPARTMENT
THIRD ASSISTANT POSTMASTER GENERAL
Washington

October 4, 1943.

Publisher, "Esquire",
919 N. Michigan Avenue,
Chicago, Illinois.

Sir:

14

Pursuant to Rule III (e) of the Rules of Practice adopted and issued by the Postmaster General April 21, 1942, Order No. 17493, and in accordance with the agreement had by your editor and vice-president with counsel for the Post Office Department when continuances of the date of the hearing from September 28 and October 12, 1943, to October 19, 1943, were granted you at your request, you are hereby notified that the rule to show cause dated September 11, 1943, heretofore served upon you is hereby amended to read as follows:

15

In accordance with 31 Stat. 1107 (39 U. S. C. sec. 232), you will be granted a hearing in Room 3237 of the Office of the Postmaster General, Washington, D. C., at 10:00 a. m., October 19, 1943, to show cause why the authorization of the admission of the "Esquire" magazine to the second-class of mail matter, and the accordance to the "Esquire" magazine of second-class mailing privileges, under 20 Stat. 359

(39 U. S. C. secs. 224 and 226), should not be suspended, annulled, or revoked, upon the grounds:

16 (a) That it is nonmailable within the meaning of 35 Stat. 1129 (18 U. S. C. 334), in that issues dated January, February, March, April, May, June, July, August, September, October, and November, 1943, have contained matters described and portrayed as set forth in Exhibit "A" attached hereto of an obscene, lewd and lascivious character; and other matter of a similar or related nature;

and upon the further ground:

17 (b) That because of the inclusion of such matter in the publication it has not fulfilled the qualifications of second-class mailing privileges established by the Fourth Condition of 20 Stat. 359 (39 U. S. C. sec. 226);

and upon the further ground:

(c) That it is not a mailable newspaper or other mailable periodical publication of the second class of mailable matter as if, in a generally uniform and systematic manner, publishes nonmailable matter in that in
18 issues dated January, February, March, April, May, June, July, August, September, October, and November, 1943, it has included matter such as is cited in Paragraph (a) hereof.

Failure of the publication to make appearance at the time and place fixed for hearing will be deemed to be a

waiver of the right to a hearing and as authorizing the Postmaster General forthwith to issue an order suspending, annulling, or revoking the second-class mailing privileges.

Yours very truly,

(signed) RAMSEY S. BLACK
Third Assistant Postmaster General.

Enclosure—Rules of Practice.
By Registered Mail.

EXHIBIT A ANNEXED TO AMENDED CITATION.

Division of Classification

In your reply refer to C. D. No.

22

POST OFFICE DEPARTMENT
THIRD ASSISTANT POSTMASTER GENERAL
Washington

EXHIBIT A

TO ACCOMPANY LETTER DATED October 4, 1943, TO PUBLISHER "ESQUIRE" MAGAZINE, CHICAGO, ILLINOIS, IN CONNECTION WITH HEARING ON REVOCATION OF SECOND-CLASS MAILING PRIVILEGE.

23

January, 1943 issue

Pages 83 and 119. Story entitled "Those Star and Garter Blues."
Page 97. Picture entitled "January."
Page 98. Picture entitled "February."
Page 99. Picture entitled "March."
Page 100. Picture entitled "April."
Page 101. Picture entitled "May."
Page 102. Picture entitled "June."
Page 103. Picture entitled "July."
Page 104. Picture and verse entitled "August."
24 Page 105. Picture and verse entitled "September."
Page 106. Picture entitled "October."
Page 107. Picture entitled "November."
Page 108. Picture entitled "December."

February, 1943 issue

Page 34. Picture entitled "The Varga Girl."

Exhibit A Annexed to Amended Citation.

March, 1943 issue

Page 36. Picture entitled "The Varga Girl."

April, 1943 issue

Page 38. Picture and poem entitled "Peace, It's Wonderful."

May, 1943 issue

Page 38. Picture entitled "The Varga Girl."
Pages 86 and 87. Pictures 29, 30, 31 and 32 and accompanying text of "The Exploits of Esky".

June, 1943 issue

Page 34. Picture entitled "The Varga Girl."

July, 1943 issue

Page 76. Picture entitled "Broadway for the Boys."
Page 146. Pictures bearing an advertisement of "Esky buy-products."

August, 1943 issue

Page 10. Letter to editor bearing caption "Considered Opinion."
Page 38. Picture entitled "The Varga Girl."
Page 89. Picture bearing statement "Paste Your Face Here."

September, 1943 issue

Page 38. Picture entitled "The Varga Girl."

October, 1943 issue

Pages 43-44. The Varga Girl.
Page 49. Cartoon.
Page 93. "Goldbricking With Esquire." Items 2, 3, and 17.

November, 1943 issue

Page 46. The Varga Girl, picture and verse.
Page 66. Cartoon "It's no use, Sarg.—we're outnumbered—Yippppeeeee!"
Page 73. Picture "Golden Mould."
Pages 94-95. "Goldbricking With Esquire."
Item 4, "The corporal was going home on a furlough," etc.;
Item 15, "He: I see your husband has been promoted", etc.;
Item 24, "Home on furlough", etc.;
Item 27, "The beautiful Army hostess—", etc.;
Item 28, "Have a good time—", etc.;
Item 30, "Buck Private: 'I'm afraid we can't have much fun tonight—", etc.;
Item 31, "Pardon me Miss,—", etc.;
Item 35, Cartoon;
Item 36, "A beautiful young lady went for a swim—", etc.

Respondent's Answer to Original and Amended Citations.

BEFORE THE
POST OFFICE DEPARTMENT
C. D. No. 37099

IN THE MATTER

OF THE

SECOND-CLASS MAILING PRIVILEGES OF THE MAGAZINE, ESQUIRE, PUBLISHED BY ESQUIRE, INC.

Respondent, ESQUIRE, INC. (hereinafter referred to as respondent) by its attorneys, CRAVATH, de GERSDORFF, SWAINE & WOOD, for its answer to the original and amended orders to show cause citations (hereinafter called citations) in the above-entitled matter, dated September 11 and October 4, 1943, respectively, and signed by Ramsey S. Black, Third Assistant Postmaster-General, alleges as follows:

1. Denies each and every statement of subparagraphs (a), (b) and (c) of each of said original and amended citations except that respondent admits that the issues of its magazine, ESQUIRE (hereinafter called the magazine), dated January, February, March, April, May, June, July, August, September, October and November of 1943 (hereinafter called the cited issues), respectively, contained among other material the matter specified in Exhibit A, annexed to each of said citations.

For a First Complete Defense.

2. On December 15, 1933, respondent applied for and re-
34 ceived second-class mailing privileges for its monthly maga-
zine, and has continued to use and enjoy said privileges un-
interruptedly for approximately ten years, that is, until
September 13, 1943, when it was served with the original
citation to show cause why its said privileges should not be
suspended, annulled, or revoked. The October and November
issues were mailed under second-class privileges without
prejudice to their being included by the Postmaster-General
in the amended citation herein.

3. Respondent is a Delaware corporation with its editori-
35 al, circulation, business, and production offices in Chicago,
Illinois, and with its advertising offices in New York, N. Y.,
and has published the magazine regularly since December
15, 1933. During said period the magazine has been pub-
lished each and every month.

4. Each issue of the magazine, including specifically the
cited issues, bore and bears a date of issue and publication
number, and the address of the publication office. At the
present time the magazine is being printed at its aforesaid
office in Chicago, Illinois, and all the cited issues were
printed at Chicago, Illinois, although mailed out of both
36 Chicago, Illinois, and New York, N. Y.

5. Each issue of the magazine, including the cited issues,
is now and always has been formed of printed paper sheets
without board, cloth, leather, or other substantial binding
such as distinguishes printed books from periodical publica-
tions.

6. Each issue of the magazine since December 15, 1933, and including the cited issues, was, and future issues will be, originated and published for the dissemination of information of a public character, or matter devoted to literature, the sciences, arts, or some special industry. The magazine has had at all times since December 15, 1933, a legitimate list of subscribers and now has a legitimate list of subscribers numbering approximately 300,000 for each of the cited issues. 37

7. The magazine has never been and is not now designed primarily for advertising purposes or for free circulation or for circulation at nominal rates. The present yearly subscription rate and the yearly rate for the cited issues is and was $5.00 per year for twelve issues in the United States. 38

8. Each of the cited issues of the magazine regularly contains from 150 to 200 pages of which approximately 65% is editorial content and the balance devoted to advertisements by recognized, reputable business concerns through the country. The magazine has a standard editorial formula followed throughout the cited issues which includes (a) from six to nine articles of current general interest and information, (b) several fiction short stories, (c) several articles on sports, (d) from one to three articles on interesting personalities, (e) a feature discussing trends in men's dress, (f) a number of regular departments, including correspondence from readers, notes about contributors, the lively arts, books, wearables, theatre, potables, edibles and sports, and (g) a number of regularly recurring features such as paintings, water colors, prints and photographs. Substantially all of the non-advertising material, i.e., edi- 39

torial content, contained in the cited issues is devoted to the dissemination of information of a public character.

40

9. Each article or feature is contributed by persons well known and highly respected in their special fields, and each cited issue of said magazine furnishes valuable information of a public character to its readers as well as matter devoted to literature, the sciences, arts, or some special industry.

10. An average of 700,000 of the cited issues of the magazine were sold and distributed either through the mail to subscribers (300,000) or through newsstands (400,000).

For a Second Complete Defense

41

11. Each and every item referred to in Exhibit A annexed to the original and amended citations is mailable matter under the provisions of all applicable statutes.

12. None of the matter specified in Exhibit A annexed to the original and amended citations consists of non-mailable matter within the provisions of 18 U. S. C. 334 or any other applicable statute purporting to define non-mailable matter.

13. In none of the cited issues is there contained a single

42 article feature or other item of non-mailable character.

14. In none of the cited issues is there included any matter of an obscene or lewd or lascivious or indecent or filthy nature. None of the matter specified in Exhibit A annexed to the original and amended citations is matter of an obscene or lewd or lascivious or indecent or filthy nature.

15. All matter published in the cited issues consists of matter which is in accord with and entirely sanctioned by the current standards of morality as accepted by the community generally and as reflected in the magazine, book, newspaper, advertising, screen, stage and other fields of communication and entertainment. 43

16. Material substantially identical with that now cited in the original and amended citations as violating the provisions of 18 U. S. C. 334 and as obscene or lewd or lascivious has been generally accepted since December 15, 1933, as mailable matter of the second-class by the Post Office Department in respondent's magazine and throughout 1941 and the first seven months of 1942 such material has been held mailable second-class by specific rulings. Matter substantially identical with that now cited in the original and amended citations herein has likewise been accepted as mailable matter by the Post Office Department in other magazines of unquestionable standing in the publishing field both in advertising and non-advertising material. Such acceptance is in accord with and reflects the current standards of morality of the community. 44

17. There is no basis, in fact or in law, to support any of the charges contained in the original or amended citations of non-mailability or of violation of 18 U. S. C. 334 or any other statute relating to the subject of obscenity or non-mailability. 45

For a Third Complete Defense

18. This proceeding is in violation of 39 U. S. C. 226 and is without any basis in law for the reason that the Post-

master-General herein is attempting to impose requirements in addition to those contained in or contemplated by the statutes as a condition precedent to the enjoyment of sec-
46 ond-class mailing privileges.

19. The Congress of the United States has not committed to the Postmaster-General or to anyone else the discretion or province of determining what should be carried in the mails as second-class matter and what must be carried as matter of the third and fourth classes. It has reserved that power exclusively to itself.

20. The classifications for mailing and what constitutes second, third and fourth-class mail are fixed by statute and
47 are exclusively within the powers of the Congress. It is not competent for the Postmaster-General to add anything to, or take anything away from, the statutes defining the second, third and fourth classes of mailing.

21. The power of the Postmaster-General is limited to merely identifying the matter as included within one or the other of the classifications set forth and defined by the statutes. It is not competent for the Postmaster-General to impose additional requirements beyond those specified in the statutes.

48 22. In so far as the Postmaster-General by these citations and in this proceeding seeks to impose additional requirements for second-class mailing privileges not set forth or contained in any of the statutes, the Postmaster-General exceeds his power and the procedure is unconstitutional and in violation of due process of law.

23. The requirements for second-class mailing privileges are defined by statute. The Postmaster-General has no pow-

er to alter in any way the provisions contained in said statute. Respondent having complied with all requirements for second-class mailing is entitled, as a matter of right, to the privilege of second-class mailing and is not limited to exercising the privilege merely in the discretion of the Postmaster-General.

For a Fourth Complete Defense

24. The Postmaster-General has no authority to revoke the second-class mailing privileges of respondent on the purported ground that the matter stated in the citations, contained in the cited issues of the magazine, was non-mailable under the provisions of 18 U. S. C. 334 or under any other provision of any other statute or law.

For a Fifth Complete Defense

25. Section 232 of Title 39 U. S. C. as sought to be administered by the Postmaster-General by the citations herein and by this entire proceeding to revoke respondent's second-class privileges is unconstitutional in that under the Post Office Department rules of practice governing such proceedings, as administered by the Postmaster-General, respondent is denied due process of law.

WHEREFORE, respondent prays:

A. That this Board:

1. Enter its findings:

(a) that there is no support whatever in fact or in law for the charges of obscenity and violation of

18 U. S. C. 334 specified in the original and amended citations.

52 (b) that the publication complies with all statutory requirements for second-class mailing privileges, and

2. Recommend to the Postmaster-General that this proceeding be dismissed and the second-class mailing privileges of respondent be continued in full force and effect, and

B. That the Postmaster-General, or his duly designated representative, issue an order dismissing the proceedings
53 herein.

CRAVATH, de GERSDORFF, SWAINE & WOOD,
Attorneys for respondent, ESQUIRE, INC.,
Publisher of the magazine, ESQUIRE,
15 Broad Street,
New York, N. Y.
616 Transportation Building,
Washington, D. C.

54

Postmaster General's Order Appointing Board.

POST OFFICE DEPARTMENT

55

Washington 25, D. C.

October 14, 1943

ORDER No. 22538

A show-cause order dated September 11, 1943, which was amended on October 4 to include additional items and issues, having been prepared and duly transmitted by registered mail to Publishers, "Esquire," 919 North Michigan Avenue, Chicago, Illinois, calling upon said Publishers, "Esquire," to show cause at a hearing scheduled at 10:00 A. M., September 28, 1943, which was continued at the publishers' request until 10:00 A. M., October 12, 1943, and at further request of the publishers has been postponed until 10:00 A. M., October 19, 1943, in Room 3237 of the Office of the Postmaster General, why the authorization of admission of a certain publication, to wit, "Esquire," to the second-class mail privileges heretofore accorded said publication under the provisions of Title 39, United States Code, Section 224 and 226, should not be suspended, annulled or revoked upon the grounds and for the reasons specified in said notice;

56

Now, therefore, having ascertained that the following officials have not personally participated in the investigation or in the initiation of matters involved in this proceeding, pursuant to the authority contained in Title 5, United States Code, Section 22 (Section 8, P. L. and R., 1940), and the provisions of Order No. 17493, dated April 21, 1942, of the Postmaster General, Walter Myers, Fourth Assistant Postmaster General, Tom C. Cargill, Deputy First Assistant Postmaster General, and Frank H. Ellis, Chief Clerk and Director of Personnel, are hereby designated as hearing officers to conduct and preside at said hearing. Walter Myers is designated as chairman in such proceeding.

57

(Signed) FRANK C. WALKER
Postmaster General.

Hearing of Tuesday, October 19, 1943.

58 BEFORE THE

POST OFFICE DEPARTMENT

IN THE MATTER

OF THE

SECOND-CLASS MAILING PRIVILEGES

OF

THE MAGAZINE, ESQUIRE, PUBLISHED BY ESQUIRE, INC.

59

Room 3237 Post Office Department Building, Washington, D. C.
Tuesday, October 19, 1943.

Met, pursuant to notice, at 2 p. m.

Before:

WALTER MYERS, Fourth Assistant Postmaster General, Chairman;

TOM C. CARGILL, Deputy First Assistant Postmaster General;

60

FRANK H. ELLIS, Chief Clerk and Director of Personnel.

Appearances:

CALVIN W. HASSELL, Esq., Assistant Solicitor, appearing on behalf of the Post Office Department.

CRAVATH, de GERSDORFF, SWAINE & WOOD, Attorneys for respondent Esquire, Inc.,
by:

BRUCE BROMLEY, Esq.,
JOHN F. HARDING, Esq.,
JOHN F. DOWD, Esq.

Colloquy.

PROCEEDINGS

Chairman Myers: The case set for hearing today is Post Office Department of the United States against the publishers of Esquire on notice of a show cause why the second-class mailing privileges of the magazine Esquire should not be suspended, annulled, or revoked. 61

The papers upon which the proceedings are based will presently be made a part of the record, and if the parties are ready may we have the appearances; first, for the Department and then for the Respondent.

Mr. Hassell: Calvin W. Hassell, Assistant Solicitor, for the Department.

Chairman Myers: For the Respondent.

Mr. Bromley: For the Respondent, may it please the Board, the firm of Cravath, de Gersdorff, Swaine & Wood, Bruce Bromley, of counsel, that is my name; John F. Harding, who sits beside me, also counsel; and John F. Dowd, also of counsel, who sits on Mr. Harding's right. 62

Chairman Myers: Now, do the parties desire to make an opening statement at this time?

Mr. Hassell: Mr. Chairman, may I say—

Chairman Myers: You want to introduce the papers upon which the case is based?

Mr. Hassell: Yes.

Chairman Myers: Proceed with that, then.

Mr. Hassell: I will furnish counsel for the Respondent a list of these papers and he has also had an opportunity to examine them. 63

First, I would like to have introduced for the record the order of the Postmaster General appointing the Board, and I would also like the record to make reference to the rules of practice governing this procedure, taken from the order

of the Postmaster General, Order No. 17493, published in the Federal Register of April 23, 1942, at pages 3001 to 3003.

64 Next, the record should show the rulings of the Solicitor to the Third Assistant Postmaster General, dated September 8, 1943, to the effect that the January to September, 1943, issues of the magazine are non-mailable under Section 598 of the Postal Laws and Regulations, 18 U. S. Code, 334.

Next, the rule to show cause of September 11, 1943, to the publisher of Esquire, and I understand that counsel admits that service; service of this rule.

Mr. Bromley: That is right.

Mr. Hassell: The next item, the letters of September 11, 1943, to the Postmasters of Chicago and New York directing delivery of the rule to show cause.

65 Next, a letter of September 14, 1943, from the vice-president of Esquire requesting a continuance from September 28, 1943, to October 12, 1943.

Next, a letter dated September 17, 1943, from the Third Assistant Postmaster General to Mr. Gingrich, of Esquire, advising him of the continuance of the hearing to October 12, 1943.

Next, a letter of September 29, 1943, from Mr. Harding, of counsel for the publisher, to the Third Assistant Postmaster General requesting a further continuance to October 19, 1943.

66 Then, a letter dated October 1, 1943, from the Third Assistant Postmaster General to Mr. Harding granting the further continuance to October 19, 1943.

A letter of October 2nd, 1943, to the Third Assistant Postmaster General from the Solicitor holding that the October and November issues of Esquire are non-mailable under Section 598 of the Postal Laws and Regulations.

The next item is an amended rule to show cause, dated October 4, 1943, and letters of October 5, 1943, from the Third Assistant Postmaster General to the Postmasters at Chicago and New York transmitting the amended rule to show cause. 67

Last, a letter of October 8, 1943, from the Third Assistant Postmaster General to Mr. Harding advising him of the further postponement of the hearing to two p. m., October 19, 1943.

Chairman Myers: Is counsel for the Respondent familiar with all of those?

Mr. Bromley: Yes, sir.

Chairman Myers: Any objection?

Mr. Bromley: No objection. 68

Chairman Myers: They will be made a part of the record.

(The above-mentioned papers were thereupon filed and made part of the record.)

Chairman Myers: Now, if the parties desire to make an opening statement I would be glad to hear them at this time.

Mr. Hassell: I should like the answer of he publisher made a part of the record.

Chairman Myers: I thought you included it.

Mr. Hassell: No, sir. 69

Chairman Myers: We should have the answer of the publisher by all means; that raises the issue. Do you have it?

Mr. Bromley: Mr. Hassell has it. It has been filed with him.

Mr. Hassell: I had Mr. Wentzel deliver it to you.

Chairman Myers: I have the original copy. If you want to introduce it into the record, let counsel for the Respondent see it.

70 Mr. Bromley: May it please the Board, I offer in evidence, and ask that it be made a part of the record, the Respondent's answer to the original and the amended citations.

Chairman Myers: It may be made a part of the record. There is no objection, is there?

Mr. Hassell: Why, I move that a portion of this answer of the Respondent be stricken as it is not pertinent to any issue involved in this proceeding.

The first paragraph, numbered paragraph, on page 1 is a complete answer to the rules to show cause.

71 Paragraphs 2, 3, 4, 5, 6, 7, 8, 9 and 10 cover matters that are not in issue here. No issue is raised by either of the rules to show cause, and it certainly would be a waste of the time of this Board to go into and develop proof on those items in the answer.

Paragraphs 15 and 16 are argumentative and really have no place in the answer, as also with paragraph 17.

Paragraph 16 attempts to open up in this way, if the Board pleases, the past history of this publication. I warn the Board now that if we are going into that we are going to consume considerable time, if the Respondent is allowed to go into these things directly, because then the Government

72 will then have to certainly go through the files of its office to show the history of the publication prior to the first issue that is involved here, that is, the January, 1943, issue.

Paragraph 17 is argumentative.

Paragraph 18 is argumentative.

Paragraphs 19, 20, 21, 22 and 23 state no issue involved in this proceeding because counsel for the Department will admit the law with respect to the authority of the Post-

master General concerning the granting or revocation of the second-class privileges stated in the Court of Appeals case, Payne vs. United States, ex rel. National Railway Publishing Company, 20 App. D. C., 581, and the Supreme Court of the United States in Haughton vs. Payne, 194 U. S. 88, and the Milwaukee Publishing Company vs. Burleson, 255 U. S. 407. Of course, the statute 18 U. S. Code, 334, should be considered in connection with those paragraphs. I don't think there will be any controversy about the language of the statute. 73

Paragraph 24 is also purely argumentative and ignores the law laid down in the Milwaukee Publishing Company vs. Burleson, 255 U. S. 407.

I move the Board that those portions of the answer be stricken. 74

Chairman Myers: The portions enumerated?

Mr. Hassell: Yes, sir.

Mr. Bromley: May it please the Board, since this case may very possibly go to the Supreme Court, at least in one eventuality, it seems to me that the Respondent has the right to protect its legal rights in this case and state clearly its position. There may be some question when we come to particular items of proof under these defenses as to whether what we offer is material, but it seems to me there can be no doubt but what we have a right to plead affirmative defenses; not only affirmative defenses under the statute, but affirmative defenses as the last two do, setting up what we claim to be an invasion of our constitutional rights, in the event this Board construes the statute in a fashion which we consider as unconstitutional. 75

Now, the first defense is an affirmative defense which alleges simply facts which we assert show complete compliance with all the statutory requirements for second-class

privileges, and which Your Honor will remember are four in number.

76 Now, we did that because Mr. Hassell has never been clear with us as to whether he is willing to stipulate that or whether he was not, so we pleaded that as a defense. If he will now stipulate that he raises no issue with respect to that matter and that he agrees that we are entitled to and have fulfilled each and all of the four conditions in the statute which are required to entitle us to second-class privileges, then we will offer no proof under that affirmative defense.

I still think we are entitled to plead it.

Mr. Hassell: I have endeavored in conferences with Mr.
77 Harding on several occasions in the past, and by a letter addressed to him, to show what my position was. As a matter of fact, I have shown him in detail the entire Government case. I furnished him with not only the references to the matters and the citations, Exhibit A attached to the citations, that I proposed to call the Board's attention to, but to similar matters in these various issues that I intend to call the Board's attention to.

We make no contention here that this publication does not comply with the first three conditions of Section 226 of 39 U. S. Code.

As to the fourth condition, reading that section 224 of
78 39 U. S. Code, the law requires that second-class matter be mailable matter. That is the first word in the statute 224 of 39 U. S. Code, mailable matter of the second class.

We contend that this publication, as we will show here, has not complied with the fourth condition of the second-class statute in that it is not designed for the dissemination of mailable matter such as described in that section.

Mr. Bromley: Now, if the Board pleases, let me say at

the outset that I have never had a more courteous or fairer or abler opponent than Mr. Hassell. He has shown us every consideration, and nothing that I have said here is intended to be otherwise. 79

It seems to me that we do disagree upon the interpretation of the law and the only way we can protect our client's interest is to plead what I think are proper affirmative defenses.

Now, if Mr. Hassell will stipulate that if Esquire is mailable at all it is mailable with second-class privileges maybe that would obviate our disagreement, I am not sure. In other words, if the only contention that he makes is that it is not mailable because it is obscene, then he ought to be willing to agree that if it is not obscene it is mailable as second-class matter, because, of course, the fourth condition, as the Board probably knows, and I want to quote the exact words, the fourth condition is: "That the magazine be originated and published for the dissemination of information of a public character or devoted to literature, the sciences, arts, or some special industry". 80

Now, we say that is our magazine, that we fulfill that condition. Mr. Hassell says we do not, but only because we are obscene. If we are not obscene, then he, I take it, admits that we are devoted under that statute to the dissemination of information of a public character or devoted to literature, the sciences or arts. 81

Is that a fair statement, Mr. Hassell, or am I still wrong?

Mr. Hassell: I am simply stating the position of the department and I will not alter the position by any statement I make here. It is very clearly shown in the rule to show cause that recites that it is not mailable matter within the meaning of Section 334, 18 U. S. C. 334, in that the various issues have contained matter described and portrayed as

set forth in Exhibit A, which are attached hereto, and are of an obscene, lewd, and lascivious character, and other
82 matter of a similar or related nature, and upon the
ground that (b) "that because of the inclusion
matter in the publication it has not fulfilled the q
tions of second-class mailing privileges established
fourth condition of 20 Stat. 359 (39 U. S. C. S

And upon the further ground (c) "that it i
able newspaper or other mailable periodical pu
the second class of mailable matter as it, in a gene
form and systematic manner, published non-mailable matter in that the issues dated January", and so forth, it has included matter such as is cited in paragraph (a) hereof."

83 I think that the rule of citation states the position of the Department and that is definitely my position and I don't know how to state it more clearly.

Chairman Myers: The motion of Mr. Hassell to strike out will be over-ruled. If any question arises with respect to the evidence on these particular points, they may be agreed upon at the time and perhaps that will eliminate some of the questions which may come up. It is true that there are some references to legal propositions in the answer, but sometimes we have those come up in equity cases in the same way.

We are now ready to proceed.

84 Mr. Hassell: Of course, I except to the ruling of the Board.

Chairman Myers: Certainly.

Mr. Hassell: Except, I assume I am not precluded from objecting to the testimony introduced with respect thereto?

Chairman Myers: Not at all. That is the point upon which it is over-ruled. You have the right of objection at any time during the proceeding.

Mr. Hassell: I will call Mr. Wentzel.

Chairman Myers: Do you desire to make an opening statement first?

85 Mr. Hassell: Yes. The Government will establish first that this publication enjoys the second-class privilege. It will also establish that the several issues involved in this proceeding were actually deposited in the mails.

We will show the quantities of practically all of them, probably not of the last issue, but we will show the amount of postage paid and the amount of postage that would have been charged or paid by the publisher had he not enjoyed the second-class privilege.

Factually, that is all. That will be the Government's case.

86 Mr. Bromley: May it please the Board, we will concede all of those facts and figures however presented.

The Respondent here is a Delaware corporation which applied for and received second-class privileges back in December, 1933, and until this action has enjoyed them uninterruptedly for ten years.

The citation, as Your Honors are now aware, seems to me sets forth but one ground of attack upon the second-class privileges of this publication, and that is that under a criminal statute it has published obscene, lascivious, lewd, indecent, or filthy matter.

87 We will show that the magazine during its ten-year history has been published regularly each month. That it now has regular subscribers numbering over 300,000; that each month it regularly sells through newsstands about 400,000 copies; that that newsstand distribution is accomplished through the facilities of the Curtis Publishing Company, the publisher of The Ladies Home Journal and the Saturday Evening Post and others.

The price of the magazine is fifty cents a copy, five dollars a year.

It has had a continuing circulation in England for years.

88 It is a magazine for men as our evidence will establish and its advertising is principally directed to the men's trade.

It regularly appears in from 150 to 200 pages, sometimes more, of which approximately 65 per cent is editorial content and 35 per cent, about, is advertising.

It has now and has always had a standard editorial formula, a living demonstration of which you can see in the table of contents.

It always divides its editorial content into about seven classifications. It features a number of articles of current

89 interest, current affairs, now largely matters that deal with the war.

Secondly, it always publishes a number of short stories written by distinguished writers, in many instances stories that have been carried in fine collections of short stories for years.

In the third place, it always carries articles on sports.

In the fourth place, it carries articles on interesting personalities in the news, in this country and elsewhere.

Fifth, it has always a feature on men's clothing, either by way of illustration, text, or both; trends in men's dress.

In the sixth place, it has a number of special departments

90 which occur regularly every month, the Sound and the Fury, Letters to the Editor, the Lively Arts, Books, Wearables, Potables, and Edibles, and the Theatre.

Finally, it each month has recurring features, such as great paintings reproduced in color, water colors, photography, both black and white, prints, and the like, and the Varga girls.

Opening by Mr. Bromley.

Now, this Respondent is a Delaware corporation and it publishes a number of magazines like the magazine Coronet, which is made up of a collection of articles and stories and devoted in part to the arts. 91

It also publishes Apparel Arts, which is devoted to the special industry of men's clothing.

It also publishes a series of sports books.

The ownership of this corporation has never changed since the beginning of 1933. It is owned by the Smart brothers and edited by Arnold Gingrich, and those three gentlemen have directed its policy throughout the period of ten years.

The matter which is involved in this proceeding consists of eleven issues which run from January through November, 1943. There are some 1950 pages in those eleven issues, and out of those 1950 pages a total of 36 pages is cited directly by the Department as being obscene. Not all the pages, but generally some part of the page. 92

Now, in addition, here is what we are a little bit confused on, a little bit out of tune with Mr. Hassell. He has served us with what he calls a specification in which he says the citation alleges that there is other matter of a similar and related nature in our book, and then he says, "I now specify what that is", and he calls our attention to 52 additional pages. He does not cite that as obscene. He says that is other similar and related matter. I don't know whether he means it is obscene or not. I am perfectly sure it does not bear such a direct relation to the matter that he complains of that it affects or changes the character of the matter which he directly complains of, although that theory, I think, is somehow not carried out when he says it reinforces the cited matter. 93

So, you have those two classes of matter to consider in these magazines.

Now, on these 36 pages of directly cited material there are 32 features which he claims either wholly or partly
94 violate the criminal obscenity statute. Of the 32 features, 21 of them are Varga girl drawings. There are 12 of them in the January issue and one each thereafter, and then in one of the magazines there is an advertisement for post cards, with a small reproduction of the Varga girl drawing on the back, so out of 32 items in his complaint 22 of them are those Varga girl drawings.

The others consist of letters from soldiers or excerpts from military camp papers, a theatrical review by Gilbert Seldes of a Broadway musical, "Star and Garter", now being shown in New York, and one picture of a scene from
95 a Broadway show, "By Jupiter"; exploits of Esky, a couple of cartoons, one color photograph, and a paste-up feature for service men consisting of a girl sitting on a man's shoulders with the man's face in blank, and it is designed to have the purchaser cut out his face and put it up there and pin it up on the barracks walls.

Now, I want to say this to Your Honors, here is one of the matters that have been cited as obscene. This is a cartoon of some of our soldiers surrounded by a group of girls with spears and underneath it says: "It's no use, Sarge, we are outnumbered. Yippee".

Now, that is cited as violating a criminal obscenity
96 statute.

I say to the Board at the outset that if any such position is sustained by the Board, it goes directly to the constitutional guaranty of the freedom of the press, and as such creates a very dangerous precedent.

The danger, it seems to me, that we will overstep every criminal statute in a ruling of that kind and bar material

from the mails which are in questioned taste, and that certainly would be a very serious thing with regard to the constitutional guarantee of the freedom of the press.

Now, the 52 pages of related matter is something like the cited matter. Indeed, it is difficult to draw the distinction; how can any man classify one cartoon as obscene and the others as being similar thereto? 97

Now, I pass to the statutes. The criminal statute, as Your Honors well know, makes it a crime in the following words:

"Every obscene, lewd, or lascivious, and every filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character * * * is hereby declared to be non-mailable matter and shall not be conveyed in the mails from any post office or by any letter carrier." That is page 6 of our brief, at the bottom of the page. And it further states that whoever shall cause this to be done shall be guilty of a crime and shall be fined $5,000, or imprisoned not more than five years, or both. 98

That is the statute and that is a criminal statute, and the very words are "obscene, lewd, lascivious, filthy, indecent," those five words.

Now, you would think that Mr. Hassell and I could agree upon the test. Perhaps the Chairman knows better than the other members that lawyers seldom agree, but we are in disagreement as to the test which you are obligated to apply under the law. 99

What is the test as to whether a thing is obscene or not? What is the law? What has the law had to say about it?

And let me say before I come to that, that there is no direct connection between this criminal statute and the other statute which lays down the four conditions in order to entitle the publication to go second-class. There is no

direct connection. If matter is obscene under the criminal statute which says "It is hereby declared to be non-mailable"
100 it should be barred not only from the second-class, but from the mails entirely, and the publisher prosecuted in the criminal courts.

But that is not the effort in this proceeding. Here the effort is to deprive us of second-class privileges so that it can go in a higher class, in our case fourth class, which would cost us something over half a million dollars more a year if sent in that class.

In other words, instead of being fined $5,000 under the criminal statute, it is the purpose of the Government to fine us $500,000 a year and let us go on and send the stuff
101 through the mails.

I say there is no authority for the Government so to interpret the criminal statute.

What is the test? We tried to phrase it at page 9 as we think has been clearly established in the law as follows:

"The gravamen of obscenity is the tendency of the publication to corrupt the morals of the normal average person or to lower such person's standards of right and wrong concerning sexual behavior. The test is that of sexual impurity."

We have quoted all the cases which we think bear on it and there have been many. At the bottom of the page the Court in the case of the United States versus Dennett,
102 which was a very famous one, said:

"The statute we have to construe was never thought to bar from the mails everything which might stimulate sex impulses."

In the Swearingen case the Supreme Court says:

"The words 'obscene', 'lewd', and 'lascivious', as used in the statute, signify that form of immorality which has relation to sexual impurity, and have the same meaning

as is given them at common law in prosecutions for obscene libel. As the statute is highly penal, it should not be held 103
to embrace language unless it is clearly within its letter and spirit."

And throughout the rest of those quotations the standard is set up, as I believe we have phrased it. Where is the disagreement?

In his Appendix A brief which Mr. Hassell has submitted to the Board as being a test of the law, he has gone to the original test set up by the English courts in 1888 in Regina vs. Hicklin, which in 1889 in U. S. vs. Clarke was approved. That is the weakest class test, and that test has been ex- 104
pressed this way:

"There is another large class to be found in every community—the young and immature, the ignorant, and those who are sensually inclined—who are liable to be influenced to their harm by reading indecent and obscene publications. The statute under which this indictment is framed was designed to protect the latter class from harm."

Now, lawyers have come to refer to that as the weakest class test. But that has been repudiated. That is no longer the law of this country. It has been expressly and vigorously repudiated by Judge Learned Hand in the famous "Ulysses" case and in the Parmelee case in the Court of 105
Appeals for the District of Columbia, and I believe does not exist any longer as the correct test, because the Judge here in the District said:

"Although the word has been variously defined, the test applied in many of the earlier cases was that laid down by Lord Chief Justice Cockburn in Regina vs. Hicklin, as follows: '* * * whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands

a publication of this sort may fall.' * * * But more re-
106 cently this standard has been repudiated, and for it has been substituted the test that a book must be considered as a whole, in its effect, not upon any particular class, but upon all those whom it is likely to reach."

So, it is our position, as a matter of law, that the test is the test upon the normal average mind, and whether or not it has the tendency or will corrupt the morals of such a person, lower his standards of right and wrong with relation to sexual behavior, or corrupt his morals.

The test is not whether or not it would stimulate sex thoughts because it would be impossible to bar all things that
107 stimulated thoughts of sex.

Now, in this connection, in Appendix A, the Solicitor for the Department seems to take the position that something less than obscenity as defined in the criminal statute will suffice to deprive a publication of second-class privileges. And that is why we pleaded one of these constitutional defenses. I do not believe it is possible to say, even though the second-class privilege may be properly described as a privilege, that Congress ever set up any other standard than obscenity, and that you can find any warrant in any statute for saying "Even though the thing is not obscene it comes so close to the line that while it should not be
108 barred from the mails altogether, it should lose this subsidized position given it by the second-class privilege", and I think the position of the Department is founded upon the erroneous assumption that something less than obscenity will justify this department in depriving us of our privileges. I do not believe that is the standard.

We shall show that the test of obscenity has always been recognized by the law as a living, growing, changing standard.

Judge Hand wrote about that and said that the words of the statute and the Constitution mean different things for different periods and not only what people thought about in Victorian times. 109

I need only remind you that that is best exemplified by the development in the bathing suit. What would our Victorian forefathers have thought, those who clothed women in the bathing suits with flowing skirts and stockings, about the girls on the beaches at Coney Island or Newport?

We have to put our minds in tune with what the public generally thinks today, and that is why we refer to other magazines and publications. We don't mean why can't we do it because someone else does it. But it is important, it seems to me, to find out what is commonly accepted, what is not criticized, what appears generally throughout the reputable magazines of today, such as Harpers, Time, Life, The Saturday Evening Post, and so forth. 110

And, in that connection, it is our position that we are entitled to show, as we have alleged in one of these defenses, that this Department itself 19 consecutive times wrote us formal letters approving issues of this magazine, from 1940 through 1942, which contain Varga girls more extreme, in many respects, than those appearing today.

I realize no man can estop the Government, but this is an indication of what the people in this Department thought about those drawings at that time. 111

Now, I wonder about the material itself. Our evidence will show that judged by present day standards the material complained of, without any exception, is sanctioned.

We expect, with the permission of the Board, to produce psychiatrists, clergymen, and educators, to whom we have submitted this material and let them give you their expert

opinion as to what the effect of the matter complained of is upon the various classes of persons in each community, and what the tendency is to lower the standards of right 112 and wrong, and their opinions about obscenity.

What are the Varga girl drawings? I wish Your Honors would now open the January issue to page 97, where there are 12 all in a bunch. They are a recurring feature; they have been published for ten years. They are one of the few features which originated in the magazine—they or their predecessor, the Petty girl—and have been published ever since. You have a ten-year history behind this thing.

They are frankly published for the entertainment they afford, and we do not contend that we publish them as art.

As the publication goes on—not in that book, but in 118 others—you will notice the size has increased and we have a gate fold. That is because of the servicemen's demand for pin-up pictures in a somewhat larger size.

We shall present witnesses to show that those pictures are nothing but attempts to glorify the American girl by artistically presenting the creator's conception of the most perfect and attractive American form and figure he can think of.

There is in no one of those drawings ever any exposure of any intimate part. They are not drawn from models but are created as wax dummies are. They represent a com-
114 bination of attractive features. If you analyze them they are all out of proportion. The legs are too long, the figure is shortened or lengthened. They are imaginative reproductions of the artist's conception of what the perfect figure, face or form, of a woman should be.

I say that judged by present-day standards of evening gowns or bathing suits, those pictures are not obscene. Judged by evidence which we will seek to introduce here

as to girl illustrations generally by many reputable magazines, and by magazine advertising such as lingerie, bathing suits, perfumes, even cigarettes, that these pictures are sanctioned by that custom which has been built up until today they are not ahead of the times. Indeed, I sometimes think they are not up to the times. 115

And, in addition to that I hope you will take the opinion of skilled psychiatrists and educators as to their opinion of these drawings.

In addition, there are some photographs by photographers of national reputation, for artistic presentation. They are in relaxed poses, but fully covered as far as any exposure is concerned. 116 There are also reviews of the Star and Garter show, which perhaps you saw, as I did, a sort of bawdy show. It has been presented in New York and is still running.

All the reporter, Gilbert Seldes, did was to say how far it went and what was the one dirty song which the chorus sang. That is only factual reporting to which any publication is entitled.

Life will report what it was that caused a burlesque show to be banned, in a way which if it does not express its approval, does not lead people to go to see it or want to see it, but it contents itself with reporting the facts.

Then, there is a series of articles, one of which was written by Paul Gallico exposing the cheap and tawdry lack of appeal that existed in burlesque and what a silly thing the "strip" was, and the thesis of his article was that if producers of this sort of thing think it attracts men generally, they are crazy. 117 It is not sex stimulation at all.

Gilligan wrote a report of a typical night court in New York. It is a fine thing for all adolescent people to read because it points out the dangers of the prostitute and the

high prevalence of venereal disease in New York, and
118 should cause any young man to hesitate before he committed any indiscretion. It is helpful and useful.

And then George Jean Nathan condemning 45 or 50 things currently being produced on the stage, said: "I resent producers who present shows in which there is a confusion among those on the stage as to whether or not a reputable girls' school or some other such institution is or is not a bawdy house."

That phrase occurs in literature and has occurred for years and years.

Gilbert Seldes criticized the modern tendency of clothing
119 and perfume ads to appeal to the senses and poked fun at the titles which were given by manufacturers to their perfumes such as "Desire" and so forth, and said: "How silly to try to sell by emphasizing that element."

And there are a couple of pages devoted to excerpts from camp papers published by soldiers. Some of the humor may be in bad taste, a little mannish, a little crude, but nothing obscene or vulgar about it.

A girl says, "Would you like to see where I was operated on?" And the man says, "No, I hate hospitals."

Those are merely reproductions of things published in Army journals. They are designed to show a cross section
120 of Army humor and what the boys are reading. And, anyway, most of the jokes are pretty old stuff for the most part.

And then there are some articles which contain indelicate language. An article about a merchant marine sailor who has been torpedoed several times and he gets drunk on shore and swears and uses indelicate language, and an arti

cle about Negroes living together in one room in tenements.

Then, cartoons dealing with, some of them, indelicate situations. It is our opinion that indelicate matters and 121
even matters of vulgarity are not matters of obscenity.

And for that reason I have asked these psychiatrists to come here to see if they cannot draw the line.

And then there are some cartoons. Two air raid wardens on a roof looking through the transom. The light has come on and you can't see what is underneath the transom, and one fellow says, "To think I gave up drawing." What is he looking at? He must be looking at an artist who is drawing a model. You can think of worse things and you can think of better things. The model might be dressed and going home. Is it obscene because some dirty mind 122
might think of a bad thing? The normal reaction to a thing like that is not bad.

Finally, the character of this magazine must be tested not only by consideration of these features complained of, but by its contributors, advertisers, and its readers. And we would like to show you, if we may who our contributors are. Starting with William Lyon Phelps, who has contributed to Esquire, and who wrote us: "I enjoy my writing for Esquire so much that I would let nothing interfere with it," and Peter B. Kyne, Theodore Dreiser, and many, many others. It is inconceivable that these men would let their names be associated with a dirty, filthy 123
magazine.

Now, no advertisements are complained of except two out of the bunch, the post-card one I mentioned and an advertisement of the Literary Guild of America, an adjunct of the publishing house of Doubleday-Doran.

They advertised some books by Thorne Smith in the way that publishers for 50 years have advertised de Maupaus-

sant, illustrated with women with not very many clothes on, and saying, "Read the startlingly frank books".

124 Those are the only two specified as obscene or related to obscenity.

Our advertisers include Ford, Chrysler, United States Rubber, Cluett Peabody, Wilson Sporting Goods, Bristol Myers. There are no love potions or females seeking companionship. There is nothing of that sort whatsoever.

This magazine is distributed through the vast distributing organization of the Curtis Publishing Company. We believe our magazine is read by at least 34 per cent of the armed forces. The Army buys it for resale in most all of its centers.

125 We are furnishing 50,000 and later 60,000 copies a month made up on thin paper, without advertising, to be shipped by the Army to our soldiers overseas.

We would like an opportunity not to show our entire subscription list, but to show who takes this magazine regularly, and that would disclose that there are nearly 50 individual chaplains in the service who are subscribers, over 4,000 U. S. O. centers and 1,600 schools and universities, 9,000 commissioned officers, and many directors of business firms listed in Poor's and Moody's.

It is to be found in substantially all of the university libraries and most, if not all, Navy and Army hospitals.

126 Not one of these eleven issues has been cited or disapproved of by any censorship body in this country. This magazine is not on the proscribed list of the National Order of Decent Literature and the New England Watch and Ward Society does not condemn this.

If the Board will bear with us, and we will try to be as brief as we can, we would like an opportunity to present these witnesses.

Chairman Myers: Do you have a copy of your answer to spare? 127

Mr. Bromley: Yes, we do (document handed to Chairman).

Mr. Hassell: Mr. Chairman, in view of the argumentative statement of counsel in which he has gone into these various matters in advance, I think it incumbent upon me to make a further statement to clarify my position here.

I explained to counsel when I furnished the items of similar matters to those charged in the citation specifically, that it was not my contention or position that these were all of the objectionable matters in this publication. I said I simply intended to call the Board's attention to those matters, that the magazines would be offered as a whole, and would, I assume, be considered as a whole, in their entirety. 128

As to counsel's emphasis that th statute, the postal obscenity statute, so-called, is a criminal statute, I would respectfully call his attention to the fact that it also makes matter non-mailable and imposes upon the Postmaster General the authority, the duty and the obligation to exclude matter contained thereunder from the mails.

Also, in addition to the obscenity and indecent matter in the case of United States vs. Limehouse, 284 U. S. 424, when the statute was amended in 1909 by the addition of the words "and every filthy", the Supreme Court said, "This amendment added a new class of unmailable matter," and you will find that class of unmailable matter in this publication if you go through it. 129

The words which were the basis of the indictment in the Swearingen case, 161 U. S. 446, which the Court held were not of the character as to make those matters punishable by the statute as it was then worded, when it was amended

—it was amended by reason of the decision in the Swear-
130 ingen case—a new class of unmailable matter was created by the addition of the words "and every filthy".

I want to add that I make no claim that this magazine does not contain perfectly proper and interesting matter in addition to these matters that we are complaining of here, but counsel knows, and each member of this Board knows that you can be surfeited by filth. The promoters of every burlesque show know that. When he brings on his strippers he intersperses those things with so-called comedy, scenic matter, and other things.

This was recently called attention to by an article ap-
131 pearing in Harpers Magazine discussing these picture magazines, and the writers of this article have stated:

"Sex required skill in handling. People wanted to read about it and look at it frequently, but not all the time; it could be given in large doses, but it must not be overdone. How to space and coax the reader along from one dose to the next was Goddard's anxious care."

As I stated before, we are going into the past history of the publication and we are going to show the fight this publication has had ever since its inception to keep this rank filth in the mails.

Counsel has referred to this office having passed certain
132 issues. I want to show the files and records on those matters, if that is brought in in his direct case, to show where we repeatedly, time after time, told them we would bar matter from the mails, how we were deluged by editorials and cartoons and practically put on the editorial staff of this publication, in the hope that they would get something by.

And, of course, the Solicitor was perfectly human; that thing worked, probably, once in a while. Probably they

did get something by that they should have not gotten by, but the fact that the Solicitor or the Solicitor's Office or anyone made a mistake two years ago does not justify 133
this publisher in putting this stuff in the mails now at a subsidized rate of postage.

Chairman Myers: If there is nothing further, we will proceed with the evidence.

NELSON B. WENTZEL was called as a witness by and on behalf of the Post Office Department, and being first duly sworn, testified as follows:

Direct Examination by Mr. Hassell: 134

Q. State your name and official position, Mr. Wentzel. A. Nelson B. Wentzel, Superintendent, Division of Classification.

Q. For how long have you held that position, Mr. Wentzel? A. Since March, 1934.

Q. And prior to that time were you connected with that office? A. Yes, since 1906.

Q. You were Assistant Superintendent for some years prior to 1934, were you not? A. I was.

Q. Mr. Wentzel, has the publication known as Esquire, the Esquire magazine, a second-class permit? A .It does 135
have.

Q. I believe I have the files here (handing the witness). Will you state when this publication was accorded the second-class privilege and what its frequency was at that time? A. The original entry of second-class matter was authorized October 19, 1933, based on the Autumn 1933 issue as a quarterly publication.

Q. And when did it change its frequency? A. Re-entry was authorized as a monthly under date of December 15, 1933.

136 Q. Was it entered at Chicago and New York? A. The original entry was at Chicago in both of these cases. Additional entry was accorded considerably later at New York for certain mailings.

Q. I see. Coming to the January to November, 1943, issues of Esquire, Mr. Wentzel, have you evidence of the actual mailings of that publication and the amounts of the mailings?

Mr. Bromley: We will concede that, if the Board please.

137 Mr. Hassell: I would rather have it in the record, Mr. Bromley.

The Witness: We have the duplicate copies of the receipts which were issued by the post offices of mailing during this interval.

Mr. Hassell: At this point I would like to offer these issues from January to November, 1943, in evidence and have them marked as Post Office Department's Exhibits.

Mr. Bromley: No objection.

Chairman Myers: Without objection, they are admitted in evidence.

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(Department Exhibits 1 to 11, referred to above, were received in evidence.)

By Mr. Hassell:

Q. Mr. Wentzel, are these the receipts showing the mailings of these issues, which I show you? A. Yes, sir.

Q. These show mailings at Chicago and New York post offices? A. That is right. 139

Mr. Hassell: I would like to offer these in evidence.

Mr. Bromley: No objection.

Chairman Myers: Let them be marked and received in evidence.

(Department Exhibits Nos. 12-A to 12-Y, 13-A to 13-N, 14-A to 14-M, 15-A to 15-O, 16-A to 16-J, 17-A to 17-K, 18-A to 18-I, 19-A to 19-C, 20-A to 20-L, 21-A to 21-M, 22-A to 22-K, 23, 24-A to 24-K, were 140 received in evidence.)

By Mr. Hassell:

Q. These cover the issues from January to November—only one receipt covering November? A. That is right.

Mr. Hassell: I might explain to the Board that apparently there are various and consecutive mailings of each issue. The November issue, of course, has not been out very long.

141

By Mr. Hassell:

Q. You might explain for the record how those receipts are obtained. A. The mailings are presented at the respective post offices, they are weighed by the post office employees, and based on figures taken at the time of the weighing, the receipts are issued and the postages computed on an analysis of the distribution by zones which the publishers furnish twice a year or oftener if they so desire, or if the Post Office feels it is necessary.

142 Q. And these receipts show the amount of postage actually paid for each of those mailings? A. They do.

Q. Have you made a calculation of the amount of postage paid on most of these issues? A. Yes, we did. We summarized the weights and postage from these receipts and I have it here by months.

Q. What months does that cover? A. January, February, March, April, May, June, July, August, September and October.

Q. I see. And do you have the estimated postage that the fourth-class rate of publication would have taken had
143 it been mailed fourth class? A. For the months of January, February, March, April, May, June and July we did make such an estimate. During that period the total weight of the copies mailed was 2,900,380 pounds. The postage paid at second-class was $66,341.52, and the estimated postage at the regular rates which would have been the parcel post rates, and these copies, weighing between one and two pounds, would have been a charge for a two-pound parcel, from the information given on the publisher's analysis of distribution, would have been $369,045.43.

Q. For the seven months? A. For the seven months. We did not make that extension for the remaining period.
144 If the remaining months were added the figures would be approximately one-third larger.

Mr. Hassell: That is all.

Mr. Bromley: No questions.

Chairman Myers: That is all.

(Witness excused.)

Mr. Hassell: At this point, Mr. Chairman, I would like to have the pleasure of the Board as to

whether the Board would like for me to go through these issues and point out the various things I have told counsel I was going to point out to the Board. He has done that in his own way to some extent in his opening statement. Or would you wish that I reserve this for argument? The issues will be in evidence. 145

Chairman Myers: I prefer to have it in argument. I think it would be fresher for us.

Mr. Hassell: I might, at this point, if counsel does not object, give the members of the Board the lists for each month that I furnished counsel. 146

Mr. Harding: Why don't you give them the complete list which includes November? Is that the same?

Mr. Hassell: Yes.

Mr. Harding: All right.

Mr. Hassell: I might state that the items checked in red pencil are the ones specifically mentioned in the citation.

Chairman Myers: Mr. Bromley said he would agree to all that you might want to prove. Could you indicate that on the record?

Mr. Hassell: We might have an understanding that if the Department wants those papers they can substitute papers or a summary of them. 147

Mr. Bromley: Surely.

Mr. Hassell: There is one difficulty with my statement of a while ago with respect to going into details on argument. I believe under the rules we are ordinarily limited to an hour on argument. I might require a little more time if I put this off until then.

148 Chairman Myers: I think we might be willing to waive that. We want to give everyone a chance to be heard.

Mr. Hassell: That is the Government's case, Mr. Chairman.

Chairman Myers: We will have a recess for ten minutes.

(Whereupon, a brief recess was taken.)

Chairman Myers: We are ready to proceed.

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KENNETH J. TILLOTSON was called as a witness by and on behalf of the Respondent, and, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Bromley:

Q. What is your name, sir? A. Kenneth J. Tillotson.

Q. Where do you live? A. 179 Clifton Street, Belmont, Massachusetts.

Q. What is your profession? A. Physician and psychiatrist.

150 Q. Do you hold any degree? A. Master of Science and Doctor of Medicine from the University of Vermont.

Q. Do you practice your profession? A. I do.

Q. Where? A. At the McLean Hospital, Belmont, Massachusetts; Massachusetts General Hospital in Boston, and I am consultant at several hospitals, and to the Hygiene Department of Harvard University, and former instructor in psychiatry at Harvard Medical School, and I have a private practice and office at 179 Clifton Street, Belmont.

Q. Belmont is part of Boston? A. Belmont is a suburb of Boston.

Q. How long have you been engaged in your profession of medical doctor and psychiatrist? A. I graduated from the medical school in 1921 and went to Mary Fletcher Hospital in Vermont, and I came to Harvard and began specializing in neuro-psychiatry, and since 1922 I have practiced my specialty of neuro-psychiatry. 151

Q. Have you any church affiliations, doctor? A. I have.

Q. What are they? A. I am an Anglo-Catholic, better known as high Episcopal.

Q. Tell us briefly the nature of your professional work. A. At first, after specializing, I held various positions with the McLean Hospital exclusively, such as assistant physician, clinical doctor, and then medical superintendent, until 1932, when I was made psychiatrist-in-chief devoting my entire time to research in nervous and mental diseases, teaching and the clinical practice on nervous diseases. 152

Q. Have you ever had any occasion, and, if so, to what extent, in advising any Governmental officials on the question of obscenity or related matters? A. I have. The two district attorneys in Massachusetts in Middlesex and Norfolk Counties on several occasions, and the Attorney General on several occasions, in regard to cases involving the issue of obscenity, and several private cases in this region, all the authorities at Harvard University in regard to obscenity, and the issues that arise in the large student body there. 153

Q. Have you had any experience in connection with Selective Service and Army induction? A. I am chief advisory psychiatrist for District 11 in Greater Boston, and I am regularly consulted and do regular duty at the First Corps Area Induction Center one day a week.

Q. Has any of your experience been in connection with young men of high school or college age? A. A part of my patients are young men of high school and college ages, and for five years at Harvard in the student health department I spent two days a week dealing exclusively with the college students there.

154

Q. To what extent have you made case studies of what constitutes sexual impurity or obscenity? A. In every psychiatric study the question of the sex life and all that pertains thereto is a part of the study, and in the course of a year I study and review several thousand cases.

Q. Will you give us a brief definition of the word "psychiatry"? A. Yes. Psychiatry is that department of medical science which deals with diseases of the mind. Neuropsychiatry embraces a little more and spreads the diseases of the mind to the nervous system, including diseases of the personality.

155

Q. Doctor, at my request have you made an examination of these eleven issues of Esquire magazine in evidence as Post Office Departments Exhibits 1 to 11, inclusive? A. I have.

Mr. Hassell: At this time I would like to object to this testimony.

As I take it, this witness is to advise this Board as an expert witness as to what is obscenity under the statute involved here. This proposition is entirely novel in cases of this sort, not only in hearings of this sort, but in criminal prosecutions, so far as I am advised.

156

Counsel in his remarks, in his opening statement, referred to the effect the matter would have upon the average mind. I take it that he would include

in that classification the members of this Board.

157 Therefore, I submit that what this witness may say, regardless of his qualifications as a psychiatrist or his qualifications or experience in dealing with warped mentalities, his testimony will be of no value to this Board and certainly would not be controlling, and it would not have any value so far as I can see in enabling this Board to determine the issue here involved.

Chairman Myers: As I understood from the opening statement, this is an effort to prove standard. Isn't that your purpose?

158 Mr. Bromley: Standard and effect upon people generally of the attacked material.

Chairman Myers: And for that purpose he was qualified as an expert. Was your objection directed to the last question?

Mr. Hassell: My objection is directed to that matter as well as the matter to which I referred. Counsel, in his statement, said that he also proposed to produce or give in evidence here the names of persons who purchased this magazine. That specific matter has been passed upon by one of the Federal Courts—

159 Chairman Myers: That question is not before us yet. It may be later.

Mr. Hassell: That is certainly related to this proposition. The inference there is that if responsible people buy this magazine, then it is not obscene, but I submit the testimony of this witness will be of no value to this Board.

Mr. Bromley: In 1940 the Court of Appeals of this District had occasion to consider this question,

and I would like to call Your Honors' attention to
160 this expression from this Court.

"With such considerations in mind, perhaps the most useful definition of obscene is that suggested in the case of United States vs. Kennerley, i. e., that it indicates 'the present critical point in the compromise between candor and shame at which the community may have arrived here and now.' But when we attempt to locate that critical point in the situation of the present case, we find nothing in the record to guide us except the book itself. The question is a difficult one, and to which the expert opin-
161 ions of psychologists and sociologists would seem to be helpful if not necessary. Assumptions to the contrary which appear in some of the earlier cases, reveal the profound ignorance of psychology and sociology which prevailed generally, when those opinions were written. More recently, in the cases and text books, the desirability and pertinence of such evidence has been suggested. Lacking such assistance in the present case, we can compensate for it in some measure by noticing, judicially, evidence which is thus available to us."

I submit, therefore, that the testimony is com-
162 petent.

Chairman Myers: The objection is overruled.

By Mr. Bromley:

Q. Have you made a careful examination of all of the eleven issues? A. I have.

Q. Will you turn to page 97 of the January issue and direct your attention with me to the twelve Varga girl

drawings appearing on that page and subsequent pages? A. Yes, sir.

Q. Have you likewise examined every Varga drawing in every one of the remaining ten issues? A. I have. 163

Q. Directing your attention to all of the Varga girl drawings, in all of the issues, let me ask you this question: Based upon your training and your experience and the case studies which you have made, are you able to express an opinion as to the effect that these drawings would have upon people of various age groups in this country? A. I am.

Q. Will you state what effect, in your opinion, this material would have, if any, upon pre-adolescents? A. I believe it would have little, if any, effect on pre-adolescents. 164

Mr. Hassell: I don't like to interrupt again, but does counsel have other witnesses of this sort present in the hearing room?

Mr. Bromley: Yes.

Mr. Hassell: I request the other witnesses on this particular feature, at this time, be excused.

Mr. Bromley: That is agreeable.

Mr. Harding: There are none here today.

Mr. Bromley: There are other witnesses in the case present, but not psychiatrists.

Chairman Myers: Does your objection extend to them, Mr. Hassell? 165

Mr. Hassell: Other witnesses who are to appear as expert witnesses on the question of what is obscene?

Mr. Bromley: Yes.

Mr. Hassell: I submit that they should be excused.

Chairman Myers: They may retire from the room.

By Mr. Bromley:

166 Q. What is a pre-adolescent, Doctor? A. Usually a child from the age of twelve to fifteen.

Q. And what is an adolescent? A. An adolescent is usually an individual from twelve to fifteen or over.

Q. Up to what age? A. Well, I have students in the graduate school at Harvard at 25 whom I thought were adolescent. It is a variable thing depending upon the individual personality.

As a rule, adolescence is achieved by the age of 16 in the most retarded normality.

Q. What is a post-adolescent? A. An adult. After they have gone through the period of transition from child-
167 hood to adulthood.

Q. What, in your opinion, would be the effect of this material upon those three classes? A. The adolescents are interested in body development and I think that these would be very inspiring to the young adolescent girl, and I think they would be attractive to the young adolescent boy, not in an obscene way, however.

To the adult I think that they glorify the American girl in physical and esthetic development and body grace.

Q. In your opinion, is there anything in any of those drawings in any of the issues that would tend to stimulate sexually impure thoughts in any average member of the
168 groups which you have described? A. No, and my basis for saying "No" is that with hundreds of adolescents and camp men, even those who have had troubles and problems of adolescence, the masturbation problem and so forth, never have I known any of this material to come into the case studies, whereas other magazine material has come into the studies.

Q. In giving these answers do you make any distinction between males and females? A. No, except that I have had more experience, a great many more studies, of males than females. 169

Q. And what distinction, if any, do you make between normal and abnormal members of these groups? A. I have studied the normals extensively and it was with the normals in mind that I spoke particularly in answer to your questions.

There are, of course, abnormal sexual psychopaths who get stimulation and see obscenity in a variety of things, but that is with their own perverted and distorted minds rather than the material they are necessarily looking at. 170

Q. Do you see anything in the Varga drawings that would have a greater tendency to stimulate abnormal people than to stimulate normal people? A. No.

Q. In your opinion, is there anything in any of these drawing that would have a tendency to corrupt the morals of any average member of the groups you have mentioned? A. In my opinion, there is not.

Q. Will you please state your reasons for that opinion? A. Yes. The parts of the body that ordinarily stimulate or are considered obscene, are very carefully covered up in all of these Varga drawings. I can specify those parts if it is thought advisable. 171

Q. I wish you would. A. Well, the nipples on the breasts are concealed in all of them. The pubic regions are carefully concealed and there is no exposure which is necessary to constitute obscenity, indecency, or filthiness.

(There was a discussion off the record.)

By Mr. Bromley:

172

Q. Now, in your opinion, is there anything in any of the Varga drawings in these eleven issues which would have a tendency with the average normal human being to lower his standards of right and wrong as regards the sexual relation? A. In my opinion, there is not.

Q. Is there anything that is lewd, lascivious or indecent or filthy, in your opinion, in regard to these drawings? A. No.

Q. Would your answer be the same if I took them singly in the January issue or as a group in the eleven issues?

173 A. It would. I have been over them all very carefully.

Q. Will you state your reasons for your opinion that there is nothing lewd, lascivious, filthy or indecent about the Varga drawings? A. Yes, because they appear to be an effort to glorify the physical beauty of young womanhood as we see it in this country in accordance with the tendency of the times.

There is nothing exposed about these pictures that could constitute lewdness or lasciviousness. The poses are graceful gestures such as you see. The hair on the head is featured in practically all of them, and the hair is one of the female's chief assets in estheticism and attractiveness.

174 Q. Will you turn to the next picture in the January issue—the calendar for August in the January issue? As I understand, the Department there specified as obscene not only the picture but the verse that accompanies it. Have you read the verse? A. I have read the verse, yes.

Q. Does that in any way change any of your answers that you have given? A. It does not.

Q. Do you consider that the verse or anything contained in it is in any way obscene, lascivious, lewd, filthy or indecent? A. I do not.

Q. Likewise, the September verse has been cited as obscene. Would your answers be the same in regard to the September picture and verse? A. They would. This is like a bathing costume, and the weather is getting cold. 175

Q. So that the reference, "Oh, Mr. Varga, Hurry up and let me put some clothes on," you think is appropriate to the season? A. I do.

Q. While I am on the subject, let me call your attention to page 38 of the April issue in which another Varga girl appears, this time in the pin-up size, and in this connection the verse is also cited as being obscene. Have you read that verse? A. I have.

Q. Would that change any of your answers which you have given with respect to this picture? A. It would not. 176

Q. Is there anything in that verse which you consider to be obscene, lascivious, lewd, filthy, or indecent? A. Nothing whatsoever.

Q. And, finally, in the November issue of the magazine, at page 46, the verse is likewise specified as well as the picture. Have you read that? A. I have. I see nothing objectionable in the verse or suggestive.

Q. Does the fact that the picture is accompanied by the verse change any of the answers you have given heretofore? A. It does not.

Q. Do you find anything obscene, lascivious, lewd, filthy, or indecent about the verse? A. I do not. In fact, the verse explains the pose. 177

Q. Will you elaborate on that?

Mr. Hassell: Did you say page 36 or 46?

Mr. Harding: 46.

The Witness: The girl is properly attired and she expresses fright or surprise, and the last line

says, "It wasn't a wolf but a mouse." Most women are afraid of mice.

178 Chairman Myers: I have often wondered what the psychology of that was.

By Mr. Bromley:

Q. Now, going back to the January issue, the only other material in that issue which is cited as obscene begins at page 83 and is an article entitled, "Star and Garter Blues", by Gilbert Seldes. Have you read that article? A. I have.

Q. Can you tell us briefly what it is about? A. Gilbert Seldes has given a very good description of the Star and Garter Blues and it seems to be an accurate narration of
179 the musical comedy now playing on Broadway, and I see nothing objectionable in this article.

Q. It continues on page 119. A. It is a very accurate description of what is portrayed in the musical comedy Star and Garter.

Q. Did you see the show yourself? A. I did.

Q. Is it still running in New York, do you know? A. I don't know; I saw it last year.

Q. Now, I direct your particular attention to page 119, columns 2 and 3 and 4, beginning in the second column of the first full paragraph: "Once in a while". Have you read that reference to the song, "Bunny, Bunny, Bunny", par-
180 ticularly? A. Yes.

Q. Did you hear that song sung in the show? A. I did.

Mr. Hassell: What month is that?

Mr. Harding: January. It is a continuation of the Star and Garter piece.

By Mr. Bromley:

181

Q. Do you consider that to be a piece of accurate reporting as to the singing of that song? A. Precisely.

Q. Do you find anything in the description of that song which, in your opinion, would tend to stimulate any sexually impure thoughts in a normal individual? A. I do not.

Q. Or lower his standards of right or wrong? A. No, I do not.

Q. Or corrupt his morals? A. No.

Q. Will you state your reasons for that opinion? A. Because there is nothing about this that refers to anything vulgar. It refers to a song which was sung and refers to the 182
bunnies which the chorus carried when they sang the song. I see nothing in it to indicate lewdness or obscenity.

Q. Now, there are in that issue one or two other references not claimed to be obscene, but claimed to be related, and the first one appears on page six? A. Yes.

Q. That is the picture insert entitled "Shor Nuff"? A. Yes.

Q. And that is on its face and by reason of the footnote, an exact reproduction from an Army camp paper? A. Yes.

Q. Have you read that article? A. Yes.

Q. Do you see the reference in the first paragraph to 183
Esquire and its spicy cartoons? A. Yes.

Q. Do you find anything that is obscene, lewd, lascivious, filthy or indecent in that reference? A. I do not.

Q. Do you find anything of that nature in any part of the article? A. I do not. I think it is written to be humorous and in keeping with the times and must be entertaining to the service men it is intended for.

Q. In connection with number seven where it says "Juk-

ing—that's right. Just what you're thinking about," is the
184 reference, so far as the word "juking" is concerned, explained in the article itself? A. Yes.

Q. Whereabouts? A. I think it is the last paragraph of the first column.

Q. What does the article say "juking" means as used there? A. "Juking? This is something Woodhead thought up which includes sex, dancing, manners, drinking and risque behavior in one package".

Q. Do you find anything obscene, filthy or indecent in that reference? A. I do not. The young people today are talking about juking and doing that sort of thing.

185 Q. Do you find anything which is lewd or lascivious in any part of that reproduction from the Army paper? A. I do not.

Q. Will you turn now to page 45 in which the verse entitled "Benedicts Awake" appears? Have you inspected the picture and read the poem? A. Yes.

Q. What is your opinion in respect to that poem? A. I think it is a beautiful poem, in no way lascivious or lewd. It is inspired by the times and I see nothing which could be intended by that article as even suggestive of anything except what is taking place in real life.

186 Q. Do you see anything lascivious or lewd in the repetition of the line in each of the three stanzas, "Men sleeping beside your wives, awake"? A. I do not.

Q. Do you find in literature, many times, references to men sleeping beside their wives? A. I am sure you do.

Q. Do you find anything in that verse which would tend to lower standards of morality? A. I am sure you do not.

Q. Page 123, which is the third item of material attacked in the specification. Have you read the right-hand column starting at the top and running down to the first picture which I believe is the specified material? A. I have.

Q. That is in a section called Ad Libbing with Esquire, is it not? A. That is right.

Q. And reference is to "Dear Doctor Diddle" and an allegedly humorous interview with patients who come to him. Is that right? A. That is right. 187

Q. Is there anything lascivious or lewd or filthy or obscene in the use of the word "Diddle"? A. No, not in my opinion. It might as well be "Dr. Fuddyduddy" or something of that kind.

Q. What do you know about the use of the word "diddle", such as "diddling around"? Is there anything indecent about that in your experience? A. No, it is frequently used in my section of the country.

Q. Is there any other reference in that paragraph which to your mind conveys any sort of obscenity? A. No, none. 188

Q. Is there anything in it which in your opinion is lascivious, lewd, indecent, filthy or obscene? A. No.

Q. And, finally, in this issue, page 137, what is your opinion of the two air raid wardens looking through the skylight saying, "And to think I gave up drawing," and what comment have you to make on that? A. Apparently, this is the roof of the studio and one can let his imagination go and think maybe there might be a nude model in there and there might be a fully dressed individual there. I see nothing, even with the worst connotation that could be seen. It is all in the mind of the individual.

Q. Do you think that would create a tendency to cause the average normal mind to conjure up some obscenity? A. I do not. 189

Q. Do you think the publication of that cartoon would tend to corrupt morals or lower standards of right and wrong? A. I certainly do not.

Q. Do you think it is obscene, lascivious, lewd, filthy or indecent? A. No, indeed.

Q. That concludes the January issue. Now, in February the only cited material is the Varga girl on page 34—

190 Chairman Myers: What does the word "diddle" mean to your mind?

The Witness: We use the word "diddle about", meaning he is a fuddydud, he gets nowhere.

Chairman Myers: It means what?

The Witness: Fuddydud. "Diddling around" means walking around ineffectively. Dr. Diddle might be Dr. Doolittle, not accomplishing much.

It doesn't connote anything else to me.

Mr. Cargill: You say that is used frequently in that sense?

191 The Witness: Oh, yes. The college fellows come in and say, "I have been diddling around," meaning that they haven't accomplished anything; they haven't got anything done in their studies, or something like that.

Mr. Cargill: You would say that they refer to studies when they say that they have been diddling around?

The Witness: They weren't accomplishing what they should have accomplished, wasting time, were ineffective in what they were trying to do. I have heard it used in other connotations.

192 Mr. Cargill: So that would not call that to your mind in this instance, would it, Doctor?

The Witness: Not particularly here. I thought of that, naturally, but I didn't think it was specified there for that purpose.

By Mr. Bromley:

193

Q. Well, do you find anything in any other conversation between the doctor and his patient which to your mind in any way attempts to carry out the dirty connotation which the word "diddle" might have, as suggested by the member of the board? A. No, I don't.

Q. Do you find any reference to sexual intercourse or sexual impurity in any part of the interviews between the doctor and his patient? A. No.

Mr. Cargill: Did you mean just now that that did come to your mind when you read it? 194

The Witness: It did in discussing it only, not when I read it. It did when I was discussing it with counsel. It was brought to my mind by counsel. It didn't occur to my mind when I read it.

By Mr. Bromley:

Q. Now, coming to February, the Varga girl on page 34. You have already covered that. That is the only material cited as obscene in the February issue. There are three items of specified material, and the first is on page 65 and is a cartoon about a sultan and a girl. Do you recall that 195 these sultan cartoons—

Mr. Cargill: What page is that?

Mr. Bromley: Pages 64 and 65.

By Mr. Bromley:

Q. (continuing)—frequently occur in issues of the magazine? A. I do.

196 Q. What is the subtitle under that sultan cartoon? A. "What am I bid for this 100 pounds of sugar?"

Q. In your opinion, would that have any adverse effect on a normal human being? A. It would not.

Q. In your opinion, is it obscene, lewd, lascivious, indecent or filthy? A. It is not.

Q. Would it have any tendency to corrupt morals or to lower the standards of right or wrong of the beholder of that cartoon? A. No.

Q. Will you state your reason for your opinion, Doctor? A. I think the subtitle might have some reference to the
197 rationing, a hundred pounds of sugar. I thought it might be a play on the present tendency for the shortages of sweets, and it certainly does not connote any obscenity.

Mr. Cargill: Doctor, what was the basis for your thinking that that cartoon had any reference to the rationing of sugar?

The Witness: "What am I bid for this 100 lbs. of sugar?"

Mr. Cargill: Yes; in relation to rationing.

The Witness: Well, the individual is very sweet and it might be a play on rationing when sugar was very scarce. It has the dual meaning of the sweetness
198 of the woman, of womanhood.

Mr. Cargill: So you do read into things the dual meaning there?

The Witness: Sometimes.

By Mr. Bromley:

Q. Well, is the dual meaning which is referable to the use of the word sugar as a connotation of the picture of the

harem girl one which does not create any inference of obcenity in your opinion in the mind of the observer or the beholder? A. No, it contains a reference to a custom in a certain country where women are bartered. There is a bartering for a woman, but there is nothing lewd or obscene about it. 199

Q. Now, will you turn to the second specified material in this February issue, which is on page 77, at the bottom of the page? The reference is to the cartoon at the bottom of the page and the accompanying text. Now, have you read that whole story? A. I have.

Q. Is it about tenement house Negroes? A. It apparently is. 200

Q. In Harlem? A. In Harlem.

Q. It is of a Negro social worker is it? A. That is right.

Q. It is an attempt at humor; a humorous article, isn't it? A. That is right.

Q. Have you studied especially the picture at the bottom of page 77? A. I have.

Q. Have you read the accompanying text on the left-hand side of that picture? A. I have.

Q. Do you see anything which is obscene, lewd, lascivious, indecent or filthy either about the picture or the text, or both picture and text? A. I do not. 201

Q. Do you understand what the Department could have in mind by claiming obscenity in either or both of those things? A. I do not.

Q. Whatever it is, do you find anything in there which would tend to corrupt morals or lower standards of right or wrong? A. No.

Q. Do you find anything in that article, anywhere, which in your opinion is obscene or indecent or would tend to corrupt morals? A. No.

202 Q. And finally, in this issue, page 95, a reference is made to a part of the story "The Unsinkable Sailor." Have you read that story? A. I have.

Q. Briefly, it is describing a somewhat colorful character who was a member of the Merchant Marine who had been torpedoed many times and who, when he got ashore, led a drunken and colorful life? A. It is.

Q. Now, reference is made to several of the paragraphs on that page, and I assume it is meant that the reference is to paragraphs 1, 3, 9, 10, 11, 12, 13, and 16, coming from the top of the page; so I would take it it would be the first full paragraph on that page? A. Yes.

203 Q. Do you find a reference in there to Las Palmas? A. Yes.

Q. Will you read that out loud? A. "So I beat it ashore in Las Palmas. In Las Palmas he went to work as a sort of contact man for an establishment known as The Black Cat, and the less said about that phase of his life, the better."

Q. Now, what inference did you draw from that statement about the reference to The Black Cat? A. I think that means a house of ill fame, house of ill repute, or house of prostitution.

204 Q. Making that inference, do you find anything obscene, lascivious, lewd, or filthy about that reference? A. No, I don't.

Q. Do you think that sentence would tend to corrupt morals or lower standards of right or wrong? A. No.

Q. Do you find anything in the paragraph upon which objection could be made on any of those grounds in the slightest degree? A. I do not.

Q. Take the next paragraph, which is No. 3. A. "Take the deck?"

Q. It starts: "I take the deck." A. "I take the deck at a union meeting"— 205

Q. You need not read it all. Is it a fact that having read it, the only possible thing to be drawn from that paragraph is the use of the word "sonovabitch"? A. That is right.

Q. And there the word is spelled how? A. Sonovabitch.

Q. It is in a quotation, something that the man or somebody else said? A. That is right.

Q. Judged by a person like yourself, is there anything obscene, lewd, lascivious, indecent or filthy about the use of the word in print spelled that way or any other way? A. No, there is not. 206

Q. Do you find constant repetition of it in books such as those by Hemingway and others? A. A great many books have it correctly spelled.

Q. 9 is the next one? A. Yes.

Q. It is the one on the second column beginning "I got in a little trouble." A. Yes.

Q. Now, did you find anything in that paragraph or in 9, 10, 11, 12, and 13, the four which follow it, which is obscene, lascivious, filthy, lewd or indecent? A. I did not.

Q. The reference is, is it not, to the fact that the sailor was asked by the doctor to get a sample of urine and he left it in the hotel manager's safe? A. That is right. 207

Q. Is there anything else in those four paragraphs to which objection might possibly be taken by anyone, in your opinion? A. No.

Q. Now, is there anything in that reference which is obscene, lewd, lascivious, indecent or filthy? A. No.

Q. Is there anything in the reference to those five paragraphs, 9 to 13 inclusive, which, in your opinion, would corrupt morals of the reader or lower standards of right and wrong? A. There is not.

208 Q. That concludes the February issue. Now, will you take the March issue? As in the case of the February issue, the only matter cited as obscene in the issue is the Varga girl on page 36?

Mr. Hassell: Might I interrupt counsel? You mean you have reference to that as mentioned in the citation?

Mr. Bromley: Yes, sir.

Mr. Hassell: The citation also covers similar matters and I have given counsel a list of those matters which I have handed up to the Board. The contention is that they are all obscene.

209 Mr. Bromley: I didn't hear that.

Mr. Hassell: That they are not all the obscene matters in this magazine.

Mr. Bromley: What is that?

Chairman Myers: He said that they are all obscene.

Mr. Bromley: We will go to the others.

By Mr. Bromley:

210 Q. In the March issue on page 9, there is an advertisement of the Literary Guild. Have you studied that advertisement? A. I have.

Q. Are you familiar with the Thorne Smith books that are advertised? A. Moderately. I have read some of them.

Q. Do you see anything in that advertisement that is lewd, lascivious, obscene, indecent or filthy? A. I do not.

Q. Do you know anything about the standing of the Literary Guild of America, Incorporated? A. I believe it has a very high standing in our community.

Q. What would you say about whether or not that ad exceeds the standard of advertising which has existed for years and now exists with reference to books, Doctor? Books by Rabelais and De Maupassant and others of that class? A. It looks very much like the ads for De Maupassant, Rabelais and others. 211

Q. Your experience—

Mr. Hassell: I don't like to interrupt counsel, but I don't believe this witness has yet qualified as an expert on advertisements.

Mr. Bromley: I think that is right. I have gone too far and I will start all over again. 212

By Mr. Bromley:

Q. Now, is there anything in the text of that advertisement which, in your opinion, is lewd, lascivious, obscene, filthy or indecent? A. There is not.

Q. Or any of those pictures, no matter how small they are drawn there in pen and ink, in your opinion are any of those pictures properly within the classification of the five words which I have just used? A. They are not. They are not lewd, lascivious or obscene or filthy.

Q. Do you find anything in the whole ad, pictures and text, as a whole, which would tend to corrupt morals or lower the standards of right or wrong? A. I do not. 213

Q. Page 10 has a letter to the editor at the bottom of the second column, which is entitled "On Putting Esky in a Cap and Gown." Have you read that letter? A. I have.

Q. Is there anything obscene, lewd, lascivious, indecent or filthy about it? A. I don't find anything that is, no.

214 Mr. Hassell: At this point I might state, to have the record clear, that the attention of the Board was not called to this as being obscene. The idea is to have the Board get the appraisal of this publication as given by the publisher itself, since it reproduces this comment on what appears in the magazine.

Mr. Bromley: Now, Mr. Hassell confuses me. You told me a minute ago that everything you specified was obscene in this issue. Now you say that everything is not obscene.

Mr. Hassell: I will have to withdraw that. There
215 are a few items, and I will name them for counsel if he desires.

Chairman Myers: I don't see anything wrong with someone from Indiana.

Mr. Bromley: It couldn't possibly be, no, sir.

Mr. Hassell: There are a few items that I propose to call the attention of the Board to by reason of the fact that they reflect just what the publishers of this publication seem to think their publication has in its effect on its readers and Esquire's reputation among its readers as shown by the material under the editorial "Shor Nuff", referred to by counsel on page
216 6 of the January issue.

The matter appearing on page 10, which is this matter in the March issue.

The material appearing on page 10, "The Sound and the Fury" in the July issue, "So, I'm willing to pay my half buck just for a peek at the Hurrells and Vargas."

The matter appearing on page 10 of the August issue, "The Sound and the Fury."

The matter appearing on page 10 of the September

issue, "The Sound and the Fury", "Conservative suggestion."

The matter appearing on page 10 of the October issue, "The Case of the Classy Chassis." 217

Chairman Myers: Proceed.

By Mr. Bromley:

Q. Well, Doctor, did you read the letter? A. I have read the letter.

Q. In your opinion, is that the expression of a reader's opinion that "Esquire" is obscene? A. It is not.

Q. Now, let us go to the next Sultan cartoon. A. What page?

Q. Page 49. That is the cartoon with the harem girl and the two soldiers. What is the sub-title under that? A. "I wonder how the Sultan knew this was my birthday." Apparently this girl is—this is in the Orient and this girl has gone from one place to another, which may be from the palace in the background there, and the soldier on guard has intercepted this girl and it happens to be his birthday, and he looks surprised. It seems to me to be rather an innocent thing. I see nothing suggestive or vulgar in it. 218

Q. Is there anything about the picture of the harem girl which, in your opinion, is lewd, lascivious, filthy, indecent or obscene? A. There is not.

Q. Is there anything about the entire picture which, in your opinion, would tend to corrupt the morals of the average person or lower the standards of right or wrong? A. There is not. 219

Q. Or to incite thought of sexual impurity? A. No.

Q. On page 68, Mr. Seldes has some reference to advertising perfume and clothing, particularly paragraphs No. 4 and

6 on that page. Have you read the whole article? A. I have.

Q. How would you describe the article, briefly? A. I think it is a very good article, trying to do precisely what
220 it does. It tends to debunk the allure of suggestive clothing and perfumes that have suggestive names. It seems to me to be in the nature of an editorial.

Q. Now, coming down to paragraph 4, that is the one in the second column, "Now it is a rare odd thing that clothes which do enhance the sexual attractiveness of women are sold to them for smartness." A. That is true.

Q. Have you read that paragraph? A. Yes.

Q. Do you see anything in that which is obscene, lewd, lascivious, indecent or filthy? A. I do not.

221 Q. Do you understand how any suggestion could be made by anybody that it was obscene? A. I do not, frankly.

Q. The next reference is to paragraph 6, which is in the third column, beginning "When we approach the young of the species, the innocents of college, we are a little franker. A 'show off V-neck' or a 'skirt pleated for action' (on a bicycle, so be quiet)," and so forth.

Would a reference to the term "fly-front" mean anything? Do you find anything obscene, filthy, lewd, lascivious or indecent in that paragraph? A. I do not.

Q. Is there anything obscene about the words "fly-front"? A. Not in my opinion. It is frequently used. I think it
222 has no—it is used in advertising clothing; it is used in everyday conversation. I see nothing suggestive or lewd or vulgar about it.

Q. Is there anything in that paragraph which in your opinion would corrupt morals or lower the standards of right or wrong or incite or stimulate thoughts of sexual impurity? A. No, nothing whatsoever.

Q. Finally, page 107, the full page hillbilly cartoon. A. Yes.

Q. Will you read the sub-title under that cartoon and give me your comment as to what you think about it? 223
A. "Seems like somebody's allers clamorin' to somebody to open up a second front, don't it?" I suppose reference is made to the infant on the floor who is crying and the woman is nursing a child. It is in a hillbilly community. Other people don't do that in public, some do. I see nothing obscene about it, however; it is an ordinary biological function to be carried out.

Q. Have you any opinion as to whether it is in good or bad taste? A. Well, I would say it is poor taste, yes.

Q. Now, do you think it has any tendency to corrupt morals or to lower the standards of right or wrong in an average person or incite thoughts of sexual impurity? 224
A. I certainly do not.

Q. Do you think it is filthy, obscene, lewd, lascivious or indecent? A. I do not.

Q. That brings us to the April issue, on which, again, in the citation there is reference only to the Varga girl and the verses which accompany it on page 38. You have already testified with respect to both and given your opinion.

Now, going to the specified material, the note says: "Front cover; breasts of female figures over-emphasized." I assume that means the figures, and I assume it means both figures because there are two figures. 225

What opinion can you give us with respect to that cover, especially with respect to the reference to the exaggeration or over-emphasis of the breasts? A. Well.

Mr. Bromley: I am referring, if the Board please, to the cover on the magazine.

Chairman Myers: Yes.

Mr. Bromley: The reference is to the fact that the breasts of those two caricatures are over-emphasized.

A. Well, so are all the features, the eyes, the lips, and the
226 moustache of the man and the bulging eyes of Esky. That is what it is supposed to be, an exaggeration of the whole thing. If one takes those breasts out of the setting, that is, if it was just that and everything else is not exaggerated, one might be attracted to that, but frankly, I would not be attracted to those at all unless they were specified. I think the average individual looking at it would not think anything too much about it.

Q. What do you mean, unless they were specified? A. Unless attention was drawn to them that they are over-emphasized. I simply take it for granted that the whole
227 thing is emphasized, that the breasts were over-emphasized and everything else. If the breasts were over-emphasized and nothing else, then the whole context would be different, wouldn't it? I see nothing lewd or obscene in the way it is presented.

Q. Do you see anything filthy about it? A. No.

Q. Do you think it would have a tendency on the average human being to corrupt his morals or lower his standards of right or wrong or arouse or stimulate thoughts of sexual impurity? A. I am sure it would not.

Q. The only other reference is to page 60 of an article by
228 Edmund Gilligan, "The Court of Lost ladies." A. I remember that very well. That is a very good article, in my opinion and estimation. It is the kind of article that does a good deal of good. I have had several adolescents speak of this article. It is informative; it narrates precisely what goes on in our night courts. It shows up the prostitute in a true light and shows respect for law and order and to the court. The judge is held up in a very favorable light and high plane as he should be for this kind of work.

I think it is a very good article. It has a very good moral

influence on the college man and the high school boy. As a matter of fact, my own son, who is an adolescent, commented on that article.

229

Q. How old is he? A. 14.

Q. Did he read the article? A. He did.

Q. Did you have any objection to his reading it? A. I did not. In fact, I think these are good for him. I think they show up the tendencies of the times and the way in which the average adult and adolescent receives things outside.

Q. Now, is there anything in that article which you think is indecent, lewd, lascivious, obscene or filthy? A. Nothing.

Q. Is there anything in it which you think would tend to corrupt morals or lower the standards of right or wrong or stimulate thoughts of sexual impurity? A. No, just the opposite.

230

Q. Now, I come to the May issue of the magazine, page 38, the Varga girl is cited as obscene. The picture you have already covered in your testimony.

On pages 86 and 87 we have the first example of the comic strip. Did you read that comic strip, which consists of a number of separate pictures? A. I did.

Q. Now, you notice what has been specified is pictures 29, 30, 31, and 32 as similar and related material. Now, have you studied that especially? A. I have.

Q. Directing your attention to 29, do you find anything indecent or filthy or lascivious or lewd or obscene in the picture, of a naked woman standing in the water up to her waist with Esky looking over the bushes at her? A. No, because there is nothing exposed there that would make the picture indecent.

231

Q. Can you tell us from your study of this comic strip as to what its effect was? As to whether it was satire on

existing comic strips? A. I suppose that is what it was supposed to be, a satire on existing comic strips, and that
232 is about all.

Q. Now, will you look at the text under 29, which begins under 28, "The lady dislikes men but wants a baby, so I sold her a ticket for the time when women can become pregnant by taking an electric shock."

Is there anything obscene or indecent or filthy or lewd or lascivious in that sentence? A. No, and I assume that that is satire and I think that we are now using electric shocks for the treatment of a great many emotional disorders as a recognized form of treatment, and in that connection it certainly could not be anything but true.

233 Q. Hasn't it also a reference to those comic strips which portray occurrences many, many years in the future, for centuries to come? A. That is right.

Q. So the reference to "I sold her a ticket for the time when women can become pregnant," that means transferred to the future, does it not? A. That is right.

Q. Now, do you find anything in 30, 31 and 32 which is obscene, indecent, lewd, lascivious or filthy? A. Neither in the text nor the accompanying pictures.

Q. Do you think there is anything in the text or pictures, or both, which would tend to corrupt morals or lower standards of right or wrong or arouse sexual thought,
234 sexual impurity? A. I do not.

Q. Now, on page 32 is some more similar material, according to the specification, and the first one is an article by Paul Gallico entitled "The Savage Beast in Us." Have you read that article? A. I have.

Q. And the sub-title is what? A. "Dispelling the hopes of burlesque entrepreneurs and fears of censors that the strip has sensory appeal." It seems to me that that was a good

article as debunking the burlesque and showing it up for just what it is, and being rather discouraging to the adolescent young man or old man or any man who spends $4.40 for a ticket for something that they don't get. By that, I mean that burlesque is debunked here. It is a very good editorial type of article. I see nothing objectionable in that. 235

Q. Do you find anything indecent, obscene, lewd, lascivious or filthy in the accompanying illustrations? A. I do not. That is precisely what you see on burlesque billboards and I dare say these are copied from the burlesque boards.

Q. Is there any reference in the text which you think would be indecent, lewd, lascivious, obscene or filthy? A. Definitely not. 236

Q. Is there anything about the article as a whole—

Mr. Cargill: What was the witness' answer about not seeing something in the article?

The Witness: I don't see anything lascivious or lewd in the pictures. They are apparently copies of pictures taken from billboards. In my opinion, I think the whole thing was written to show burlesque as cheap and unattractive.

By Mr. Bromley:

237

Q. Now, on page 48 is a cartoon which shows two airplane spotters on a roof at night: What is the sub-title? A. She looks more like a B-17 than a P-40."

Q. Have you any understanding as to how anybody could specify that as being obscene? A. I do not.

Q. Do you know that a B-17 is a bomber and a P-40 is a pursuit or fighter plane? A. I do know now. I didn't know before. I didn't know that from reading it.

Q. Do you get any possible connotation about what they
238 are looking at from what they are saying or seeing? A. No. I don't.

Q. Do you think the normal average mind would conclude from that picture that they were observing something filthy, indecent or obscene or lascivious? A. No.

Q. Do you find anything in the picture which would tend to corrupt morals, in your opinion, or lower standards of right or wrong or stimulate impure sexual thoughts? A. I do not.

Q. Finally, on page 93 there is a picture from a Broadway show "The Eve of St. Mark." Did you see that show? A. I
239 did not.

Q. Did you read the text in the lower right hand box? A. I did.

Q. Have you studied the picture? A. I have.

Q. Now, do you see anything in the text or the picture, or both together, which is indecent, lewd, lascivious, filthy or obscene? A. I do not. It represents, to my mind, the social relationship of a fine young type of woman with their soldier friends who have returned, or perhaps hostesses who are entertaining soldiers, and I can see nothing obscene, lewd or lascivious about it.

Q. Do you know that that represents an actual scene from
240 the show? A. I have been told that it does.

Q. Do you know that the accompanying text describes the actual scene from the show? A. Yes, it is my understanding that it does.

Q. Do you know that the show had a long, successful run on Broadway? A. Yes, I have been told that it did.

Q. That concludes that issue. Now, in the June issue we have, on page 34, the Varga girl which you have already discussed, and the one other reference in that issue is on page

134 to an article numbered 2, in the middle of the page, and entitled "Libel suits were as wine to that hell firin' editor of the old west, Dave Day." A. Yes. 241

Q. Have you read that article? A. I have.

Q. Have you noted especially the reference near the bottom of the first column to social items? A. The epitaph?

Q. No, to social items. A. Oh, yes.

Q. Will you read that reference, "Social items on the first page, included such as these:

"Two weddings are on dit for next week. This weather kind of suggests two in a bed, spoon fashion.'

"An epitaph: 242

'Here lies the body of poor old Charlotte.
Born a virgin, died a harlot.
For 18 years she kept her virginity,
An all-time record in this vicinity.'"

A. Well, that is a familiar epitaph with various modifications. I heard it when I was a boy many times.

Mr. Hassell: In New England?

The Witness: In New England. I would say it is poor taste, but I don't think it is going to corrupt any one's morals. 243

By Mr. Bromley:

Q. Do you think it would tend to lower the standards of right or wrong or stimulate thoughts of sexual impurity? A. No, I don't.

Q. In your opinion, is it obscene, lewd, lascivious, indecent or filthy? A. No.

Q. Now, the description is of a colorful far-western editor of a small newspaper, isn't it? A. Yes.

I think one has to take that as it is. It describes a small
244 town newspaper and town as a frontier, primitive, uncultured community, and in that setting I think it goes into the category of descriptive or narrative only.

Q. That brings us to the July issue of the magazine, and on page 76 there is a picture which has a caption, "Broadway for the boys," it is a scene from "By Jupiter," which was a musical comedy. A. I saw that.

Q. You did see it? A. Yes.

Q. It was a musical comedy, wasn't it? A. Yes.

Q. You recognized that as an actual scene from the show, didn't you? A. I did.

245 Q. Is there anything obscene, lewd, lascivious, indecent or filthy about that picture? A. No.

Q. Or in the pose of the girl in the foreground? A. No.

Q. Is there anything about that picture which would tend to stimulate thoughts of sexual impurity? A. Not in my opinion.

Q. Lower standards of right or wrong or corrupt morals? A. No.

Q. The text is not cited, so I assume there is no need to refer to it.

Now, at page 146, which is one of the advertisements cited by the Department, an advertisement of postal cards con-
246 taining Varga drawings. Have you studied that? A. I have.

Q. Is there anything within the text which comes within any of the condemnatory words which I have used? A. None, nothing.

Q. Is there anything in the pictures? A. No.

Q. I direct your attention to the middle picture, of the girl stretched out on the back of the card. A. Yes.

Q. In your opinion, is that picture lewd, lascivious, obscene, indecent or filthy? A. In my opinion it is not.

Q. Is there anything about it which would tend to corrupt morals or lower standards of right or wrong or stimulate thoughts of sexual impurity? A. In my opinion it would not. 247

Q. Will you state your reasons for that, Doctor? A. Because it is a very frequent pose of individuals taking a sun bath, and the erogenous areas are covered, and it simply shows the back with the erogenous areas covered of an individual. Again, the hair is featured here, which is one of the attractive features of the feminine beauty; hair of the head.

Q. Now, I show you under the heading of specified material a letter at page 10, which counsel states he cites only as indicating the opinion of one of our readers of our magazine, which we publish as part of our correspondence with our readers. 248

Do you see anything lewd or lascivious in that? A. I do not.

Q. That has the reference, has it not, "I am willing to pay my half buck just for a peek of the Hurrells and Vargas." A. Yes. I assume that peek, you might just as well use the word "look."

Q. Do you find any lascivious or lewd connotation in his use of the word "peek"? A. I do not. 249

Q. The Hurrells are photographic studies of women which sometimes appear in the magazine, are they not? A. They are.

Q. The next item which is specified is the second and last comic strip at page 87, numbers 55 and 56 of that comic strip, on the right hand page. Have you examined those pictures? A. I have.

Q. With the text underneath them? A. Yes.

Q. Can you see anything in the text to which objection
250 on any of the grounds I have mentioned might possibly be made? A. I do not.

Q. What about this reference "Esky turned to Verne: 'Say, there's something I've always wondered about mermaids.' 'I wouldn't know,' replied Verne."

Now, directing your particular attention to that, what comment have you to make on that? A. Of course, a variety of one's imagination can be turned to all sorts of possibilities. He might wonder how mermaids get along out of the water because they have no legs. I see nothing lewd or obscene about it.

251 Q. Now, is there anything in the text under 56 which has any tendency in that direction as you see it? A. None. nothing.

Q. Is there anything about either of the illustrations which you consider to be indecent, lewd, lascivious, filthy or obscene? A. Nothing.

Q. Anything about the two sections taken together, alone, or in their setting which would tend to corrupt morals, lower the standards of right or wrong or arouse thoughts of sexual impurity? A. No, nothing.

Q. At page 141 is a poem: "Dog's worst friend." Have you read that poem? A. I have.

252 Q. What comment have you to make about that, at the top of page 141? A. I think it is rather silly, but I see nothing really objectionable in it.

Q. Do you see anything filthy, lewd, lascivious, obscene or indecent in it? A. I do not.

Q. Do you think it would tend to lower standards of right or wrong or incite to sexual impurity? A. I do not.

Q. Or corrupt morals? A. I do not.

Q. On page 148, at the bottom of the page is a short black and white cartoon. A. Yes. 253

Q. What is the sub-title? A. "I think, Miss Hill, it might be advisable to display those a little farther apart." There are two cards on the counter with "Burning desire" and "Baby's breath," both apparently advertising perfume.

Q. Now, in your opinion, is there anything obscene, lewd, lascivious, indecent or filthy about that? A. Nothing.

Q. Do they have a tendency to corrupt morals, lower standards of right or wrong, or incite thoughts of sexual impurity? A. No, in my opinion, no.

Q. That brings us to the August number, in which there is cited at page 10 a letter to the Editor entitled "Considered Opinion." 254

Have you read that letter? A. I have.

Q. Now this is a letter which, in spite of Mr. Hassell's statement, or perhaps because of it, I understand to be cited as obscene.

Mr. Hassell: Yes, that is true, counsel.

By Mr. Bromley:

Q. Have you read the letter? A. I have.

Q. In your opinion, is there anything obscene, lewd, lascivious, or filthy about it? A. No. 255

Q. In your opinion, would it have any tendency to corrupt morals or lower standards of right or wrong, or incite sexual thoughts of impurity? A. In my opinion, it would not.

Q. Do you recognize the reference in the first sentence as something, as part of another item that you saw? A. Yes. "Broadway for the Boys," I think.

Q. That is from the show, "The Eve of St. Mark," is it not? A. That is right.

Q. Now, while we are on this page, there is another letter
256 which is not cited as obscene but specified and that is "Prayer For a Paper Shortage." Over on the right hand column, with a photograph of a woman. A. Yes.

Q. Have you read that? A. I have.

Q. Have you any idea, Doctor, why anybody would specify that letter as obscene or indecent? A. I do not.

Q. Do you see any reference in it or in the position of the photograph or anything about the photograph which would possibly be considered as obscene, lewd, lascivious, indecent or filthy? A. I do not.

Q. Would your answers with reference to this letter be
257 the same as were given regarding the other letters, so far as its tendency to corrupt morals, lower standards, and incite sexual impure thoughts? A. It would.

Mr. Hassell: Counsel, that is one of the articles I referred to as reflecting the reputation that "Esquire" seeks from its readers.

Mr. Bromley: Would you mind telling me what part of that letter?

Mr. Hassell: "Darn that Varga guy and his beautiful girls! ! Flesh and bone competition is bad enough nowadays; but when a 'gal' on paper enters the race—
258 something is wrong somewhere! ! !

"How in the devil do you think I felt when my 'one-and-only' opened his wallet and the first thing I saw was a Varga girl's chassis where mine used to be!

"Have a heart, Mr. Varga, those full-page Esquire beauties are trouble enough, but when it comes to wallet sized ones—darn it, something has to be done!

"P. S. Like the lady from Bangor, Maine in the June issue I don't dare sign my name—and if you print my letter I hope to heck you leave the city and state out, too."

259

Chairman Myers: She must be from the District of Columbia.

By Mr. Bromley:

Q. Well, on page 30 is an article entitled "Many Wives Too Many." Have you read it, Doctor? A. I have.

Q. What is your opinion on it? A. I think that is a satire and I think it is rather good, showing some of the pitfalls "to that sporting but foolhardy professor who advocates plural marriage in England". I think it is a take-off on polygamous tendencies, and I think it carries a moral.

260

Q. Now, it was a fact, was it not, that Doctor Joad of London had written an article in which he had advocated plural marriage in England? A. That is right.

Q. And this writer David Emory rather takes him to task and pokes fun at him? A. That is right.

Q. Is there any expression or word or phrase used in the article which is obscene, lewd, lascivious, indecent, or filthy? A. No.

Q. Is the article as a whole subject to designation by anyone or all of those five words? A. No.

Q. Is there anything about the article which would tend to corrupt morals, lower standards of right or wrong or incite thoughts of sexual impurity? A. Nothing whatsoever.

261

Q. Now, on page 89 there is cited as obscene the "Paste your face here" picture. Have you looked at that? A. I have.

Q. What is your opinion of it? A. I see nothing suggestive or obscene about it. It is the sort of thing that might

take place with a sailor and his girl on the beach. I think there is a series of these. Taken in the series or taken alone it certainly does not suggest anything obscene or lascivious. It is pretty much in line with the things we used to see at the beach, where a man got in a frame and had his picture taken, and there would be the body of someone and he would stand behind it and the picture would be photographed, showing his uniform.

262

Mr. Bromley: I would like to show the Board the other two, the one in June and the other in September, which were on both sides of this one. It is the same principle. Neither one of these are complained of in any respect at all. It is just the one sitting on the shoulders of the sailor, but these three make up the series so far as 1943 is concerned.

263

By Mr. Bromley:

Q. Now, will you turn to page 73, which was specified, the photograph entitled "Mood for red hair". A. Yes.

Q. What is your opinion of that picture, Doctor? A. My opinion is that it is a beautiful and artistic representation of a photograph of a young woman.

Q. Do you find any indecent exposure there? A. Nothing whatsoever.

264

Q. Is there anything about the picture in your opinion which is indecent, filthy, lascivious, lewd or obscene? A. Definitely not.

Q. Is it obscene in your opinion? A. No.

Q. Is there anything about it which would tend to corrupt morals, lower standards of right or wrong or incite thoughts of sexual impurity? A. No.

Q. On page 90 there is a cartoon showing the girl working at a machine in a factory with her wedding dress on. What is the sub-title? A. "She came directly from the wedding—boy! That's patriotism". 265

Q. Do you find anything obscene, lewd, lascivious, indecent or filthy about that? A. I do not.

Q. Is there anything there in your opinion which would corrupt morals or lower standards of right or wrong or tend to arouse thoughts of sexual impurity? A. Nothing whatsoever.

Q. What comments can you make about the picture? A. Well, I think it is just what it says, what it speaks of, "That's patriotism". The young lady who has had time to get married rushes back to her factory without taking her wedding gown off and she is working apparently at a war industry. I think it is quite in keeping with the times. 266

Q. Nothing else on that page that is either specified or cited.

Now, on page 105 there is another cartoon which shows some native girls with an emaciated man on his knees grasping a tree and a rescuing sailor paddling up to him and the sub-title is what? A. "Thank God. Help at last."

Q. Do you find anything obscene, lewd, lascivious, indecent or filthy about that? A. No, I don't. 267

Q. In your opinion would it have any tendency to corrupt morals, lower standards of right or wrong, or incite thoughts of sexual impurity? A. It would not.

Q. Do you consider that funny, Doctor? A. Somewhat, yes.

Q. Page 110, the cartoon in the medical field showing a young good looking nurse in an abbreviated uniform. What is the sub-title? A. "That's Miss Blimpton, our special nurse for low-blood pressure patients". I would say that was quite innocent.

Q. On page 127 is a cartoon, on the right page, of a young
268 lady painting stockings on another girl who is lying on her back with her leg in the air. A. That is right.

Q. What is the sub-title? A. "Hew to the line, Bertha. Let the skirts fall where they may".

Q. Do you get any obscene connotation from that? A. No, I don't.

Q. Do you understand how anybody could get a filthy meaning out of that picture? A. I don't.

Q. The stocking is being painted on both legs about as high as an ordinary stocking, isn't it? A. That is right.

Q. The girl is in a bathing suit? A. That is right.

269 Q. Isn't she at least in a halter and trunks? A. That is right.

Q. Now, is there anything obscene, lewd, lascivious, indecent, or filthy about that? A. No.

Q. Now, the matter under it is fashion matter, isn't it? A. That is right.

Q. This is a fashion page, isn't it? A. That is right.

Mr. Hassell: For men?

Mr. Bromley: For women.

By Mr. Bromley:

270

Q. The editor's note says: "Esquire will accept no responsibility for what may happen if male readers fail to tear off the bottom of this page before letting their female dependents see it." A. Well, it is, after all, like all of these cartoons. They are for men. It is not even risque; it is humorous; it appeals to men.

Q. Finally, on page 144 reference is made to an article entitled "Offensive on the Home Front." Did you read that article? A. I did.

Mr. Bromley: I would like to know, Mr. Hassell, if you don't mind telling me now, just what it is in that article you don't like. I can't find it. 271

Mr. Hassell: I would be glad to read it to counsel.

Mr. Bromley: Thank you.

Mr. Hassell: Third column at the bottom of page 144. "He noticed how large the uniform made her behind look."

Mr. Bromley: Would it have been all right if it said "Made her look behind"?

By Mr. Bromley: 272

Q. Doctor, do you find anything obscene, lewd, lascivious, indecent or filthy in this reference which has just been read to you? A. I do not.

Q. Do you think this reference or the references in the article would have any tendency to corrupt morals, lower standards of right or wrong or incite thoughts of sexual impurity? A. I do not.

Q. That brings us to September, in which the only cited material is the Varga girl on page 38, which you have already covered.

Mr. Hassell: There is specified material. 273

By Mr. Bromley:

Q. On page 10, there is specified material from the Sound and the Fury. Have you read that? A. "Conservative suggestion." Yes, I have.

Q. Now, the last paragraph has: "Why doesn't he"—meaning Varga—"leave them as they are, thereby cooperating

274 in this national emergency by conserving paint," and the first paragraph reads: "Recently I have read that Varga paints all his models in the nude and after that puts their clothes on. (I mean the pictures, of course)."

Now, is there anything obscene, lewd, lascivious, indecent or filthy about that letter? A. I see nothing.

Q. Now that Mr. Hassell has cited as obscene and not as showing what somebody thinks of us.

Mr. Hassell: That is cited as showing what subscribers consider "Esquire" to be. "My passion for Varga girls goes almost to the extreme." And the
275 balance you read.

Mr. Bromley: Will you read that?

(Record read.)

Mr. Hassell: It goes ahead: "A spot has been reserved on my wall to deposit such a dish."

Mr. Bromley: There is nothing like that in my copy.

Mr. Hassell: This is on page 10: "The case of the classy chassis."

Mr. Bromley: I had directed your attention to
276 "Conservative suggestion" in the middle of the third column.

Mr. Harding: You are in the wrong issue.

Mr. Hassell: I beg your pardon? October?

Mr. Harding: September.

Mr. Hassell: I beg your pardon?

Mr. Bromley: "Conservative suggestion."

Mr. Hassell: That has reference to the reputation that "Esquire" seeks for itself and the desire of the reader for more news.

By Mr. Bromley:

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Q. What is your opinion on that letter, Doctor? A. Well, I see nothing about that letter that is suggestive. It is the opinion of one individual who signs his name "The Height of Expectation." He may be a sexual pervert, of course; in fact, he speaks more like the pervert type, according to my experience. You might find in all sections of the country quite a number of people that would send in that kind of letter, among the lewd and psychopathic personalities, but, after all, that is one letter, isn't it?

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Chairman Myers: Mr. Bromley, if it is convenient to stop now, some of us have a great deal to do. Suppose we adjourn until 10 o'clock tomorrow morning, unless you have some reason to the contrary.

Mr. Bromley: Not at all.

Chairman Myers: Therefore, we will adjourn until 10 o'clock tomorrow morning.

(Whereupon, at 5:00 p. m., the hearing was adjourned until 10 o'clock a. m., Wednesday, October 20, 1943.)

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HEARING OF OCTOBER 20, 1943.

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PROCEEDINGS RESUMED.

Chairman Myers: You may proceed.

KENNETH J. TILLOTSON, a witness called by and on behalf of the Respondent, having been previously duly sworn, resumed the stand and testified further as follows:

281

Direct Examination by Mr. Bromley (Continued):

Q. May it please the Board, I direct your attention, Doctor Tillotson, to the September issue, particularly page 43. That is the cartoon there. Have you examined the cartoon appearing on that page? A. I have.

Q. In your opinion is that cartoon obscene, lewd, lascivious, filthy or indecent? A. It is not.

Q. Do you see anything about the cartoon which, in your opinion, would tend to corrupt morals, lower standards of right and wrong with regard to the sexual relation, or

282 stimulate impure sexual thoughts? A. I do not.

Q. Have you any comment to make on the cartoon, Doctor? A. Well, the "Sold American", is a play, I gather, on the Lucky Strike, sold American radio idea. This old sheik here wants to please this soldier here, so he is remarking "Sold American". He has got that American phrase which he has picked up in order to entertain the soldier.

Q. I call your attention next to page 65. A. Yes.

Q. Are you familiar with and have you examined the cartoon on that page? A. I have.

Q. With respect to that page would your answers be the same to the questions I asked you regarding the cartoon on page 43? A. Yes.

Q. Will you turn over the page to page 66. Have you examined the cartoon at the top of page 66? A. I have.

Q. Would your answers be the same to the same questions with respect to that cartoon? A. Yes.

Q. Turn to page 84, please. A. Yes.

Q. Have you studied and examined that cartoon? A. I have.

Q. Would your answers to the same questions be the same, Doctor? A. Yes.

Q. On page 86, have you read the contents of pages 86 and 87 under the title "Gold Bricking with Esquire"? A. I have.

Q. I believe that there is specified on those two pages only two of the many jokes reproduced from Army camp papers, and the first one is at the bottom of the left-hand column on page 86, beginning "A sergeant was home on emergency furlough" and ending up "See, blue booties".

Is there anything in that reproduced joke or the text thereof which, in your opinion, is indecent, lewd, lascivious, obscene or filthy? A. There is not.

Q. In your opinion, would that text stimulate the average normal person to impure sexual thoughts or have a tendency to lower the standards of morals? A. No, indeed.

286 Q. Now, the next of the three items appears at the bottom of the third column on page 87 and is reproduced from Arizona Contact, Phoenix, Arizona:

"She: 'Would you like to see where I was operated on for appendicitis?'

"He: 'No, I hate hospitals.'"

Do you consider that joke to be indecent, lascivious, lewd, obscene or filthy? A. I do not.

Q. Do you see anything in it which would tend to corrupt morals or lower standards of right and wrong or stimulate impure sexual thoughts? A. I do not.

287 Q. I notice now that those are the only two items specified on those two pages and I was wrong when I said there were three; there are only two.

Will you turn over to page 102 of the September issue? A. Yes.

Q. Are you familiar with that cartoon and have you studied it, Doctor? A. I have.

Q. Is there anything obscene, filthy, indecent, lewd or lascivious about that, in your opinion? A. No.

Q. In your opinion, has it any tendency to corrupt morals, lower standards of right and wrong in regard to sexual relations or stimulate impure sexual thoughts? A. It has not.

288 Q. Will you turn your attention to the October issue, please? There is there specified as obscene, first, the Varga girl on pages 43 and 44 as to which you have already testified fully. Will you, therefore, turn to the second item of cited material, page 49? Are you familiar with the cartoon appearing on that page? A. Yes.

Q. In your opinion is there anything about that cartoon

which is obscene, lewd, lascivious, filthy or indecent? A. No. 289

Q. In your opinion, is there anything about that cartoon which would stimulate impure sexual thoughts, tend to lower the standards of right and wrong with regard to the sexual relation, or have a tendency to corrupt the morals of the average normal person? A. No.

Q. Will you turn to the third item which is on page 38? That article is entitled "Wise Men Pick Pyknic Girls", by J. George Frederick. Have you read and studied the article? A. I have.

Q. What comment have you to make about it, if any? 290
A. That is a very good popularized version of a well-known scientific article. The material that is based on is originally Kretschmer's material in which he tries to correlate personality with body building and the leptosomes refer to the tall, athletic figures.

This has been discussed in scientific literature a good deal and this is an honest and serious attempt to give the mass of readers an idea in a straight-forward way of the personality relationships in body structure.

It is based on real scientific material that we are concerned with, and psychiatric studies and researches, and I think this has gone a long way toward giving the public 291
a pretty accurate account of material that is considered scientific.

Q. Is the word "Pyknic" a scientific word? A. It is.

Q. It is not, then, a play upon the word "picnic"? A. No.

Q. And is the word "leptosome" a scientific word? A. It is.

Q. Do you find any reference in any part of that article

292 to anything which is, in your opinion, lewd, lascivious, filthy, indecent, or obscene? A. I do not.

Q. In your opinion, would this article have any appreciable effect on any normal person by way of tending to corrupt his morals or lower his standards of right or wrong or stimulate him to impure sexual thoughts? A. None whatsoever.

Q. The next item cited as obscene appears on page 93, items 2, 3 and 17. Again there is a double-page spread of jokes reproduced from Army camp papers. Is that right? A. That is right.

293 Q. Under the title "Goldbricking with Esquire". A. That is right.

Q. And the first one appears on page 93, the left-hand column, second from the top, beginning "Five times the beautiful woman stared invitingly," and ending "Don't bother me, Madam, liquor is my weakness."

Have you read that joke? A. I have.

Q. Is there, in your opinion, anything obscene, lascivious, lewd, filthy, or indecent about it? A. There is not.

Q. In your opinion, would the reproduction of that joke have any tendency to stimulate impure sexual thoughts, lower standards of right and wrong, or tend to corrupt morals? A. It would not.

294 Q. The next item is in the same column, the very next joke, beginning "Pullman porter" and ending up with "If dem shoes stickin' out from under the bed ain't got no feet in 'em, ah is gonna shave."

Would your answers in regard to that be the same as in regard to the preceding joke? A. Yes, indeed.

Q. And the third and last one on page 93 is the fourth column beginning with "What does f-e-e-t spell?" Would your answer be the same to the same questions with regard to that joke? A. Yes, indeed.

Q. Now, turning to material in this issue which is specified as similar and related, page 10, a letter from a reader— 295

Mr. Bromley: Mr. Hassell, that is not cited as obscene, but merely as an opinion of one of our readers which we published.

Mr. Hassell: That is correct.

By Mr. Bromley:

Q. I then go to the next item, page 37, a cartoon in the lower right-hand corner. That is the cartoon in black and white with no sub-title, the sailor with the tattoo on his 296
arm, and the native girl looking at it.

In your opinion, is there anything obscene, lewd, lascivious, filthy, or indecent about that cartoon, sir? A. Definitely not.

Q. In your opinion, would the publication of that cartoon have a tendency to corrupt morals, lower standards of right and wrong, or stimulate impure sexual thoughts? A. No, indeed.

Q. And the next item begins on page 56, and it is a piece of short story fiction entitled "Portrait Above the Fireplace." A. Yes, sir.

Q. By Joseph Yablonski. Have you studied and read 297
that story? A. I have.

Q. What is your opinion with respect to it? A. This is a very interesting article on a very old theme dealing with the Oedipus complex. It depicts the young man's attachment to his mother and he finally, when the mother dies, becomes attached to a portrait which is hanging over the fireplace, and he visualizes that the direction of his life and many of his activities are by his mother when

298 they are actually by this portrait, and in the end it is alleged by an intoxicated friend that the portrait is that of a rather well-known mistress, and the young man does not accept that graciously and still goes on thinking a great deal about the portrait.

This is rather psychological and psychology is mentioned in this, an expression for the public of the Oedipus situation. That is showing the extreme attachment the young man has for his mother, and brings out a rather wholesome moral that this young man was guided, when he lost his mother, by the portrait which he, of course, in his psychological mechanisms learned to think of as his mother's face.

299 For instance, he would not undress in front of the portrait. He turned the light out because he thought his mother was looking at him, and, furthermore, he wouldn't appear intoxicated before it and, when he did, he apologized for it.

I think it is a well written article utilizing psychological theory.

Q. Now, remembering the questions which I have asked you with respect to the preceding items, will you tell me whether your answers to those questions would be the same with respect to this article? A. Yes, indeed.

300 Q. Turning to page 104, have you read that? A. "The Sporting Scene"?

Q. Yes. A. Yes, I have.

Q. It goes over to page 105 and ends there. A. I have.

Q. In your opinion, is there anything indecent, lascivious, lewd, obscene, or filthy about that? A. Nothing whatsoever.

Q. Do you think there is anything in that article, or the article as a whole, which would have a tendency to corrupt morals, lower the standards of right and wrong, or incite or stimulate impure sexual thoughts? A. I do not.

Q. That brings us to the final issue, the issue of November. There is cited in that issue as obscene the Varga color picture and verse which appears on page 46, as to which you have already fully testified. 301

I, therefore, call your attention to the cartoon on page 66. The picture of the soldiers who are surrounded by the native girls with spears, with the sub-title, "It's no use, Sarge. we are outnumbered. Yippee." A. Yes, sir.

Q. Will you tell us whether your answers as to the alleged obscenity of this cartoon are the same as those you have previously given with respect to the other cited and specified material? A. They are.

Q. Will you turn now to page 73, which is a color photograph entitled, "Golden Mould." A. Yes, sir. 302

Q. Looking at that color photograph, will you tell us whether your answers as to its alleged obscenity are the same as you previously have given with respect to the other cited and specified material? A. They are.

Q. Now, please turn to pages No. 94 and 95, which, again, is a double page spread of excerpts from Army camp humor under the title "Goldbricking With Esquire". There is there specified, items 4, 15, 24, 27, 28, 30, 31, 35, and 36, quite a number of jokes.

The first one appears at the bottom of the left-hand column on page 94. A. Yes.

Q. Beginning "The Corporal was going home on a furlough and was lucky enough to have a pullman reservation," and ending up, "I am sorry, one of you girls will have to leave." 303

Now, do you see anything obscene, indecent, lascivious, lewd or filthy about that joke? A. I do not.

Q. That is reproduced from the Camp Livingston, Louisiana, service paper, is it not? A. It so states.

Q. In your opinion, is there anything which would tend to stimulate impure sexual thoughts, or lower standards of
304 right and wrong, or corrupt morals of the average normal person, in that joke? A. No.

Q. The next one appears in the fourth column of page 94, the fifth from the bottom, beginning, "He: 'I see your husband has been promoted to a Master Sergeant,'" and ending up "Don't fool yourself, he doesn't suspect a thing."

Would your answers be the same with respect to that cartoon? A. Yes, indeed.

Q. As you have given with respect to the questions regarding the others? A. Yes, sir.

Q. The next item is on page 95, second column from the
305 top, "Home on furlough," and ending up "Where do I start." Would you make the same answers, and would your opinions be the same with respect to that joke? A. Yes.

Q. The next one is at the bottom of that column on page 95, beginning, "The beautiful Army hostess," and ending up, "you're thinking that pan's got a bottom in it." A. Yes, sir.

Q. Would your opinion be the same with respect to that joke? A. Yes.

Q. The next one cited is the next succeeding one beginning, "Have a good time at the party, daughter," and
306 ending up, "Make up your mind, mother." Would your answers and opinion be the same as to that? A. Yes, sir.

Q. The next one is the joke, skipping one, which begins, "Buck Private: 'I am afraid we can't have much fun tonight,'" and ending, "a five dollar bill." Would you make the same answers and have the same opinion with respect to that joke? A. Yes, sir.

Q. The next one is the one immediately succeeding that,

beginning, "Pardon me, Miss, said the sentry," at the bottom of the third column on page 95. Would you make the same answers to the same questions, and are your opinions the same with respect to that joke? A. Yes, sir. 307

Q. And the final one is in the fourth column, beginning, "A beautiful young lady went for a swim," and ending, "the answer came quickly 'Seventy-nine, darn it.'" Do you make the same answers to the same questions, and are your opinions the same with regard to that joke? A. I do, sir.

Q. Now, will you turn to page 52, which is a Sultan cartoon, specified as similar and related material. Have you examined that cartoon? A. Yes.

Q. The sub-title is, "Such a neighbor—always borrowing." A. Yes. 308

Q. Would you make the same answers to the same questions which I have asked you before? A. I would.

Q. Are your opinions the same with respect to that cartoon? A. They are.

Q. Turn over to page 60, which is a photograph in color, by Anton Bruehl, of girls from the Folies Bergere. Will you look at that photograph and tell us whether your answers as to alleged obscenity and so forth are the same with respect to that material as you have previously given with respect to the other cited and specified material? A. It is.

Q. I call your attention to a cartoon on page 67, at the top of the page, entitled "At the U. S. O. in New York they just gave us cigarettes." A. Yes. 309

Q. Is your opinion the same of that cartoon as you have expressed with regard to the others? A. It is.

Q. Next, will you turn to page 77, an article by George Jean Nathan entitled "First Nights and Passing Judgments," which is his regular critical column appearing in

the magazine as a regular feature, and I direct your attention to paragraphs 1, 10, 15, and 21. A. What page is
310 that, sir?

Q. Page 77.

Paragraph numbered 1. This is in the left-hand corner of the column, page 77. Have you read that? A. I have.

Q. Do you see in the middle of that paragraph a phrase "St. Louis sporting house"? A. I do.

Q. Paragraph 10 is the next one cited, the top of the third column, "Young floozie characters wearing short skirts that tightly embrace their hinterparts". A. Yes.

Q. And the next paragraph "Any more plots about some one who mistakes an innocent institution for a bawdy house
311 or vice versa". A. Yes.

Q. Those are all things about which Mr. Nathan objects as being presented on the stage? A. Yes.

Q. Paragraph 21, beginning "Den don't gimmie". A. Yes.

Q. That is a quotation from one of the Dead End boys in the play "Dead End"? A. Yes.

Q. That is something about which he objects? A. Yes.

Q. Is your opinion with respect to those paragraphs the same as you have expressed with regard to the preceding items? A. Very definitely.

Q. Finally, I call your attention to page 83, a cartoon at the top of the right-hand column sub-titled "My date's at
312 the awkward age, all hands and no dough". A. Yes.

Q. You have the same opinion with respect to that cartoon? A. I do.

Q. One last reference, page 89, a color photograph. Would you make the same answers to the same questions as I have heretofore asked you? A. I would.

Q. Are your opinions the same with regard to it? A. They are.

Q. Doctor, let me ask you this: Having examined all the cited and specified material in the January issue, in your opinion, is the cumulative effect of the cited and the specified material in that issue, such as to render all or any part of it obscene, lascivious, lewd, filthy or indecent? A. No. 313

Q. Would your answer be the same as to each of the other issues? A. It would, and to the combined issues.

Mr. Bromley: That is all.

Mr. Hassell: If the Board does not object, I should like to remain seated for the examination because it is going to take quite a little while.

Chairman Myers: I don't see why you shouldn't. For that matter, Mr. Bromley, if you wish to remain seated it is satisfactory to the Board. 314

Mr. Bromley: Thank you, sir.

Cross Examination by Mr. Hassell:

Q. Doctor, what is your definition of the word "obscene"? A. "Obscene" is that which is lewd, lustful and filthy.

Q. Does that definition apply to all ages and all sexes? A. It applies to obscenity the world over in all ages and in all sexes.

Q. What is your definition for the word "lewd"? A. "Lewd" is that which is indecent and, obscene, I think is used in the definition of lewd. 315

Q. Would you accept as a competent and proper definition of the word "obscene" "offensive to the senses, repulsive, disgusting, foul"? A. That is, second—yes, I would accept foul; foul and filthy are the same. Disgusting to the senses would be and is mentioned in Webster, I think, as the second or third line. There are several other lines. I wouldn't use it interchangeably.

Q. Would you accept as a definition of obscene "offensive to the senses"? A. No, indeed.

316 Q. If the Century dictionary gave that as one of the definitions of obscene, you would disagree with it? A. No. Webster gives that as a definition also. I would accept it as part of obscenity, but not as a substitute.

Q. I was not asking for synonyms or substitutes but, would you accept that as a definition? A. As a part of the definition, yes.

Q. As a part of the definition? A. Yes.

Q. Would you accept as a part of the definition "offensive to modesty and decency"? A. Yes.

Q. "Impure"? A. Yes.

317 Q. "Unchaste"? A. Yes.

Q. "As obscene actions or language; obscene pictures"? A. Yes.

Q. Would you accept as a part of the definition of the word "obscene", "offensive to chastity"? A. Yes.

Q. "Delicacy"? A. Yes.

Q. Or "decency"? A. Yes.

Q. Would you also accept as a part of the definition of obscene "expressing or presenting to the mind or view something that decency, delicacy, and purity forbid to be exposed"? A. Very definitely.

Q. Would you also accept as a part of the definition of 318 obscene "offensive to senses, obscene publications, and indecent publication which, whether true or false, tends to deprave and corrupt"? A. Yes.

Q. Would you accept as a part of the definition "offensive to morals"? A. Yes.

Q. Those latter definitions are from Funk & Wagnalls New Standard Dictionary? A. Yes, sir.

Q. Now, coming to the term "lewd", would you say that

word is synonymous with the word "obscene"? A. Practically, yes. 319

Q. You said "practically". Let's get down to cases. A. I will say "Yes," if it will save time.

Q. I am not interested in saving time. A. Neither am I.

Q. I want to get this straight on the record. The word "lewd" would you say is something characterized by lust or lasciviousness? A. Yes, indecent and vulgar.

Q. Would you accept Funk & Wagnall's New Standard Dictionary definition "Or given to licentiousness, libidinous, unchaste"? A. What was the second word? 320

Q. "Libidinous". A. "Libidinous" is a technical word which in itself I would not consider in any way synonymous with licentiousness. The word "libidinous" is an adjective referring to libido which does not connote licentiousness or lasciviousness. It is a part of the general public psychology and is talked of freely now.

I should not accept "libidinous" as a qualifying adjective—

Q. What is "libido"? A. "Libido" is the technical term representing the whole sex super-ego, the sex urge in the psychology of man. Libido does not mean just sex in the sense of intimate relationship between men and women. It 321 represents the beauty in nature, it represents the beauty in music, it represents the beauty in art.

If we think of three fundamental instincts of man as self-perpetration, self-preservation and self-perfection, the libido threads through all, but has particular reference to the sex impulse, not in a restricted way but in a broad way.

I could not, for that reason, use the word "libidinous" in any way as a part of the definition of lewdness. It is part of our modern educational trend.

322 Q. If Funk & Wagnall's New Standard Dictionary gives "libidinous" as one of the definitions of "lewd", you would not agree? A. I would not accept it.

Q. And if that word had been accepted by the courts, including the Supreme Court of the United States— A. When?

Q. In connection with obscenity and lewdness— A. When?

Q. I am not on the witness stand. A. I beg your pardon.

Q. I say if it had been so accepted, you would not agree? A. I would not.

Q. You say "lewdness" and the common every-day acceptation of the term does not imply "libidinous"? A. No,

323 not to my mind.

Q. Now, coming to the word "lascivious", what would be your definition of that? A. "Lascivious" would refer to the sex on a lowered plane, the vulgarity of sex rather than the beauty of sex, to the carnal knowledge or carnal instinct of man.

Q. And how would you distinguish that word from "lewd" and "obscene"? A. I think they go very intimately together and usually in the definition of one, according to Webster, you will find the others.

Q. Would you accept the definition of the Century Dictionary of lasciviousness as being "wanton, lewd, lustful, lascivious men, lascivious desires"? A. Quite right.

324 Q. "Tending to excite voluptuous emotions"? A. Right.

Q. And you would accept Funk & Wagnall's New Standard Dictionary's definition of "lascivious" as "having or denoting wanton desires, lustful, lewd, as a lascivious person, lascivious feelings or words; tending to produce sensual desires; as lascivious pictures or books"? A. Yes.

Q. Now, will you give us the definition of the word "indecent"? A. I think "indecent" is something which tends to violate the mores and the customs of good society of the times

in which we live. "Indecent" violates good taste, good morals and the customs and the psychological tendencies of the habits and social etiquette of the times. 325

Q. Would you accept the definition of the Century Dictionary as "indecent, unbecoming, unseemly, violating propriety in language, behavior, etc."? A. I think that is the same thing.

Q. "Grossly vulgar, offensive to modesty"? A. That is right.

Q. "Offensive to common propriety or adjudged to be subversive of morality, offending against modesty or delicacy, unfit to be seen or heard, immodest, gross, obscene". 326
A. I would.

Q. "Contrary to what is fit and proper, unbecoming, inelegant in form, uncomely". A. It spreads that pretty thin there, but I would accept it.

Q. Now, what would be your definition of "filthy", Doctor? A. Well, I don't think "filthy" needs to be defined. It refers to words that are not spoken in society. Filthy would be rankly indecent, lewd and obscene, language, pictures, poetry, articles, or anything.

Q. Do you associate the word "filthy" necessarily with the words "obscene, lewd and lascivious? A. I do.

Q. Meaning substantially the same thing? A. Yes—no, 327
I think it is more vulgar, to introduce another word. I think it is more vulgar than "obscene" although it is practically the same thing.

Q. Now, would you agree with the following Century Dictionary definition of the word "filthy": "Containing or involved in filth, foul, dirty, noisome, nasty"? A. Yes, sir.

Q. "Morally foul, defiled by sinful practices, polluted". A. If you will indicate when you want me to answer, sir, I will be glad to do it.

328 Q. Do you agree with that? A. I do.

Q. "Low, scurvy, contemptible, mean." A. You mean "filthy" may be "mean"?

Q. Yes. A. I would like to have an explanation of that. I never knew those words were synonymous.

Q. The Century Dictionary gives that as the third choice of definition. A. It spreads that out thin there. Too mean, in the old English sense, meant too uncomely.

Q. Would you agree with Funk & Wagnall's New Standard Dictionary's definition of 'filthy", as "of the nature of or containing filth, dirty, nasty; hence vitiated by contact
329 with impurity, morally unclean or depraved, foul, obscene. as a filthy street, filthy tastes". A. Yes, sir.

Q. Now, you had in mind all of these definitions that you have agreed to, in answering counsel's questions on direct with respect to all of the matter contained in these eleven issues of Esquire? A. I had the essentials of those definitions in mind when I answered every question, and the phrase which I think is quoted in your law, "pander to the prurient".

Q. What is the normal mind you speak of, Doctor? Will you define that? A. No, sir.

Q. When you refer to the effect of material referred to
330 here as affecting the normal mind. A. I beg your pardon. I didn't understand your question.

Q. Just what do you mean by "normal mind"? What do you mean by the normal mind? A. I mean by the normal mind the average mind of the average man or woman and boy or girl in our society who has average intelligence and who has the average emotional makeup and who is subjected to the impact of everyday life in a realistic manner. and who makes a normal adjustment, either in school, college, or employment, or in vocation and occupation.

The mind of the mass individual and the mass man as we speak of it, the psychologic biological. He is that individual who shows no particular personality deviations or no 331
particular emotional disorders such as neurosis or neuropsychiatric conditions and has no particular psychopathic tendencies. He has average normal emotions, intelligence, and lives in the milieu of our cultural environment and normal average life.

Now the mind of that individual, if there is any one pattern, and I think there is not, I think in psychiatry and in science and all our work today we establish what we call the average individual, the average man. We have to investigate them at the induction center, and those that do not measure up to that standard we consider deviate, and 332
the deviation is due to some function or disturbance of function.

I think I visualize very clearly what you mean by the normal mind, and I think it has to be traced in a situation like that from the very early childhood to the very senescence of life.

Q. As applied to the general reading public? A. Yes.

Q. The magazine-reading public? A. Yes.

Q. Would you say it is the ordinary man who is allowed to walk the streets and buy a magazine off the newsstand? A. Yes, sir.

Q. Man, woman, or child? A. Yes, sir. 333

Q. What do you call a person who is under this or below this normal or average? A. Well, there are various types. Are you speaking intellectually from the standpoint of his psychometric standard, or are you speaking from the standpoint of his emotional standard? They do not necessarily go together.

Q. I feel we are talking about emotions. I judge that

is what you are talking about. A. Well, in answering, I would be glad to follow that line if you would like to. The
334 individual who is emotionally an upset individual, from that standpoint, or the emotionally ill individual, may be suffering from a neurosis. There are many types of them, or he may be suffering from a psychosis and there are many types of those, and your question is rather broad. It is almost like saying what physical conditions or disabilities are walking the street? It is a little difficult to orient your question.

Q. Is there a line of demarcation between the average normal individual? I am talking about emotionally. A. Yes.

335 Q. Is it very clearly drawn between the normal individual you have had reference to? A. To the psychiatrist, yes; to the average individual, not necessarily.

Q. So it is a fact, is it not, Doctor, that there are a great many people who may patronize newsstands who are, in fact, subnormal? A. That is right.

Q. Are you able to divide the population of the United States? A. I have never undertaken that, no, not on that. You mean numerically?

Q. Yes. A. Not numerically. I think otherwise we can.

Q. Have you, in your studies of Esquire, classified as normal, sub-normal, or both, these several hundred thousand
336 readers of Esquire? A. Yes.

Q. You have? A. No, I haven't.

Q. So you are not able to tell this Board whether, as a matter of fact, the readers of this magazine, the seven hundred thousand, are sub-normal, normal, or abnormal? A. I am not.

Q. In what category did you place yourself, Doctor? A. In regard to normalcy?

Q. Normalcy. A. Well, I think I am an average normal individual morally and physically, spiritually and intellectually. I think we might go into those four fields because I really think, and I really know, and I don't like to seem egotistical, that I am above the average normal intellectually. That is as you take the cross section of the population. I would not like to go any farther than that. 337

Q. You speak of spiritually. What is the Seventh Commandment, Doctor, of the Ten Commandments? A. Well—

Q. We have that in this case. A. Which one?

Q. The Seventh Commandment. A. What is it? Thou shalt not commit adultery.

Q. We will come to that later. A. All right.

Q. But you have guessed it is, "Thou"— 338

Mr. Bromley: How do you know he guessed it?

Mr. Hassell: Well, just from the way he hesitated in answering the question.

By Mr. Hassell:

Q. You take that, is that right? You say that is the one? A. (No answer.)

Q. Now you have lumped into this average individual, as I understand it, both normal and abnormal? A. Yes.

Q. Pre-adolescent, adolescent, and post-adolescent, is that correct? A. Yes. 339

Q. You believe that pictures and reading matter have the same effect on this average individual no matter what his sex, regardless of his age? A. Oh, no, certainly not.

Q. Did you in your answers to counsel's questions on direct have a mental reservation as to the age of the individual, of this average or normal individual, or his or her sex? A. None whatsoever.

Q. You did not? A. No. If I understand your question, your questions are extremely ambiguous.

340 Q. Doctor, you would say that age is a factor upon the sexual desire, would you not? A. Yes, sir.

Q. A young man of 18 has a great deal more sexual urge than a man, say, of 65 or 85? A. Not always, but as a general proposition I think that is true. There is a great variation in the sex urge and drives of individuals in all ages.

Q. Would you say that the young man of 18 may be stimulated, has his sexual desire stimulated, by material which a man, say, of 65 would not get any kick out of at all sexually? A. Yes.

341 Q. As a matter of fact, would there be a vast difference between a man of 18 or 20 and a man of 45 to 50? There would, wouldn't there? A. There might be in certain instances.

Q. And as a matter of fact, Doctor, not to quibble, the sexual processes diminish, do they not? A. Yes, sir.

Q. In your answers to counsel's questions on direct, what age man did you have in mind? A. All men.

Q. All men? A. From pre-adolescent to senility.

Q. How old are you, Doctor? A. I am 46.

Q. You personally know the difference in the matter of sexual desires now and when you were, say 20? A. Yes.

342 Q. Are you stimulated now in the same way by pictures or material in print as you were when you were 20? A. I think I probably am, yes.

Q. You would say there is no difference there? A. I think—

Q. But there is a difference? A. I think I am much more sex conscious now than I was when I was 20.

Q. In your business you have had occasion to inquire

into the sex habits of a great many individuals? A. Yes, sir. 343

Q. That made you more sex conscious or more callous as to sex matters? A. I think it has made me more intelligent in the field of sex. I doubt that it has made me more callous. I think it has made me have a more wholesome and more careful and more scientific and a better educational outlook on sex. It has given me an opportunity to see why we have missed the boat in our education in matters of sex.

Q. But you would still say that you are affected? I mean yourself, personally, you are affected in your sexual desires the same now as you were before when you were 20? 344
A. Well, I haven't thought very much about that, but, offhand, I would say that you are speaking of my instinctual urges. I would say that they are greater now than they were at 20, if that is what you mean, the biological urge.

Q. I have reference to that as applied to the sex images you get from reading salacious material and seeing salacious pictures. A. I never get much kick or sex stimulation from salacious pictures or salacious material when I see it. That is something that I try to eliminate from those whom I care for and from my family and from the public. I am as eager to do that as you are, sir. 345

Q. You enjoy that same ability now as you did when you were 18 or 20? A. I was never fond of the dirty pictures, lewd or salacious pictures or literature.

Q. In other words, you never had a very great liking for the double entendre and off-color jokes and cartoons and pictures? A. No, sir.

Q. Yet you say you are the average individual so far as that goes? A. Well, I have a great many in my group, in my class, who have the same feeling, and I see many

346 patients who have a passion for that sort of thing, of course, who take the opposite view. I would say that society is divided about half and half that way, irrespective of their sexual or psychological or emotional makeup.

Q. You base that statement on what segment of society, Doctor? A. The whole cross section.

Q. You mean you have had personal contact with the whole population? A. No. I made that estimate on the basis of a portion of the population that I have seen, running from all classes of priests, judges, physicians and professional people, and going down to the ditchdigger. I see
347 all classes under all conditions.

Q. You are now in active practice, Doctor? A. I am.

Q. Where? A. I am Psychiatrist-in-Chief at McLean Hospital, and I am a consultant Psychiatrist at Cambridge Hospital and a consultant Psychiatrist at Harvard University, and I have a private practice in my own home and office at 179 Clifton Street. The latter office is because a great many people like to see a psychiatrist and don't like to have it generally known that they are seeing a psychiatrist. And I also serve at the First Corps Area Induction Center one day a week, and I am Chief Psychiatrist for Draft Board No. 11 in Greater Boston.

348 Q. Doctor, do you come in contact, in your practice, with city dwellers and urbanites? A. I see them all the way from the hills and farms in Vermont and California and Mexico. All over. Our hospital caters to people from all over this country and from out of the country. I have several patients from Mexico and Canada.

Q. Those patients are abnormal, Doctor, sub-normal? A. I don't like the word abnormal or sub-normal. Of course they are somewhat abnormal. I would have to say that any person who has an emotional situation is abnormal

temporarily or has a temporary abnormality. The emotional 349
illnesses are now regarded as curable in the same way and category as medical diseases. They are curable. For instance, my field is in experimentation and concentration on the treatment of such disorders and I am naturally interested in the prevention of them.

Q. You come in contact with a great many normal people who live in small towns and rural communities through the south and west and midwest and far west? A. I don't come in contact with many people from the west or far west or midwest. I see more people from New England, which is my area of operation. I see more from there. 350

Q. Why do normal people come to see you, Doctor? A. To consult me about members of their family who are ill, and many people come to me about problems. The psychiatrist is consulted in many ways today, about how to live, what to do. I have been consulted by hundreds of mothers about their adolescent and debutante daughters about affairs that they have had with young men, whether they should get married. I have seen hundreds and thousands of college men, and I also see them at the Pre-Induction Center. Of course, that is rather hurriedly, but it is indicative of the type of material we have in this country.

Q. When a mother comes to consult you about her daugh- 351
ter, or a father about a member of his family, do you psychoanalyze him? A. No. Psychoanalysis is a very specialized problem. I have been psychoanalyzed myself when I studied abroad. Psychoanalysis is only one very small part of psychiatry, and psychoanalysis is only carried out with a great deal of time and difficulty. Psychoanalysis is an investigation of the unconscious and the individual has to spend an hour a day, five days a week, over a period of months and sometimes years, to be psychoanalyzed. The

352 average psychiatrist doesn't do that. It is impractical and unnecessary. It is sometimes referred to or spoken of as analogous to major surgery of the brain, that is, psycho-analysis, but the body of the psychiatric work is the distributive work, the practical need, getting a complete history of the individual and finding out things. That not only includes the patient's history, but includes an exhaustive family history, and finding out the vocational history and finding out what the individual's background and constitutionality is, and what the individual's problems are, and thereby you get some ground to stand on as to what you
353 should do to correct. You go into the environmental field and into the biological field. In that particular field we are having a great deal of success.

Q. You go through that process in each examination of appraising normal individuals? A. Yes. Many normal individuals come in for psychiatric review. Now there are such tests as aptitude tests whereby the individual going to college takes a test. Practically all college men have these aptitude tests, to find out what vocation they should pursue, or what profession they should take up. They are known as vocational and aptitude tests.

Q. You go into the complete history of each individual in
354 each one of those cases? A. Indeed we do.

Q. And those individuals or patients tell you all their sex impulses and feelings and so forth? A. Well, I couldn't say whether they tell all or not, but the sexual field is usually investigated.

Q. Do you inquire of those patients, those normal patients, that you have had, as to what effect these issues of Esquire has on them? Have you done that? A. Not particularly Esquire, but that is usually a question that is asked collectively, what effect current literature or anything of that kind has or what affects them sexually.

Q. You have been trying out these eleven issues on your normal patients, have you, Doctor? A. Yes, I have.

Q. You have? A. Yes. As a matter of fact, in preparation for this, I have asked a great many normal people. I 355
have asked different age groups, male and female, just what their reaction is to this.

Q. What their reaction is to Esquire? A. Yes, to this particular material we are discussing here.

Q. You mean in each one of those instances those patients sat down and read everything in these eleven issues? A. Oh, not in all of them, but a representative amount of material such as has been cited and specified here, because I wanted to see and orient myself a little bit to see if I was on the wrong track, if I missed something.

Q. You were furnished how long ago, how long back, with 356
a copy of the specifications and charges here? A. Now the specifications I had only a few days completely, as we now have them. The material was discussed with me, I think it was, two weeks ago, if I recall, approximately.

Q. So you have been working on this case, with a view to testifying in it, since two or three weeks ago? A. Yes, sir.

Q. How much of that time? A. You mean in preparation for the case?

Q. Yes, sir. A. You want it in hours or days?

Q. Well, what is your regular day, eight hours? A. I wish it were. It is nearer fourteen.

Q. Fourteen? A. Yes. 357

Q. Take the 14-hour day. A. Let me make it clear that I couldn't sit down in my busy life and work 14 or 7 hours on this material. I had conferences with the attorney as to what this material was and what the action was about, and I read all of these Esquires through, and I don't know how many hours that would take, but I did that over a period

of a week or ten days. Some of these articles I probably read 20 times. Now you guess as to how much time that
358 would take.

Q. You got these normal patients whom you consulted to read these eleven issues and to put some time in on it? A. Would you want me to tell this Court what I have done?

Q. Absolutely. A. You do?

Q. Yes. A. All right. This has created quite a little interest in our section and I have groups of my wife's friends —not saying what this action was—I have asked them to pass judgment on those pictures and this material which is marked as obscene, and the most that I got from any of them is occasionally a joke is a little risque, and likewise
359 my colleagues in the field the same way.

Then I have taken the articles and have had my fellow psychiatrists, men on my staff, read them through, to see if I had missed anything in those articles, and in the whole cross section there has not been a single individual who applied the term obscenity, lewd, filthy or obscene to any of these articles, jokes, or publications, or pictures.

Q. Now, these people you are talking about were not your normal patients? They were not patients at all, were they? A. No. I haven't tried to put this experiment on patients. These are acquaintances.

Q. How many of these friends and acquaintances, and so
360 forth, that you refer to, how many individuals did you do that to? A. Why, I should think approximately 40.

Q. Forty? A. Yes.

Q. You furnished each one of those a full set? A. Oh, no, they had to use my set. I had to loan these about.

Q. And that was all done over a period of ten days or two weeks? A. That is right. You have at the hospital a group of ten at a time.

Q. Of these 40, how many were male and how many female? A. About fifty-fifty, roughly.

Q. Fifty-fifty? A. Yes, more women than men, I think.

Q. How many were pre-adolescent, adolescent, and post-adolescent? A. Well, of the pre-adolescent I can say only two, my two youngest children. One is adolescent, and all the rest are post-adolescent. 361

Q. How much post? A. All the way from stenographers, I suppose, roughly, around the age of 20 or 21, up to two or three men that are 50 or 55.

Q. How many in the 20 class of stenographers? A. I suppose about 10.

Q. How many in the 50 or 55 class? More of those? A. No, I think only two in that class. The men on the staff are between 30 and 35. 362

Q. Did you tell those people that you had been employed to testify for Esquire? A. I did not. Some of those people, my family, knew it.

Q. They gladly assisted you in this? A. They looked over the material and gave me their comments.

Q. Well, a rather laborious task, wasn't it? A. Oh, no, I had made it clear that I did not cite every article. Then I took representative articles, perhaps only showed an individual two or three copies, but I tried to pick them fairly.

Q. What do you mean by that, Doctor? A. Pick them fairly? 363

Q. Yes. A. Well, one in which there was a lot of specifications marked or a lot of cited material, not one like June where there is only two there.

Q. You mean you didn't ask the young lady stenographers to pass on the Varga girl? A. Some of them, the issue with the 12 in, yes. I was particularly eager on that because I have always admired the Varga girls very much and I heard

a great many favorable comments on them, and I wanted to be sure that I was on the right track.

364 Q. By the way, Doctor, did you see the moving picture "DuBarry Was A Lady"? A. No, I didn't.

Q. You wouldn't be able to say why those Varga girls were dressed up? A. I didn't see it.

Q. Or had a little more clothing on? A. I didn't see it.

Q. Doctor, would you agree with the statement, getting back for a moment to definitions, that obscenity is a function of many variables? A. Yes. A function of many variables. Yes. I mean I think that means that there are very many degrees of obscenity, isn't that what it is?

Q. You don't think this refers to the sex age, upbringing, 365 environment, and so forth, of the individual? A. As a part of it, yes.

Q. Now, you read I believe you stated, everything in every one of these eleven issues during the ten days or two weeks, I believe you said? A. That is right.

Q. That is, advertising and everything? A. All the specified material. I did not read what was not specified or cited.

Q. You did not read any of the other material at all? A. Well, I wouldn't say. I may have read one or two articles, I don't recall.

Q. Well, now, let us get this straight. Did you or did you not read each one of these publications in its entirety? A. 366 No, I did not.

Q. You did not? A. I did not, no.

Q. So when you answered counsel's questions as to whether there was anything in any of these issues that was obscene, lewd, lascivious, or filthy, you meant only those things that were referred to here? A. Right, right.

Q. Doctor, coming to the January issue of Esquire, I mean under "Editorial: Pep talk to the tune of 'Easy does

it'," page 6, the boxed-in article headed 'Shor Nuff' "? A. Yes, I have it.

Q. The first paragraph of that says:

"Esquire, the four-bit magazine which is always busy as a little beaver sandwiching good advice between its spicy cartoons, comes up this month with a male Dorothy Dix who tells you how to pick a war bride." 367

Do you agree with the characterization in that paragraph with respect to the cartoons in these eleven issues of Esquire, as being spicy? A. I think that they are, that adjective might be applied.

Q. And Esquire is supposed to be a man's magazine? A. Yes.

Q. What would you mean by "spicy" to a man? A. I think it might be a joke that was a little suggestive and possibly a little off-color or perhaps having a double meaning. 368

Q. By "double meaning" you mean one pointing to sex or sex activity? A. It might be sex or something else, but it might be a double meaning and I think the men get a kick out of being able to see that double meaning.

Q. The other meaning might be indelicate? A. It might be indelicate to some, definitely.

Q. Continuing with the second paragraph:

"This advice-to-the-lovelorn character is named Woodhead. This will give you an idea of what to expect. If that name isn't a phony, it's a damn fortunate coincidence. 369

"Assuming you want to get married—and some guys will do anything to get off the post seven nights a week—Esquire tells you how to pick the gal. You're supposed to use a test sheet, drawn up by this guy Woodhead, which scores a dame on a possible 500 points. If she rings up more than 400, you're advised to take a chance. If she tops 475, Esky sug-

gests that you rush her to the altar with a heavily armed guard, lest someone steal her or she change her mind. If she beats 497, you'd better forget the whole deal; she's either
370 Myrna Loy, already married, or you're dreaming.

"The test is divided into nine sections. Companionship comes first, with 105 points, followed by intelligence 90 units, and disposition, with 80. Comes it then breeding (no, not that)"—what does that mean— "comes it then breeding (no, not that)"? A. Whether she is well bred or not, I suppose. In Boston we might say whether she is in the Social Register.

Q. You wouldn't say that had any connotation of reproduction of the species? A. To a person with a filthy mind it could.

371 Q. Why is it in parentheses? A. Because they don't want to consider whether she is a blue-blood or not.

Q. Or don't want to consider whether she would be entirely fertile? A. I honestly didn't get that out of that.

Q. You didn't get it? A. No.

Q. Continuing: "—which scores 50; beauty, 45; health, 40; juking (this is something Woodhead thought up which puts sex, dancing, manners, drinking and risque behavior in one package)"—do you think that is a good definition of this word as used in this paragraph? A. Juking?

Q. Yes. A. That is a new word to me. I have seen it and the young folks are using it. I suppose that is a good defini-
372 tion of it.

Q. In the opposite column where he has numbered these items he has "Item 7: Juking—a. That's right. Just what you're thinking about." Then, 400 points or units. A. That refers to the definition, I suppose, that he has just given on the other side.

Q. You think that has nothing to do with the sex function? A. Only as mentioned in the definition, sex appeal, and so on.

Chairman Myers: Doesn't the word "juking" come from the words "juke box"? 373

The Witness: The young people in our vicinity say they are going juking. There aren't many places to go now. They go play and dance where they have juke boxes.

By Mr. Hassell:

Q. Let's refer to the complete paragraph nearest the top of the second column:

"The pay-off on what kind of a guy this Woodhead is comes quick. He figures a gal's dancing ability is worth 20 points. Sex he gives 10." 374

And then, "So he would rather dance—" —What do you think he means? A. I think he means what he says. He would rather dance.

Q. In other words, this fellow Woodhead is Charley McCarthy, in fact? A. I think he might be considered a block-head.

Q. He's a dead number? A. I suppose so.

Q. Certainly, insofar as sex is concerned? A. Insofar as that article is concerned.

Q. Now, let's see—the next item is page 45. There is a verse "Benedicts, Awake" by Franklyn Reynolds. 375

"Men sleeping beside your wives, awake!
Awake, to gaze longingly, lastingly,
Upon soft skinned thigh and softer breast revealed by careless gown.
For has not fate decreed deprivation?
Has not Hitler written and Tojo demanded
Your lot shall be the stinking bodies of men, the living and the dead?"

376 And so forth to the last paragraph reading:

"Men sleeping beside your wives, awake!
Awake, and seek the sweet caress of lip and arm.
Time awaits, not upon your pleasure, because destiny and doom are one."

The first part of this last paragraph and the first part of the first paragraph—what sort of picture do those words bring to your mind? A. That pictures something that you hear about every day, a man who is being drafted in the
377 Army and is spending his last nights at home with his wife, and who is torn with the emotions of leaving a loved one and it brings to me the beauty portrayed in that picture of womanhood, and I think it is a glorious article and a noble thought for these times.

There is certainly nothing obscene or filthy in that article. That is the unanimous opinion of everyone I have talked with. Anyone who considers that in any way obscene or indecent or filthy must have a filthy mind.

Q. In other words, you think it is entirely proper and not indelicate at all, to picture by language such as this, "men sleeping beside your wives"— A. Certainly not.

Q. "Awake, to gaze longingly, lastingly upon soft skinned
378 thigh and softer breast revealed by careless gown". A. Certainly not.

Mr. Bromley: I don't know whether you mean the answer "Certainly not".

The Witness: Will you read the question, please?

(Question and answer read.)

The Witness: I certainly do think it is proper.

By Mr. Hassell:

379

Q. You think there is nothing indelicate or indecent in that? A. I certainly do not.

Q. Now, coming to the article by Gilbert Seldes, page 83—is this one of the articles you read twenty times? A. I didn't say I read it twenty times. I saw the show and was familiar with it and it is such good reporting that I only had to read it two or three times.

Q. I believe you testified there is nothing indecent in this article. A. That is right.

Q. Up at the beginning of the article:

380

"The scene is the old familiar burlesque routine of the court room; Clark is presiding, as an owl should; and, merely as an incident, Gypsy Rose Lee is the defendant against whose navel Clark finally blows a paper tickler."

Now, "against whose navel"—do you think that is perfectly decent language in a man's magazine designed to please these average or normal men you refer to? A. Yes, I do.

Q. And we go to the third paragraph. Unfortunately, he makes practically the whole sentence a paragraph, so we have to start way back:

381

"Of course, wherever Bobby Clark goes, the mad quality of comedy follows; he is in himself a comic masterpiece; he is seductive and outrageous at the same time. Years ago he did a seduction step around Mary Boland, singing "How About a Boy Who Could Play the Piccolo (For a Girl Like You)" with such graceful and insinuating and suggestive steps as no black slave in Scheherazade could surpass; for the past few years he has leaped into the air, clicked his heels sideways (how?) and sung of himself as "Robert the Roue from Reading, P-a," weaving and winding his frame

382 around tall show girls, peering through his non-existent glasses into the bosoms he isn't tall enough to see unless he jumps."

You think there is nothing indelicate and indecent in that language? A. I don't think it is indelicate and it becomes less so if you have seen the play.

Q. I assume that some of the 700,000 readers, or a good many of them, haven't seen it. A. I still say it is not indelicate or indecent, definitely not.

Q. Or lewd or obscene or lascivious? A. No, sir.

Q. And the next paragraph;

383 "This time Bobby Clark is in a sexy show which has even a few dirty spots, I suppose. And novelty is the last thing you look for there. Burlesque patrons are single-minded, if that's the right word."—Do you know what he has reference to there? A. Yes.

Q. Single-minded, how? A. They are thinking of one thing, probably.

Q. What's that? A. Sex.

Q. "And the grinds and teases follow a pattern which can't be altered much; because like children listening to an oft told tale, the fans of burlesque do not want novelty; they think that something has gone wrong if the tale is
384 different. So you have girls stripping to a riotous dance or you have girls stripping not to a dance. And since this is uptown stuff, you have the odd spectacle of Gypsy Rose Lee stripping awkwardly and self-consciously, which may be a novelty, but isn't very good fun. Certain little gestures as she fluffs the ruffles on her jacket are enticing; but the major part of her strip she does from under the cover of a bouffant dress, working strings and letting petticoats drop—and down to the planted scream in the audience and the laugh Lee manages every night after the scream—it is just this side of the simple, honest denudation she was capable of five years ago."

Do you think there is anything indecent in the language I have read? A. I don't see anything indecent and I think he is panning it. This article has a good moral influence. 385

Q. And you would say to one who had seen the show, such as you have, you would get that understanding? A. I think you would without seeing the show, but it becomes even more clear when you have seen the show.

Q. I understand Georgia Sothern participates in this show. She is not mentioned in this article, is she? A. I think not.

Q. Do you recall the dance Georgia Sothern does in the show? A. I don't recall that I saw that—let me think— 386
let me see—is that the Bunny dance?

Q. I couldn't tell you. I think she was or is in the show. A. I think she did the bunny dance.

Q. It is a dance that has been referred to in some of these magazines as "The Bumps". It is done largely with a movement back and forth of the middle or the hips or pelvic section. A. I don't recall it. It didn't impress me if I saw it.

Q. Continuing quote "Between Bobby Clark who appears in a long funny scene wearing flannel drawers and Miss Lee whose specialty is being dressed in three well-placed, presumably provocative flowers, you have the essence of 387
burlesque. In this particular show there is also a young slender dancer named Leticia, who does a wonderful trick ballet dance—a trick because it is actually erotic, whereas so many of the hip grinds are not."

What do you have to say as to that? Would you say that is a true and correct description of this part of the show? A. Probably it is. I don't recall that particularly.

Q. So, if that is the correct description, then this article

388 would be an advertisement of an erotic show. A. I think this article is not an advertisement. I think it is a condemnation of it.

Q. Continuing: "There is also a character from the night clubs who makes her breasts jiggle, and this is considered funny, but I didn't think so even at the night clubs where her frankness was greater, her skill no more engaging. A stripper who does an orgiastic dance verges on the erotic."

Do you say there is nothing indecent in that part of this article? A. If this was taken as a glorification of the situation it might border on indecency, but since it is such a
389 definite expose and condemnation and is showing burlesque up—if you read on from where you stopped it explains the matter in a way that I think is justified, and any borderline indecency is more than justified by the moral in the article. This is a good characteristic article.

Q. Would you say, Doctor, that the practice is often followed of advertising by condemnation. For instance, perhaps you have seen advertisements of various sanitary materials for women, and they are warned not to use them at certain times. You are familiar with that type of material? A. You mean contraceptive material?

Q. Yes. A. Yes, I know that.

390 Q. Would you say that is a well-known trick of advertising? A. Yes, and we had that in prohibition days when you were sent a gallon of wine and you were warned not to leave the stopper out because if you did it would become alcoholic. Is that what you mean?

Q. Yes. A. Yes, I am familiar with that.

Q. Over in the next column in this article he gets to Lamberti.

"Lamberti plays what he calls the 'ixilphone' with many a flourish; and as he goes into his big number (Wishing)

a tall cutey saunters in behind him and begins to strip; she sheds a garment just as Lamberti finishes a chorus; applause recalls her and starts him again." 391

That, so far as you are concerned, is perfectly decent and satisfactory language describing this play? A. Yes, it is.

Q. Coming to the next paragraph on that page—

Mr. Bromley: I wish you would finish the sentence and not stop in the middle of the sentence.

Mr. Hassell: This sentence goes on for eight or ten more lines. He separated his thoughts by semicolons.

392

"Applause recalls her and starts him again; his bland and leering ignorance of why the piece is so popular (he played 103 choruses of it once at a Legion Convention, he says), is masterly; he smacks his lips and flutters his tongue and waves his toupe and rolls his eyes—purely as a virtuosa of the xylophone."

I will finish the paragraph:

"And even the old, sad, faithful lechers of the audience prefer him, I think, to the naked strip, so to speak, of some of the other acts."

And continuing:

"The business of getting comedy out of the sexual appetites isn't an easy one. Infinite variety, sex may have; but its singleness of purpose dulls the brilliance of its techniques." 393

Doctor, would you say that those matters I have just read have any indecent sex implications? A. No, I think quite the opposite.

Q. Now, going to the last two lines on page 83:

"The coming together of the male and female principles

394 in the vegetable world (if they do come together there would not be interesting, unless cow-slips flirted and violets were really bashful and false-ragwort were a seducer. It's the trace of mentality that gives us sex as a subject for fun; the trace (not more) of morality that adds spice. So an entertainment which by-passes all the refinements and whoops it up about cohabitation, with a sneer or a laugh or a cackle or even a shout, has a limited field. Burlesque and all other exhibitions seem to run into a groove; it's the best groove and you mustn't call it a rut. The girls in two-bit burlesque are seldom beautiful, but by being where they
395 are they touch off lubricity."

What is the meaning of that word? A. I don't know.

Q. That word has a definite meaning in sex, doesn't it? A. I don't know the word.

Q. I think the dictionary will supply the definition. Certainly, the medical dictionary will. A. It is not a medical term, I can tell you that.

Q. "They combine some exceptional qualities because they are outspoken and pretend innocence and corruption at the same time. They make familiar gestures whose meaning cannot be in doubt; but these gestures become a special formalized movement which one would be surprised to en-
396 counter on the street or in private. The whole event is a mass seduction with delayed satisfaction, if any."

What does that mean? What does he mean by that? "Mass seduction with delayed satisfaction, if any"—what does that mean? A. I suppose seduction is used in the way that they want to entertain a mass of people, but as you come away from a lecture with something and you don't obtain any satisfaction from it as you leave.

Q. You would say that language has nothing to do with sex—"mass seduction and delayed satisfaction"? A. Not

necessarily. I think here it probably does refer to—it is carefully worded. We speak of a spell-binder as seducing 397
a mass of people, but we get very little satisfaction out of his speech. But I think this really probably refers to the sexual satisfaction that a group of people get in cheap burlesque. I think that is the purpose of the whole article.

Q. Continuing: "It can't be the divine event towards which all esthetic creation moves; but it is a relief after some mincingly disagreeable expressions of sexual impotence or variation." A. That pretty much clears up your form of question, I should think.

Q. There is not very much doubt about what he is talking about? A. No. 398

Q. He refers to sex satisfaction and seduction sexually. And you say there is nothing indecent or indelicate in this language? A. It certainly isn't indecent although I suppose some might consider it indelicate.

Mr. Bromley: Do you contend, Mr. Hassell, that any mention of sex in a magazine is obscene or indecent?

Mr. Hassell: No, I am not making any contention. I am simply contending what is here.

By Mr. Hassell: 399

Q. Now, coming to the Varga girls, or as they are described, the Varga wenches, in the January issue— A. Page, please?

Q. Starting at 97. You have answered counsel's questions that not one of these, either by picture or verse, is lewd, lascivious, indecent, filthy— A. Or obscene.

Q. Or obscene? A. That is right.

400 Q. And I believe in answer to the direct question, Doctor, you pointed out the fact, or you stated as your reason for your conclusion, or as accompanying your conclusion, as a part of it, that the erogenous zones, breast and pubic regions, are not shown or emphasized in these drawings. Is that correct? A. That is correct.

Q. So, would you say that a picture, a photograph of a perfectly nude man and woman, or men and women in a group, unretouched, would that be obscene, lewd, lascivious, or indecent, showing frontal pictures? A. Men and women together?

401 Q. Yes. A. I think that might very well be indecent, and I think that might be the element here that might constitute indecency, if you had introduced a man into these pictures, dressed or undressed, as these girls are.

Q. In that connection, I show you a picture on page 22 of this book showing a nude female with the breasts and the pubic regions. Would you say that is obscene, indecent, lewd or lascivious? A. I think I would say that that is indecent and somewhat obscene.

Q. Now, I show you a picture—here is a picture of a group of men and women in the nude, opposite page 60— A. Definitely.

402 Q. —showing two women and two men. A. That is definitely obscene. That is precisely what I mean by obscenity.

Q. I am glad to have that statement, Doctor. These pictures, for the record, appear opposite pages 22 and 60 in "Nudism in Modern Life", by Morris Parmelee.

Mr. Bromley: Which book was held to be not obscene by the courts, Mr. Hassell.

Chairman Myers: Are you introducing that in evidence?

Mr. Hassell: No, I simply referred to it.

Mr. Bromley: If the Board pleases, may we have Mr. Hassell identify for the record what the book is, that it is the book— 403

Mr. Hassell: It is "Nudism in Modern Life", by Morris Parmelee, Sunshine Book Company, Mays Landing, New Jersey, 1941.

Chairman Myers: I think that is in. I believe the reporter got it. I heard Mr. Hassell say the book is Nudism in Modern Life, by Morris Parmelee.

Mr. Hassell: Yes.

Mr. Bromley: I want him to say what is true, that this is the book involved in the Parmelee case which was held to be not obscene or indecent by the Court of Appeals of this District. 404

Mr. Hassell: That is correct.

By Mr. Hassell:

Q. Doctor, referring further to the Varga girl on page 98 of the January issue— A. That is the second one, February?

Q. Yes, the January issue, page 98—February—before we get on that picture, would you concede or admit or state that clothing is often used by the female sex to enhance their charms? A. Yes. 405

Q. That a little bit of concealment adds to the allure sexually? A. Yes.

Q. Now, as to this February Varga girl, you will notice that she is half reclining, which, by the way, is a more or less favorite pose, is it not, of these Varga girls? A good many of them are recumbent? A. Or semi-recumbent.

Q. This girl has her back to us and thrown carelessly

406 across her thigh and part of her buttocks is what purports to be a magazine called "Dreamland".

Would you say there is nothing seductive, salacious, or appealing sexually or designed to incite sexual desires in that pose and picture? A. I think there is nothing seductive or obscene. It is attractive, I don't think it stimulates the average individual, particularly in a sexual way. I think the verse explains that here is a beautiful girl, in a pensive mood, thinking about her sweetheart over there. I think it is a good, clean picture as glorifying a good physique and good American womanhood.

407 Q. Where does it say in the verse that she is in a pensive mood? A. It says here "February makes me dream of castles in the air, the castles that we'll live in when it's over over there".

Q. But you can't see her face. You don't know whether she is laughing or grinning or what. A. No, but what you can see and that verse would indicate she is in a pensive mood.

Q. Can you say there is nothing indecent— A. Emphatically not.

Q. —or overly seductive in the March pose? A. No.

Q. Now, coming to April, I believe you stated that these
408 from an artistic or draftsman's standpoint, have various parts over-emphasized. A. I didn't say that, very definitely not.

Q. I beg your pardon. You would say that they are out of proportion. Is that what you said? A. No, I didn't say that.

Q. You didn't say they had longer than natural lines? A. I didn't say that.

Chairman Myers: Mr. Bromley stated that in his opening statement.

By Mr. Hassell:

409

Q. Would you admit that the lines of this figure, or the breasts are over-emphasized? A. I would not.

Q. They don't appear to be to you? A. No, they don't.

Mr. Bromley: I think her feet are pretty big, Mr. Hassell.

The Witness: I think her feet are too large there, and too small in the next one. The comments I have heard about the Varga girl are that their feet are out of proportion.

410

Q. That is the only reaction you got from the women? A. Yes.

Q. What reaction did you get from the men? A. That they are attractive.

Q. Beautiful, attractive, seductive? A. Not seductive.

Q. Exciting? A. I never heard that. Attractive, beautiful, nice figure, good physique.

Chairman Myers: Here is a suggestion, gentlemen. Would this be a good time to interrupt you, Mr. Hassell?

Mr. Hassell: Certainly.

411

Chairman Myers: Would this meet with your convenience? Would you be just as well satisfied to come back at one o'clock?

Mr. Bromley: Yes.

Mr. Hassell: I would like until one-thirty today.

Chairman Myers: We will come back at one-thirty.

(Whereupon, at 12 o'clock noon, the hearing was adjourned until 1:30 o'clock p. m.)

412 AFTERNOON SESSION.

(The hearing was resumed, pursuant to the adjournment, at 1:30 o'clock p. m.)

Chairman Myers: Are you ready to proceed, Mr. Hassell?

Mr. Hassell: Yes.

Chairman Myers: All right, whenever you are ready.

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413 KENNETH J. TILLOTSON, resumed the stand and testified further as follows:

Cross Examination by Mr. Hassell (Continued):

Q. Doctor, referring to the May Varga girl picture, at page 103 of the January issue, would you say the costume she has on is a bathing costume? A. I should think so, yes.

Q. Without anything to hold it up over her breasts? A. I don't know what the attachments are around the neck. You can't see the neck.

Q. Would you say that the pose and the smile of this
414 girl is provocative? A. No. I would say she has the Mona Lisa smile on.

Q. Which is alluring? A. The Mona Lisa smile is alluring, people have said it is. I wouldn't say it is, no. And, in fact, it is a very little smile, it is only a suggestion of a smile.

Q. You interpret that as a suggestion of a smile? A. Yes.

Q. I call your attention to the fact that this is a semi-reclining pose. You say there is nothing indecent or suggestive in this picture? A. No.

Q. Now, the June picture. This picture shows a woman half crouched. Manifestly she has no cover on her breasts which are partly concealed by her left arm. Would you say there is nothing indecent in that pose or that picture? A. Nothing whatsoever. 415

Q. But if that picture left off the flowers or whatever lies along her arm so as to show her nipple, you would have a different view. A. I think if it exposed them it would be different, yes.

Q. Now, in the July picture on page 103, the verse in the last two lines:

"Whoever dreamed this suit up
Took a lot of liberty". 416

Do you agree with that conclusion? A. Well, if that refers to the costume of the girl, I don't. I mean, I don't know what that means.

Q. Well, the verse "July" is on the page of the Varga girl. A. July is a patriotic month.

Q. Yes.

A. "July's a patriotic month
And you will all agree
Whoever dreamed this suit up
Took a lot of liberty". 417

Q. Yes. A. That is perfectly all right. That is, July Fourth is a patriotic month and is a patriotic date. I don't think it has any reference to the girl.

Q. This suit consists, as you can see, of a very scant set of panties, which are put on in such a fashion as to emphasize the buttocks and the person took a lot of liberty in clothing

418 this figure so scantily. Isn't that what that means? A. It could mean that, I suppose.

Q. Isn't it a fact that the painting of these pictures in such a manner is to show there is no clothing around the upper part of the body, including the breasts, although the showing of the breasts in this picture is not clear and it is done to emphasize those parts of the body and make the mind follow through? A. You mean emphasize by concealment?

Q. Yes. A. I wouldn't accept that at all.

Q. You don't think there is anything in this pose or picture which is in any way indecent? A. I do not.

419 Q. Coming to the August picture on page 104 with the verse:

"I find a cool, secluded beach
A perfect August shelter,
But all the men who pass my way
Just look at me and swelter."

Do you think this figure would be more indecent, if the very scanty costume, was left off? A. Oh, if the costume was left off I think it would be another matter. Yes, indeed.

Q. But isn't it a fact, Doctor, that this costume emphasizes the lines, the hollows, and the protuberances of the figures?

420 A. Yes, I think women's clothes in general do that.

Q. Well, you think that this picture is not calculated to incite the man to look at it? A. I don't.

Q. At all? A. I don't.

Q. By the verse "Just look at me and swelter"—isn't it a fact, Doctor, that sexual excitement causes a rise in blood pressure? A. I think all excitement does, I think sexual excitement no more than any excitement.

Q. It is generally accepted— A. That all stimulating emotions increase the blood pressure.

Q. Isn't that what the verse refers to? A. It might or it might be the hot August day. 421

Q. Do you see anything hot about this picture? A. No.

Q. Or the background? A. No.

Q. It is a perfectly plain effect then, isn't it? A. That is right.

Q. There is no beach or anything? A. No.

Q. Coming to the September picture on page 105, in the verse:

"September brings us cooler days
But still I have to pose on
Oh, Mr. Varga, hurry up 422
And let me put some clothes on."

Would you say that verse, taken with the scantiness of the costume of this model, was calculated to emphasize the lack of clothing? A. No more so than the cool days of September which she is portraying.

Q. Do you see anything in the shading of the central portion of this figure which might suggest that this garment she has on is transparent? A. I do not.

Q. This figure and the August figure are both recumbent on their backs. That seems to be a favorite Varga pose. A. Also a favorite—yes. I wouldn't say it is more than a favorite. Others are sitting or semi-reclining. I think these represent beach figures. I take it that they represent beach figures in bathing suits. 423

Q. Beach figures in September? A. Oh, yes.

Q. You say the September figure represents a beach figure. She has what looks like a full-length sleeve. A. That is right.

Q. Do you see any beach costumes with full-length sleeves? A. Oh, yes. I wear them myself on the beach.

Q. I thought that harked back to the gay '90s. A. What?

Q. I thought that sort of costume harked back to the gay
424 '90s. A. Maybe it does.

Q. Full-length sleeves. A. You go in for a dip on a cool September day and put a pull-over on.

Q. This figure hasn't got a pull-over. A. I don't know. If you know it is a pull-over or what it is. It looks like a jersey pull-over to me.

Q. There would certainly be nothing under it— A. I don't know.

Q. There is no evidence of anything under it. A. I don't know if there is anything under it or not. The burden of
425 proof is on the person who says there is nothing under there.

Q. Of course, your eyesight might be rather bad. You don't see anything around the central portion of this figure? A. I don't believe any of these men here do either.

Q. You say there is nothing indecent or sexually alluring in that September figure or the verse? A. Nothing whatsoever.

Q. Or the figure and the verse taken together? A. No.

Q. And the same as to the October figure? A. That is right.

Q. On page 106, would you say that is a beach costume also? A. Yes, I think it is.

426 Q. Appropriate in the month of October? A. It depends upon where the person is. In a warm climate I think it would be appropriate.

Q. The verse says:

"October is a lovely month
Of yellows and of reds,
The leaves start turning golden
And I start turning heads."

A. Yes.

Q. Then, it would appear that is considerably north of Florida, wouldn't it? A. I wouldn't know. I thought this girl was on a spring board. It looked like a diving board. You will see some marks under her hands and feet. I think it is just as fair to assume that as to assume that there is nothing under the garment of the September figure. 427

Q. Do you see the nipple on the right breast of the October figure? A. I do not.

Q. You don't see it protruding? A. I see a pointed protuberance. It may be the shape of the breast or it may be the nipple. The nipple is very definitely not defined.

Q. The November figure—is that a bathing costume also? A. No, I would think that is some kind of a costume that women wear in circuses and there seems to be an animal there, a lion, and I would think she is perhaps a lion tamer or perhaps a girl in a circus or some show. 428

Q. Doctor, did you ever see a girl in a circus or show, a lion tamer, or in any other capacity, in as scanty a costume as that? A. Well, I have seen—in as scanty as this?

Q. Yes. A. Perhaps not, no.

Q. Would you say that is not indecent or sexually alluring? A. No, it is not.

Q. Now, the December figure on page 108, "A Merry Christmas to you all", this figure manifestly has no clothing at all above the middle. Would you say that is a bathing costume or a boudoir costume, or what? A. I should think it is a boudoir scene. 429

Q. And you say that figure would not be considered indecent or sexually alluring? A. Not in my opinion.

Q. Now, on page 123, the last column, near the top, "Dear Doctor Diddle: I am a beautiful brunet but I have a serious problem * * * every time I take a bath I blush. What shall I do? Twenty.

"Dear Twenty: Before you undress put on a blind-
430 fold."

You say that suggests no indecency, Doctor? A. No.

Q. Neither the Dear Doctor Diddle nor the balance of the language? A. It does not, in my opinion.

Q. Now, page 137, here we have what appears to be two air raid wardens not attending to business, and the legend under the cartoon "And to think I gave up drawing." I believe you stated that possibly these wardens were gazing through a skylight window into an art studio, and that
431 possibly the model they might be looking at would be clothed or unclothed. Did you say something like that? A. I think that is exactly what I said.

Q. Will you please notice the eyes of the figure who is looking through the transom, which might be described as bug-eyed, is that right? A. Bug-eyed don't mean anything to me. You will have to use a different term than that. If you mean a look of surprise, yes.

Q. Surprise? A. Surprise, yes.

Q. He got his fingers in his mouth. Would you say that it is a pleasant surprise or unpleasant surprise? A. I would say it is pleasant surprise, the same as a lot of boys put
432 their fingers in their mouths and whistle when a good looking girl goes by.

Q. A pleasant surprise? A. Yes.

Q. Isn't what he sees there pleasant entertainment? A. He probably sees an attractive female there.

Q. And the pose and the matter underneath the cartoon does not, as you stated, convey any indecent sexual connotations? A. It certainly does not.

Q. You have heard of the activities of the so-called Peeping Toms, Doctor, haven't you? A. I have examined a good many Peeping Toms.

Q. You would not associate these fellows with Peeping Toms? A. I can honestly say I would not and have not until this moment when you called it to my attention. 433

Q. Certainly— A. I wouldn't call two air raid wardens Peeping Toms.

Q. Depending, of course, upon what they were doing, wouldn't you say? A. Well, a Peeping Tom doesn't look through a skylight window in company with somebody else. A Peeping Tom always operates alone, stealthily, and he gets his thrill out of being alone, not by being observed by anyone else, and here are two apparently respectable and patriotic citizens on a roof, bored with many long hours, as many people have told me, looking at a skylight. Maybe he is looking at a delicious meal. He has his finger in his mouth, and maybe that denotes that he is hungry. 434

Q. Now, this appears to be a popular theme with Esquire, the subject of this picture. You will note there is another picture in another one of the issues, which we will come to later, with a legend underneath that about the B-17. A man looking down towards the ground. A. Yes.

Q. And describing what he sees as a B-17. A. Yes.

Q. You wouldn't call those Peeping Toms, either, would you? A. I certainly would not.

Mr. Bromley: It doesn't seem to me that you would refer to it as being popular with Esquire when they refer to it twice in a year, Mr. Hassell. 435

Mr. Hassell: Well, I would say popular to that extent. I will modify it to please counsel.

By Mr. Hassell:

Q. You say there is no indecent inference to be gathered from that picture, Doctor? A. No.

436 Q. Now, Doctor, coming to the February issue, page 31, shows another reclining Varga girl. A. Reclining?

Q. Doesn't she appear to be reclining to you? A. No. I thought she was kneeling on her knee.

Q. Would her hair be flowing in the direction it is if she were kneeling? A. I don't know if it is flowing. It may be blowing back, I am not sure of that. I didn't think she was reclining. I am not contradicting you, I am only giving you my impression.

Q. You say there is nothing indecent in this photograph, Doctor? A. No, I see nothing indecent in it.

437 Q. On page 65 "What am I bid for this hundred pounds of sugar?" You assert that might have something to do with the rationing of sugar? A. Well, I said that figuratively speaking in this way, that in this country we do not, where in the Orient they do barter off women, and he says, "What am I bid for this hundred pounds of sugar," and apparently I thought that there might be some connection in the artist's mind that sugar was scarce and here was a sweet person of a hundred pounds. I thought it was a play perhaps on our current situation. That was a far-fetched interpretation like most of these interpretations that we read about.

Q. This figure is clad in what sort of costume would you call that? A. Well, I am not an authority on costumes, but I would say she is possibly a dancing girl, she has possibly a dancing costume on. I would think it is a tight-fitting costume and this sort of veil over that. I imagine she is a dancing girl, Oriental dancing girl. I thought— I think we would have to characterize that as a dancing costume.

Q. But her face is not veiled, is it? A. No.

Q. Yet the figures wear fezzes, the male figures? A. That is right. I think that the dancing girls in the Orient don't

necessarily veil their faces, do they? I'm not sure about that. 439

Q. Doctor, you contend that the practice of selling women, so far as this country is concerned, and the readers of this magazine are concerned, is one that can be decently adverted to and portrayed in a picture of this sort? A. Well, if this was a practice, I would say perhaps not, but here, definitely, the selling is being done in the Oriental country. I am assuming that this is an Oriental girl. I am assuming that this is one of a series of the Sultan cartoons which run through Esquire.

Q. That is another feature of Esquire, isn't it? A. The Sultan feature seems to be a feature throughout. I see nothing indecent about it. 440

Q. You see nothing indecent or lewd or lascivious? A. No.

Q. Or sexually exciting? A. I do not.

Q. Now, coming to the article on pages 76 and 77 "Home Sweet Ruby Street," and then "Harlem was aglow with the joy of spring and only Mrs. Finn's conscience could keep her from singing like a bird." The cartoon at the center and bottom of page 77. I believe you stated you read that article? A. I have.

Q. Or story, or whatever it is. A. I have. 441

Q. The cartoon and accompanying text portrays this, does it not, that Mrs. Finn coming to this Harlem household in which the young colored lady is in bed with a young colored man, there being present also two elderly colored people, or older colored people, and while Mrs. Finn sits there they proceed to get out of bed and dress in her presence, and it is stated to the left "Mrs. Finn entered with considerable alacrity the living quarters of the Vermillion family. She noted with regret that Society had not yet arrived, due in

part to the early hour, in part perhaps to the fact that the
442 Vermillion's bowing daughter, Mrs. Edna Wilson, and her fiance, Radiant, were not yet up. They arose when Mrs. Finn entered, sulkily rubbing their glossy fists against their cheeks. Mrs. Finn, on noting them, longed for a fan, but blamed it giddily on the springtime." And then the story goes along further and fits in with the cartoon in the center column near the center of the page where it is stated, "It was not the response Mrs. Finn had hoped for, and left her at rather loose ends. Thinking it better to begin afresh, she fastened her good eye severely on her notebook and presently
443 flung at Mrs. Vermillion a new leaf, the writing on which became slightly furry as her wandering eye, cast presumably in the direction of the ceiling, caught Edna and Radiant gingerly dressing. Radiant, only half clad and suspecting the vagrant eye to be focused on him, winked slowly at Mrs. Finn." Now, you contend there is nothing indecent in that? A. Not indecent. It is commonplace and perhaps, taken as you have read those paragraphs, isolated, in poor taste. It must be taken in its whole setting. The article must be taken as a whole, as representing a part of society with a sort of thing that undoubtedly occurs very frequently, and I don't think that the article, as such, can be taken as in-
444 decent or obscene. It is commonplace.

Q. I believe on direct you went over most of the indicated portions of the article "The Unsinkable Sailor". It starts on page 30 and extends over on page 95.

I recall the reference to the establishment known as the Black Cat, and the lines:

"I grabbed a piece of broken glass and I yelled 'The first sonovabitch that moves I'll cut his head off.' They left the room—but I went to the hospital."

I don't believe that was covered. Beginning below the boxed in matter in the second column the words: 44

"At any rate, then I get this touch of dysentery"—

A. I am sorry, Mr. Hassell. I am trying to follow you. Could you give me the citation?

Q. On page 95, just below the boxed in matter— A. I have it.

Q. "At any rate, then I get this touch of dysentery and the skipper sends me to a doctor and this tonsil mechanic, he wants I should bring him back a sample. So I buy me a nice fruit jar and go back to the ship to follow the doctor's orders. Before I go ashore again, I come into possession of some keys, these keys happen to enable me to become the 44(proud and happy owner of six quarts of whiskey. So that kept me busy for a while. I finally went ashore, with my little fruit jar under my arm, all wrapped in paper, as tidy and neat as a pin. But I didn't go straight to the doctor. I stopped off at a bar or two—and then I visited an establishment where unfortunately I had my pants and shoes stolen. So in turn I stole a curtain and wrapped it around myself in a becoming fashion and hurried off to the best hotel in the town. I had grown a beard, and I fancy I made quite a picture. I went into the bar of this hotel, which was all filled with captains and colonels and gentlemen in twin-screw jackets, and I sat my fruit jar on a table and 447 sat down and ordered some gin and bitters. Everyone was looking at me, and I heard one fancy gazooney say to another, 'I say! Doesn't he look like Lawrence of Arabia?'

"The upshot of it was that after fortifying himself with a few quick ones, Showboat ordered the waiter to get the manager for him.

"'What kind of a safe have you got here—a combination or a key safe?', demanded Showboat in his most autocratic manner. The manager said it was a combination.

448 "'How many people working here know the combination?' asked Showboat. 'This is very important matter which I brought here from the States. Will you keep it in the safe for me and I will call for it in the morning,' and he handed over the wrapped fruit jar.

"'Then I asked for a suite of rooms, and a native boy to fan me to keep the insects away, and a bottle of whiskey. The next day I went to a tailor and got me a pair of pants and a pith helmet—and then I went back to the ship. We sailed that day * * * I wonder how long that manager will keep my package in the safe for me.'

449 And then continuing—skipping two paragraphs—and continuing with the bottom of the third column:

"There is a new secretary in the union hall who isn't used to sailors or their language.' It seems Showboat went up to her when she was alone in her office, bent over her shoulders, loop-legged drunk, and rasped, in his peculiarly hoarse and penetrating voice, 'How's chances to lower the boom on you, sister?' The girl jumped up in terror and ran screaming from the room. 'Oh, that man! That man!' she cried, 'Help! he wants to do something terrible to me.' It took quite a few people to calm her down and convince her that this is only Showboat Quinn's way of asking 'How about lending me
450 two bucks for a cup of whiskey, lady?'"

Do you say, Doctor, that there is nothing indecent in that story or article? A. Nothing, absolutely. Absolutely nothing.

Q. And that no other inferences than perfectly decent proper language can be drawn from just what I have read? A. I think probably other inferences could be drawn, but I haven't the slightest idea of what you mean by those inferences, and it is a typical merchant marine story, somewhat commonplace, but inoffensive.

Q. You say "a typical merchant marine story." A. Yes, sir. That is their language, and they say "Lower the boom" when they want to touch somebody for a little loan. 451

Q. What is that? A. They say "Lower the boom" when they want to touch somebody for a little loan. They use the vernacular, these expressions.

Q. This is, you say, a perfectly commonplace merchant marine story? A. Yes.

Q. Do you mean published in other magazines? A. I can't cite any at the moment, but this is the way merchant marines talk.

Q. Did you ever see merchant marine stories in the Saturday Evening Post and Collier's that had any such language in them? A. I don't know that I have. 452

Q. You know, as a matter of fact, that they have in the past carried many such stories? Do you know the Gilpatric stories? A. I think in Collier's I could cite some. No, I can't—but this is consistent with merchant marine language at any time. But the jar episode is commonplace.

Q. If you will refresh your recollection by referring to merchant marine stories in Collier's and the Saturday Evening Post you won't find anything comparable to this, the theme of the story and the language used.

The word that appears in the first column, the "first sonovabitch"— A. It is poor taste. 453

Q. Do you say it is not indecent or lewd or lascivious? A. It is poor taste.

Q. Would you say the word is not filthy? A. It is not filthy.

Q. In your answers to my questions and those of counsel on direct, have you had in mind the statements of the various courts with respect to certain types of language or publications going through the mails? A. Yes, that is right, the postal regulations, I think.

Q. The Swearingen case referred to in the Supreme Court
454 of the United States which led to the amendment of the section under consideration, 334 of 18 U. S. Code, and the Limehouse case? A. Yes, sir.

Q. Now, coming to the March issue, Doctor, we have first on page 9 the advertisement of Thorne Smith's three wittiest, most ribald novels. That is the heading of the advertisement. And I continue to read part of it:

"Now, in this big brand new volume! 'America's one and only Rabelaisian humorist!

"Only in the pages of Anatole France, Voltaire, and
455 Rabelais himself can you match the lusty, zestful fun of Thorne Smith's novels. He is the modern master of daringly sophisticated satire. His characters are completely uninhibited in their passionate pranks; and no writer of genius has ever ventured to create such thrillingly improper situations! Such skillfully humorous skating on thin ice is unequalled in recent literature. Yet behind Thorne Smith's brilliant comedy is the deep, keen wisdom of the classic master that he really is! He broaches hypocrisy and sham modesty. It is this that marks the difference between the 'frank' classic and the merely shocking book. Thorne Smith is as shocking as Rabelais—and as wise! As fantastic as
456 Cervantes—and as full of truth.

"Glance at the titles of the three sparkling Thorne Smith novels included in this entirely new volume—The Thorne Smith 3-Bagger—(the successor to The Thorne Smith Triplets, and the Thorne Smith 3-Decker) and you'll decide you must have it for your very own. It is big $2.50 value (and spicefully illustrated by Roese!), but we have decided to let new Guild subscribers have it without cost! Your's free if you join the Guild now."

Would you say that that language holds out to the reader

choice tid-bits of indecency and obscenity? A. No, I would not.

457

Q. You have not read those books, have you? A. No, I have not.

Q. So, you don't know whether they are, in fact, obscene books? A. I do not.

Q. And you would not know whether this advertisement is a violation of the postal obscenity statutes as telling where obscene matter may be obtained? A. I wouldn't say in the content of this advertisement—no, no, the answer to your question is no, sir.

Q. Now, coming to page 10, Doctor—

458

Mr. Bromley: Could I ask, if the Board please, if there is any contention that any of these books have been banned?

Mr. Hassell: I am not making any contention now. I don't know whether they have or not.

Mr. Bromley: Well, they have not been.

Mr. Hassell: I would not be able to state, although I might say I read the Glorious Pool and that is a rather questionable book.

By Mr. Hassell:

459

Q. On page 10, the second column near the bottom, "On putting Esky in a cap and gown". I read you this, Doctor, in connection with your answers to a question on direct with respect to the covers of these eleven magazines:

"Succeeding issues of your enticing magazine present exceeding dilemmas for yours truly. I am an English teacher in a small-town high school. (You probably envision a bald-headed gentleman gazing at Varga-vistas of forbidden fruit.

460 but, as a matter of fact, I am quite young and that's not my dilemma).

"My dilemma is this: I am tempted time after time to bring a copy of Esquire to my Senior Literature Class, and give my pupils the benefit of the excellent criticism of Mr. Phelps and the high grade fiction of Manuel Komroff, Jesse Stuart and others. The only way in which this could be done, without disturbing small-town codes of conduct, would be to somehow camouflage that bulge-eyed masher on the front of each issue and make it appear like the front of, let us say, Harpers or the Atlantic.

461 "Could you get Salvidor Dali to work on this for me?

"Sincerely, Somewhere, Indiana."

Now, Doctor, from that—shall we say criticism—of the front covers of Esquire, would you wish to modify your statement on direct that there is nothing indecent, obscene, lewd or lascivious in any of these covers of any of these eleven magazines? A. No, I don't think that letter implies there is anything lewd, lascivious, indecent or obscene. I think that letter indicates it would be rather unusual for a teacher in a small community to take anything as perhaps —say a magazine like Esquire—into a senior class, but apparently he is very much impressed with its contents. I

462 think it is rather a serious letter and I see no reference to obscenity.

Q. The senior class in high school would be individuals usually 18 years of age, would they not? A. The upper part of the class, 18 perhaps, or perhaps 19, but I think more of them would be around 17 or perhaps even 16.

Q. Usually when the ordinary individual enters school at six, they come out of high school about 18? A. I am judging by the superior group I see at Harvard. At Harvard it is usually 17 or 18.

Q. We are not talking about exceptions. A. The average would be around 18, I think.

Q. Would that age be ordinarily in the post-adolescent group? A. Yes.

Q. Now, with respect to this cover on this March issue, do you take that cover to be a cartoon showing three black African ladies looking over shrubbery, a hedge or whatever, at Esky, who is nude and in a tub taking a bath? Would you say that would be a description of that one?

Mr. Bromley: I object to this question, if the Board please, on the ground that never until now has any criticism been levied at this item in spite of repeated opportunities, and importunities from me to specify what he is complaining of.

Mr. Hassell: This is asked with direct reference to a question asked on direct examination.

Mr. Bromley: I only inquired as to one cover and that was the cover cited or specified by my friend here that it was indecent because the breasts of two models were over-emphasized.

Mr. Hassell: I think the record will show, Mr. Chairman, that the witness answered with respect to the figures in the covers of the various issues.

Mr. Bromley: No.

Chairman Myers: Let him answer the question.

The Witness: It is my opinion that this is not indecent.

By Mr. Hassell:

Q. That there is nothing indecent in this picture? A. No.

Q. No indecent reference to be drawn from it, Doctor? A. No.

466 Q. Now, going back to the January issue, would you say the female figure shown thereon has over-emphasized thighs?

Mr. Bromley: Same objection.

The Witness: The same answer, no.

Chairman Myers: Overruled.

Mr. Bromley: May I have an exception to both rulings?

Chairman Myers: You certainly may.

By Mr. Hassell:

467 Q. Near the center of this figure, do you notice any dark shading?

Mr. Bromley: Same objection.

The Witness: Same answer, no.

Mr. Bromley: Don't go so fast.

Chairman Myers: The same ruling.

Mr. Bromley: Exception. Now go ahead.

By Mr. Hassell:

Q. Now, on the February issue, Doctor. A. Yes.

468 Q. You say the breasts of the female figures shown thereon are not over-emphasized?

Mr. Bromley: May I have a general objection to this line of questioning?

Chairman Myers: Yes, you may.

Mr. Bromley: In so far as it applies to every cover, except April, which was the only one complained of in the pleadings.

Chairman Myers: Yes. Answer the question.

The Witness: In my opinion they are not over-emphasized. The breasts are not over-emphasized in the February cover. 469

By Mr. Hassell:

Q. Would you say the same as to the April cover? A. Just a minute. Let me take a look at the April cover. Yes.

Q. They are not over-emphasized? A. Not necessarily.

Q. Would you say the same as to the November cover? A. Yes, very definitely not.

Q. They are not? A. No.

Q. Over-emphasized? A. No, sir. 470

Q. And you find nothing indecent, lewd, or lascivious in any of these covers? A. I do not.

Q. The covers of this magazine? A. Definitely no.

Q. Now, coming to the picture of the Varga girl on page 36. A. Which issue, please?

Q. Of the March, 1943, issue. I believe you testified, Doctor, that there is nothing obscene, lewd, lascivious, or indecent in this picture? A. I do.

Q. Would you say that the breasts of the figure shown in this picture, that is the left breast, is very much over-emphasized and the thighs are over-emphasized? A. No, not in my opinion. 471

Q. Do you note on that left breast the nipple point through the very flimsy costume? A. I notice that it is pointed and shapely. It is not unusually large from my experience in examining hundreds of women's breasts, and if there is a tight-fitting garment or form-fitting brassiere, it would show through just exactly like that, or in an evening gown or any dress.

Q. You haven't actually subjected this picture to measurements, have you, Doctor? A. To what?

Q. To proportionate measurements. A. No.

472 Q. You have simply gone by your eye? A. That is right, the same as you are.

Q. Page 49, the cartoon, "I wonder how the Sultan knew this was my birthday."

Would you take from that cartoon—you will note that attached to the young lady's ankle is a tag "Happy Birthday". Would you take from that cartoon that the Sultan has sent to this soldier, who has his arms open, this very scantily clad girl as a birthday present? A. I don't say that. I got the idea that one Sultan had sent to another Sultan, who lives in the castle in the background, this girl, and this

473 dumb officer, it happening to be his birthday, thought it had been sent to him. I thought it was rather amusing.

Q. How did you get all of that out of this cartoon? A. The same way that you got your interpretation that she is scantily clad, or that she is being sent to one of these officers.

Q. Now wait a minute, Doctor. As to the scanty costume, you can see her legs through this garment she has on, and you can see the lower portion of her body, and you can see the lower part of her legs, can't you? A. And her thighs.

Q. And you can see the buttocks and on down, can't you?

474 A. No, you can't in the copy I have here. Maybe you got a better one than I have.

Q. Now she has a very flimsy brassiere on the breasts with the nipple sticking through. A. No, the nipple doesn't stick through this one. It is a very thick material. Perhaps my eyesight is bad.

Q. Perhaps you need better glasses. A. Perhaps I do. I honestly can say that in this copy that is what I see and I wish you would take a look at it.

Q. You say you don't get the idea from this costume that the Sultan has sent this soldier who has this wolfish, shall we call it, smile, bleary eyes, or Eddie Cantor eyes, pop-eyes or bug-eyes, addressing the other soldier, telling him that the Sultan has sent to him this wonderful, entrancing birthday present? A. No, I don't get that impression at all. 475

Q. What would a soldier do with such a birthday present? A. Well, as a matter of fact, I don't think it is the soldier's birthday present. I think he has intercepted a person who is going somewhere else and he is dumb enough to think it and the other fellow looks surprised. You can use any interpretation on this. 476

Q. How do you arrive at the conclusion that this man who is apparently the recipient of the gift is an officer? A. Which one is the recipient?

Q. I judge the man who has the happy smile. A. I thought it was the other fellow. I judged it was the fellow that looked surprised.

Q. But one is supposed to be saying something to the other and the caption underneath this says, "I wonder how the Sultan knew this was my birthday," and the man who has the wolfish grin on his face— A. Which wolfish grin?

Q. (Continuing) —and the bug-eyes, and has his mouth open, so he is the only one who could be saying anything. A. No, the other fellow has his mouth open. I wonder if we are looking at the same picture. 477

Q. You say this fellow's mouth is open (indicating)? A. Yes, I think so.

Q. I can't see it. At any rate, you say there is nothing in this cartoon that is indecent? A. Absolutely not.

Q. Lewd or lascivious? A. Absolutely nothing.

478 Q. Well, your conclusion is based upon your interpretation of what the picture means, isn't it? A. That is right, what is shown in the picture, what is there presented, and the sub-note.

Q. The what? A. The sub-note, the title.

Mr. Cargill: May I ask the witness a question?

Mr. Hassell: Yes.

By Mr. Cargill:

479 Q. In drawing your conclusions about these pictures, and your opinion, you have used your imagination as to what the picture represents in drawing that conclusion? A. That is right.

Q. Is that right, Doctor? A. That is right.

Q. So your imagination is used in the pictures? A. Yes, very definitely. That is, if I may explain that a little bit, these Sultan cartoons, all the way through, are apparently taken in the Oriental setting, the type of architecture. This is apparently Egyptian Oriental, and these soldiers are apparently French or Arabian soldiers, or something of that kind. This whole picture you see is an Oriental picture.

480 Q. You believe that any person who might look at this cartoon is drawing his conclusions by his own imagination or from his own imagination? A. Oh, yes.

Q. As to what this cartoon means? A. That is right.

By Mr. Hassell:

Q. Now, Doctor, referring to page 68, the article by Gilbert Seldes, "The Fall of the Flattering Word," and the paragraph in the center column, the last full paragraph,

"Now it's a rare old thing." Do you have that? A. Yes, I have it. 481

Q. This reference, "Now it's a rare old thing that clothes which do"—do being italicized—"enhance the sexual attractiveness of women are sold to them for smartness—'to make you more poised', to give something called 'allure'; rarely on the justifiable ground that these clothes will reveal and conceal so craftily that men will be driven mad with desire."

Do you think the scanty clothing of the Varga girls in these magazines is calculated to do that? A. No, I don't.

Q. Continuing with the reading: "That form of copy is restricted to perfumes. Given perfumes, the copywriter goes berserk. (Or maybe only becomes realistic.) Here you have all the traffic will bear in the way of suggestion—beginning with the fancy French names which suggest improprieties and running through quite a lot of suggestiveness, in a nice way, of course, but omitting feelthy pictures. Just why odors should be advertised carnally and fabrics not, I can't be sure." 482

And over in the next column, the next paragraph, "When we approach the young of the species, the innocent at college, we are a little franker. A 'show-off V-neck' or a 'skirt pleated for action' (on a bicycle, so be quiet) are at least 'functional' (of course the great surprise is to find all descriptions of clothes using the term 'fly-front'. Where I come from we didn't talk like that in front of the womenfolk, we certainly didn't.)" 483

Do you note any indecent language or connotations in connection with those matters? A. No, I don't. Fly-front is pretty generally accepted now. I think when I was a boy we didn't talk freely about it, but I think it is talked about very frankly now, and this paragraph here, on the allure

484 of clothing and the names of perfumes, since they are not mentioned, they are in the stores and shops with very suggestive names on them, but they are not mentioned here, so I see nothing objectionable about this article whatsoever. It is simply calling attention to those facts. I think this article is good, I think, taken as a whole.

Q. You think that article is written for the edification of the women readers of Esquire? A. Partly.

Q. This is a man's magazine, however, isn't it, Doctor? A. Yes, but women read it.

Q. Now, page 107, the hill-billy cartoon "Seems like somebody's allers clamorin' to somebody to open up a second 485 front, don't it."

Do you think that is perfectly decent, not indecent? A. I think it is not indecent; it is rather comical. Some of these hill-billy cartoons, as you see here and on post cards and in various other magazines, are rather good. I think this is a rather commonplace one.

Q. What do you mean by commonplace? A. Well, I think nursing a baby in public is commonplace. There isn't anything indecent about it, but it is commonplace and most women don't do it.

Q. By "commonplace" you mean it is not usual, Doctor? A. No, it is not usual. 486

Q. Now, coming to the April issue, we have already adverted to the front cover. Page 38 is the Varga girl and the verse "Peace, It's Wonderful!", and the verse reads:

"When this military beaut
Blows a root-a-toot-a-toot,
As a signal that the victory is won.

And her soldier boy relaxes
After slapping down the Axis,
And then leads her to the altar on the run.

She will him slumber heavily
When [illegible]e he woke to reveille,
And never bawl him out about his lapse:

But, unless my eyes deceive me,
He won't be so lax, believe me,
When the clock upon their mantel points to 'taps'."

Do you, or do you not seen any indecent inferences to be drawn from that verse accompanied by this picture? A. I honestly do not. 48

Q. What do you think the last line has reference to: "When the clock upon their mantel points to 'taps' "? A. To the hour when taps is blown, just as it says.

Q. In other words, the hour for going to bed? A. That does happen to be the time when taps are blown, yes.

Q. Isn't that what is meant by this phrase in connection with this picture? A. Yes.

Q. The hour for going to bed? A. The hour for taps.

Q. When he retires with his beloved? A. It might be his wife, if he is married, here. 489

Q. But just—

Mr. Bromley: Wait a minute. There is only one way in the phrase, Mr. Hassell, you know that, don't you?

Mr. Hassell: Does it say his wife?

The Witness: He has led her to the altar.

Mr. Bromley: He has married her.

Mr. Hassell: I wouldn't get very much het up over

490 this, but I think the Doctor is certainly, if I may comment on it, drawing on his lack of imagination if he doesn't apply the meaning intended by that phrase.

The Witness: Well, now, as a matter of fact, I see no double meaning in that phrase and I would be interested to know what it is.

Mr. Hassell: I think it is apparent.

Mr. Bromley: He marries her, and the sixth line of this verse reads, "And then leads her to the altar on the run." I take it that connotes marriage.

491 Mr. Hassell: Yes, but I had reference to the going to bed.

Mr. Bromley: Married people do go to bed. Mr. Hassell.

By Mr. Hassell:

Q. Now, coming to the article on pages 60 and 61, continuing over on 163, "The Court of lost ladies." A. Yes.

Q. Is this one of the articles that you read over 20 times, Doctor? A. I read it several times, and this is the article that my adolescent boy read, and this is the article that has been read, and read a lot, because it is quite informative 492 and, in my opinion, well done. The kind of article we ought to have more of in the press. It is a good article, and I got that testimony from several other people who have read this as well as myself. It is true to life, it is what is going on, and it discourages prostitution and the things which I assume you are trying to discourage.

Q. That is your conclusion? A. That is my conclusion.

Q. As to what the article says? A. That is right.

Q. In the first column of the first page, page 60:

"A younger streetwalker, pert and shapely, in a suit of bright green, sneers in disdain and tries to move away. She cannot because the bench is crowded. So are all six of the prisoners' benches crowded by the sisterhood of the streets, the sisterhood of starvation, and of syphilis. They have all been 'on the turf' pursuing soldiers on leave and men without women. They have been making shrewd bargains for the sale and resale of imitation love. Young and old, white and black and yellow, they now attend the opening of Court. The young ones sit upright in fear or in bright boldness. The oldtimers whisper to one another and send signals by eye to friends among the spectators. Always the women shift and stir in their places. A heady stream of trade perfumes creeps through the great gloomy Court. Coldly the women stare at the policemen who dragged them in at midnight and must soon reel off their cell door tales. The women wrinkle their foreheads in unaccustomed thought and make ready old, useless lies, old, useless appeals for freedom. 'I'm a good girl, Your Honor. I never did this before.'" 493 494

Over in the third column, beginning under the cartoon or drawing:

"She looks at the Magistrate in sweet dismay and delicately pats her eyes with a handkerchief. The arresting officer tells his story in a dismal rote: A glance and a whisper on a certain street and the quick sales talk. 'She put the price at three dollars and I then placed her under arrest. Yes, I've seen her before.'" 495

In the next paragraph:

"She can only deny his charge. And she does. 'I was only fooling, Your Honor, so help me God. I thought he was a friend of mine, the way he looked at me.'

"Laughter soured with sneers, jiggles up and down the benches and makes a fool of her. She scowls over her trim

496 shoulder. Then, made reckless by anger, she raises her hip into an impudent strut. Her face, cleared of rouge and powder for her trial, takes on a sullen look. Thus she gives up, wordlessly reveals her lie."

In the next column, at the bottom, the last two paragraphs:

"A yellow skinned mulatto girl goes up. She is nearly six feet tall and in high red heels. Her long legs are beautiful and her hips are slender. She shows them off. In the customary vendor's movement she draws her camelhair top coat tightly about her for the brief moment before she takes
497 the stand. She wears a turban of fur. A fawn of beaten silver gleams in the beaver skin. She's a ripe and yellow peach.

"A sad voiced policeman, well over middle-age, puts on his glasses and slowly reads his testimony. He had been sitting in his car on such-and-such a street. Along comes the defendant, no doubt a charming picture on her high red heels, her Kaffir eyes gleaming in the night. In good humor, almost gaiety, she had smiled and, for a modest consideration, in cash, had placed her person, lithe and yellow, entirely at his disposal. She had, moreover, recommended herself highly, saying that her imitation of love was mighty near the real thing.

498 "He reads precisely: 'She thereupon asked me again if I would like a good time. Following my orders, I replied: "'Yes, I would'". She thereupon invited me to her room. I asked her after we got there if this was the place where we were going to have the good time. She said, "'yes, darling'". She then pulled off her dress and otherwise divested herself. I asked her if I ought to pay her first. She said "'all right'". I paid her with three marked one dollar bills, which are in evidence. She lay down. I then placed her under arrest.'"

At the bottom of that column: "The attendant bawls again. The old girl on the front bench struggles to her feet. Once more her hands flutter to the platinum straws under her hat brim. Ruby gleams spill from her gems. Her rouge has been freshened by advice of counsel. Her lips, bartered in these times for dimes and quarters in loathsome hideaways, have been newly decorated, too. A snicker strikes her like a lash. Suddenly the attendant tells her to sit down again. 499

Other names are called. Tip-tapping heels that clicked their way last night in and out of houses and side street hotels come clicking now to the workhouse path. In swift succession, the women rise, fall, and pass through the door. Some, by grace of a good story, innocently told, go free. Not one cries out; not one protests." 500

At the bottom half of the third column on page 61:

"And now there comes a blond woman, young in years, not otherwise. Under lush mascara, her eyes send out plentiful looks of hate. She would be the last to deny that she is an old hand at the old game. Yet she's sure of one thing: Her name doesn't appear twice on the probation card. Nobody ever caught up with her before. And she's not caught yet.

"'Not guilty', she sends her answer roughly over the rail. Her loud response hushes the women behind her, hushes the spectators who are at present bored and are chatting among themselves. 501

"The arresting officer tells his story. 'And so I put three dollars in marked bills on the table and when I came near her she let her dress fall. I then placed her under arrest.' He steps down. The prisoner makes no bones about showing that someone has coached her. Quickly she begins to destroy his testimony. She remembers all that he said, re-

502 calls it so exactly that one might suppose the trial had been rehearsed.

"'Yes I was in a dressing gown. But I never said a word to him and it's not against the law to wear a dressing gown, even if you wear it on the street.'

"Her Honor sees that the prisoner is a little smarter than the others. At least, she can remember a sentence from one minute to the next. She says, 'You testify that you were visiting at the apartment when the police came in'.

"'Yes.'

"'Had you been there many times before?'

503 "'Yes. What about it? Is that wrong?'

"'No. I didn't say it was. Now, tell me again, please, what you did when the officer came into your room. Weren't you surprised?'

"'No. Why should I be? He wasn't in uniform. And there were three or four men in the house. I just said "Hello"'.

"'Did the officer say anything when he put the money on the table? Take your time before answering. He didn't testify that he said anything.'

"'No. He didn't say a word. I didn't even see the money until after he arrested me.'

504 "'The officer has testified that you took off your dressing gown in his presence. Is that true?'

"'No, it isn't true. And that isn't what he said. He said I let it fall.'

"'Tell me what happened.'

"'He put his arm around me and the gown fell off my shoulder. Then he let it fall and he held my arm and laughed.'

"'You deny, then, that you were doing anything improper when the officers came into the apartment?'

"I do.'

"'Case dismissed.'"

505

You say that is a decent subject for distribution in a magazine of 700,000 copies, 400,000 of which are sold through newsstands all over the United States— A. I say it is a decent—

Q. Just a minute. (Continuing): To be read by any person, young or old, who is able to read? A. I do.

Chairman Myers: Might that be considered descriptive literature?

The Witness: Yes, I think it could.

Chairman Myers: Describing a court room scene? 506

The Witness: That is right.

By Mr. Hassell:

Q. Now, coming to the June issue, Doctor. A. June?

Q. June. Page 34, the Varga girl picture, the semi-recumbent figure, very scantily clad. Do you notice in that picture the natural wrinkles of the body showing through the scanty garment? A. I notice the wrinkles in the garment which apparently is a close-fitting garment.

Q. You mean you note the umbilicus and the impression down the middle of the stomach? A. I know what the 507
umbilicus is, and I don't see it any place. Now, I should like very sincerely to have you point it out to me.

Q. You can't put your finger on it? A. I don't even see it. I can see where it is supposed to be and there is no indication of it here.

Q. Well, my eyesight must be pretty good if I can see it. Now, the nipples of the breast are showing through this scanty costume, aren't they? A. I disagree with you, they don't show on mine.

508 **Q. Do you contend that there is nothing sexually alluring, indecent, lascivious or obscene or lewd or vulgar in this? A. I do. I do contend that there is nothing lewd, sexually alluring or lascivious or obscene in this.**

Q. And in all of these instances, Doctor, you are having in mind, aren't you, in connection with your answers, that these pictures and cartoons are in a magazine for the entertainment of men? A. Yes, but may be looked at by children, adolescents, women, and the whole American public.

Q. Now, coming to page 134, of the June, 1943, issue, "Libel suits were as wine to that hell-firin' editor of the old
509 **West, Dave Day", by Roscoe Fleming. The lower portion of the first column: "Social items on the first page included such as these:**

"Two weddings are on dit for next week. This weather kind of suggests two in a bed, spoon fashion."

What is two in a bed, spoon fashion? What does that mean? A. Very closely together, I would suppose.

Q. Male and female, or two females? A. Not necessarily.

Q. What? A. It might be two males or two females.

Q. Two males are that close together in bed? A. It could be.

Q. Two weddings— **A. Such things occur, unfortunate**
510 **ly.**

Q. But here we have, Doctor, two weddings are on dit for next week in the same paragraph. You don't have two weddings of two males, do you? A. No. For two weddings there would be two males and two females.

Q. But would there follow that the males would go to bed together and the females together? A. No, it wouldn't.

Q. "This weather kind of suggests two in a bed, spoon fashion." Isn't it a fact that that conveys the idea of male and female in bed spoon fashion? A. Yes.

Q. And there is nothing indecent in that? A. They are married. 511

Q. You say if they are married it is all right to go into details in a magazine distributed through the mails and throughout the United States on the newsstands? A. Well, it is done all the time.

Q. What they do? A. Well, as a matter of fact, there is no use of elaborating here, it is poor taste.

Q. But it is not indecent? A. No, it is not.

Q. It doesn't portray any indecent picture or induce any indecent thoughts or anything of that sort? A. Not particularly.

Q. What do you mean by not particularly? A. I mean 512
a casual reference like that, I think, will escape the notice of most individuals who are not looking very carefully for the kind of material that you are seeking out.

It is poor taste as is the epitaph which follows.

Q. The epitaph:

"Here lies the body of poor old Charlotte.
Born a virgin, died a harlot.
For eighteen years she kept her virginity,
An all-time record in this vicinity."

You say that is poor taste and not indecent? A. It is 513
poor taste.

Q. You wouldn't call that a ribald ditty? A. It pretty nearly approximates that, sir. That is the one thing in all of these articles that I think comes the nearest of being on the line of indecency. Perhaps it is the only thing that comes near the line of indecency.

If you take that out of its setting, like the two in bed, spoon fashion, and the epitaph, I would say they are in-

514 decent, but published in this article I would say it is poor taste.

I would say it should not or would not ordinarily pass a censor and I wouldn't advocate the dissemination of that character of material, which is quite different from all the other material you have cited, in my opinion.

Q. These 40 people, old and young, that you submitted these cited articles, pictures, cartoons, and so forth, to, none of them criticized, or none of them said that these things I have just read were indecent? A. The epitaph—several of my colleagues said it was corny, meaning by that it was
515 an old one, something that you have seen many times. I remember seeing that in my boyhood. I think it was written on the wall of the backhouse when I was a boy in school, and it borders on indecency.

Q. But none of the people to whom you submitted this have said that these things were indecent? A. No, they did not.

Q. Now, the next one following the one that you last read:

"In future, all communications to the Muldoon will be marked with an asterisk to show that the editor disclaims responsibility. Each correspondent will have his
516 own." A. Will you give me that page again?

Q. Page 134. That is the second column. A. I see that.

Q. You see no indecent inferences in that? A. You mean the excessive punctuation mark there?

Q. In the Muldoon paragraph I read. A. I am sorry, Mr. Hassell. I don't get your question.

Q. You see nothing indecent in that paragraph?

Mr. Bromley: Of course, you didn't read it the way it is printed.

The Witness: As it is printed here, I don't see anything indecent, no, sir. 517

Mr. Hassell: I think the record will show I read every word there.

Mr. Bromley: The sentence ends: "Have his own *."

Mr. Hassell: I will accept counsel's amendment.

Mr. Bromley: Would you mind telling me now where the filth is in that?

Mr. Hassell: I am asking the witness.

Mr. Bromley: He doesn't see it and neither do I.

Mr. Hassell: I submit the witness should be allowed to answer. 518

Chairman Myers: I think he has.

Mr. Bromley: Will you tell me, Mr. Hassell, just for my information—

Mr. Hassell: I will tell you later, Mr. Bromley.

Mr. Bromley: Don't forget it. I think the Board would probably like to know.

By Mr. Hassell:

Q. "When Chipeta, queen of the Utes, went to Washington, Day pretended that she had been seduced there by an eminent gold-standard statesman. He followed the case for nine months, announced the birth of a boy, named by Day for the statesman, and chronicled the alleged boy's growth for years by that name." 519

Do you see anything indecent in that? A. None.

Chairman Myers: We will now take a recess for ten minutes.

(Whereupon, a brief recess was taken.)

520 Chairman Myers: We are ready to proceed, gentlemen.

B. Mr. Hassell:

Q. Doctor, turning to the May issue, page 32, the article "The savage beast in us," sub-title "Dispelling the hopes of burlesque entrepreneurs and fears of censors that the strip has sensory appeal", by Paul Gallico—I believe you stated you had read that article? A. I have.

Q. And you found nothing indecent in the article, nor in the illustrations accompanying it? A. That is correct.

521 Q. Referring to the sub-title, Doctor, do you hold that the strip has no sensory appeal? A. No, I do not say that the strip has no sensory appeal.

Q. Did you have a different idea of the sensory appeal of the strip after you had looked at the illustrations and read the article? A. I didn't mean that this article gave me any information I did not have heretofore, but I thought it gave a good many readers and the public at large a very comprehensive and factual and helpful information concerning it.

Possibly youngsters who had never seen a burlesque would

522 certainly get the idea that it is not worthwhile from this article. I think this article points a good moral.

Q. But, as far as the effect of the article on you, it did not debunk strip of its sensory appeal? A. No, I would say not necessarily.

Q. In the first column on page 32, beginning with the third paragraph, this article reads:

"Let us, for instance, consider that absurd accident of human anatomy known to science as the umbilicus, which is presented nightly as a treat to the public eye at prices

varying from four dollars and forty cents for an orchestra seat to blanket inclusion among the benefits covered by the two dollar couvert charge in cafes and night spots. 523

"Who told those congenital nit-wits there is anything stimulating, or mildly entertaining about this ridiculous wrinkle staring like a blind eye from the center of an expanse of otherwise not too revolting epidermis?" A. That is right.

Q. Is this particular part of the anatomy ever an erogenous zone, Doctor? A. No, the umbilicus is not an erogenous zone. In fact, it is exposed in bathing costumes without any complaint, and I think it is exposed in burlesque and stage without any censorship. The umbilicus is not an erogenous zone or a forbidden zone. 524

Q. You mean without any complaint from you? A. Or anyone that I know of.

Q. Or that you know of? A. Yes.

Q. Are you acquainted with all the bathing beaches in the country? A. No, sir—those in New England.

Q. At none of those beaches, those bathing beaches, are women required to wear a covering? A. It is my recollection that many of them do, but I think it is not required.

Q. Continuing with this article:

"I have yet to hear of a single instance where any average male, having been confronted with this tid-bit, has rushed panting into the night to seek assuagement for the fires kindled in his circulatory system." 525

What does that refer to, Doctor? A. I suppose to his passions being aroused, but that they are not aroused by this commonplace sign of the umbilicus.

Q. But the idea is that there might be on occasion persons who might do that? A. No, I think it implies there is not

526 anybody. He never heard of a single instance where that occurred.

Q. By reason of the exposure of this anatomy? A. That is right.

Q. But probably by the exposure of some other part of the anatomy. In other words, he would not have made the statement without any basis at all, if never in the human experience had such a thing happened, would he? A. He states there that never in his experience, to his knowledge, has it ever happened.

Q. That is, with respect to the exposure of this particular
527 part he is talking about? A. That is right.

Q. I continue:

"If anything, this abdominal replica of Polyphemus has the chilling effect of examining a fine piece of velvet and finding a cigarette hole in the middle of it. Yet, costumers are encouraged to expose this silly scar on the theory that men and women will queue up at the box office or night club gates to get a peek at it."

So there are persons in the theatrical business, who think that does have an appeal. Is that what you draw from that? A. That is what I get from the whole article, that he is trying to debunk the burlesque.

528 Q. The third paragraph below that:

"The 'bump' appears to be a violent twitch whereby the artiste gathers up all of the area immediately south of the chest and hurls it in the general direction of the audience, aimed at hitting some man, in the fifth row, right between the eyes."

Do you think there is anything indecent in that description of the so-called "bump"? A. No, I do not.

Q. Do you think there is anything indecent in the bump as he describes it? A. No.

Q. Continuing:

"The gesture is held to be fraught with aphrodisiac significance, a sure-fire yank of the hair trigger that is supposed to control the beast in us. Oh, yeah?" 529

Do you think that is an appropriate subject for inclusion in a magazine going through the United States mail? A. I certainly do in the sense in which it is written there. I think it is an excellent article.

Q. Now, in the next column, the second paragraph:

"The supposedly sultry 'grind', in which the performer revolves her hips in time to music while the rest of her stands still, may have practical value as a slimming exercise, but performed in public and by herself, I must report that from the viewpoint of the average susceptible male, the results are negative. On the contrary, it has undeniable comic aspects. A lady engrossed in delivering herself of these revolutions, her face transfixed with the curious far-off stare resulting from the muscular effort, reminds me of nothing so much as a gal who has backed herself up against a tree or a wall and is attempting to scratch an itch she can't reach". 530

Do you think a description of the reaction of the average male is a correct, true and proper one? A. I do.

Q. That is the reaction you have? A. Yes.

Q. And also his description of the "bump', that is the reaction you have to that? A. It is. 531

Q. Now, as to backing herself up against a tree or a wall and attempting to scratch an itch she can't reach, do you think there is anything indecent in that? A. I do not.

Q. You think it is perfectly proper that you put down in print for all and sundry, young and old, male and female, to read in such an article, the idea that a woman would so comport herself? A. I do.

532 Q. That is perfectly decent and proper? A. It certainly is.

Q. Do you think there is anything decent in the figure or drawing in the center of page 32? A. You mean indecent, do you not?

Q. Yes, indecent. A. No, I do not.

Q. Do you see anything indecent, vulgar or lewd, or lascivious in the figure drawing at the bottom in the fourth column of page 32? A. I do not.

Q. In that figure you will notice whatever she had around her neck or shoulders has blown off of one breast, exposing
533 it. A. Well, I can see both breasts in this picture.

Q. One of them is uncovered. A. They both seem to be in this picture. You are referring to the figure at the left of page 32?

Q. The figure at the bottom of the fourth column on page 32. A. Oh, page 32.

Q. Page 32. A. Yes. If you look sharply you can see the right breast in outline.

Q. And you find nothing lewd, lascivious, indecent or improper in that? A. I do not.

Q. Now, at the top of the first column on page 33, beginning in the second line:

534 "As a kid, you will remember wondering how that fat dame with the back porch of a hippopotamus ever got into the burleycue chorus. Later you learned that she was put there for the guys who liked fat dames."

Do you note anything indecent, vulgar, lewd, or lascivious in that? A. I do not.

Q. What have you to say with respect to the figure at the bottom of that column on page 33? A. I see nothing lewd, lascivious, vulgar, or filthy, or indecent about it.

Q. Would you say the same with respect to the figure

in the center of the second column of page 33? A. I would.

Q. Now, what have you to say with respect to the matter at the bottom of column two of page 33, beginning: 535

"The strip tease of the burlesque chains lately elevated to a national industry, is nothing more than a physical projection of a facet of the psychologie erotique of the average male." A. I think that is probably a true statement.

Q. "To put it in terms that even I can understand, when a gent sees a pretty girl concealed by a lot of clothes, he immediately wonders what dwells beneath them, and literally eliminates the garments, one by one."

Do you think that is true? A. I don't necessarily think the average man does that. I think some may. 536

Q. You don't think the average man would do that with respect to these Varga girls? A. No, I do not.

Q. Continuing with the reading:

"This harmless practice often puts him into the mood to part with diamond bracelets, emerald clips, sable coats, or even proffers of marriage which lead to happy homes in the suburbs, and little kiddies pushed about in prams."

That finishes that part of it.

Now, what do you have to say as to the decency or indecency or vulgarity or lewdness or lasciviousness of the picture at the top of the third column of page 33? A. That picture at the top is very much like actual people you see on the stage, in the Ziegfeld Follies, perhaps a little more burlesque than that, but there is nothing indecent or vulgar about it. 537

Q. Apparently this figure is only clothed with a bit of laurel or leaves about the mid-section. A. I don't know whether that is a garment or leaves or what, but certainly

538 there is no indecent exposure. Everything is properly clothed.

Q. The umbilicus is shown. A. I don't consider the umbilicus improper.

Q. Wouldn't you take it that the balance of the figure has no clothing on it? A. She has some kind of veil on her back and something in her hand with wreaths of flowers over the hips, and there is something definitely over her neck and draped over her back and down around her left arm.

Q. But her breasts are uncovered. A. You can see the
539 form of her breasts outlined, but still, in my opinion, no indecent exposure.

Q. Now, in column four, the second paragraph:

"The silliest joke played by nature on the girls, though unquestionably utilitarian, was the widening of the hips to make them look like ambulating hour-glasses. Night after night these hips, rimmed with feathers, electric lights, or assorted tinsel and rhinestones, are presented to audiences as the acme of erotic sophistication. It's all hooey, along with the chest cups, fringes, diadems, and other paraphernalia used to outline territory deemed illegal. The girls just look plain ridiculous, and guys who are supposed to
540 be entertained are plain bored."

So you think that is a correct statement of fact? A. I do.

Q. And that is the effect it has on you, is it? A. Yes. I think that is the effect that the whole article attempts to convey to the reader.

Q. And you think this article will have the effect of keeping small boys out of burlesque shows? A. Well, I think small boys are not allowed in burlesque shows in the first place. I think if these young men read this article they

would think twice before they paid $4.40 for a ticket to see a burlesque, which is precisely what this article attempts to convey. 541

I think an article like this has a good moral influence on the average adult, the average young adult. By that, I mean adolescents and college men.

Q. Now, seriously, Doctor, do you mean to say that such a writing as this would set aside all the laws of God Almighty and Nature, as imposed on a man in his reaction toward the attractive portions of a woman's anatomy? A. I didn't say that. I said I think an article like this would have a beneficial effect morally and otherwise on young men of high school and college age, and I mean it most sincerely. 542

I wish when I was a boy I had articles like this to read, and I am allowing my boys to read them.

Q. You probably would have gotten quite a lot of kick out of them.

Continuing the reading on page 33:

"It is bad enough when these poor, chilly-looking monkeys are marching about, or trying to sing a song in unison. I will not touch upon the caricatures that occur when thus clad they engage in tap dances or acrobatic numbers which result in a girl's rear end, clad in white satin, suddenly appearing behind her ear, like a winter moon, when she tears herself in two in what is graphically termed a split, or ties herself into knots that resemble the confused physique of a clam. These performances may have merit as grand guignol, but where sex is concerned, it's a laugh." A. I think that "grand guignol" refers to a famous French burlesque. 543

Q. You agree with the statement expressed in that, Doctor? A. Yes, I certainly do.

544 Q. And you think that such statements, to the uninitiate, would induce them to save their money from such shows as this? A. I certainly do.

Q. You don't think it would have an effect of putting a keen edge on an otherwise keen appetite of an average adolescent? A. In my study of adolescence it doesn't work that way.

Q. Now, as to the Varga girl on page 38, you say there is nothing indecent in the pose and the figure or the scanty dress of this picture? A. I see nothing indecent.

Q. Do you notice the nipple of the left breast very prominently emphasized in this picture? A. I notice an outline 545 which may be the nipple of the left breast.

Q. At page 48 there is another one of the air raid warden —I believe you object to the word "peepers"? A. I don't object to it.

Q. Well, you say that "peeping Toms" don't operate in pairs, in your experience. A. That is right.

Q. What do you think this fellow with the glasses is looking at, considering the picture and the statement underneath "She looks more like a B-17 than a P-40"? A. Well, I know nothing about airplanes, so the thing was actually meaningless to me except the pronoun "She" indicates he 546 is looking at a woman and I suppose the B-17 and P-40 refer to sizes of planes, and I suppose he is using that figuratively about the size of some woman that he sees on the street.

Q. You don't get the idea from the cartoon that he is actually looking at an airplane, do you? A. No, I get the idea he is looking at a "she". Of course, he could be looking at a flying field.

Q. He is looking at what purports to be a congested section of a city and he is looking down. A. I thought he was looking at a woman.

Q. You say there is no indecent inference to be drawn from this cartoon? A. It is hard for me to make any inference from it and it certainly couldn't be very indecent, I should think. If we knew what a B-17 and P-10 were, it would mean more to us, perhaps. 547

Q. Pages 86 and 87, "The Exploits of Esky", the central line of cartoons across these two pages numbered 29, 30, 31 and 32, and under cartoon 28 on page 87, the text reads:

"The lady dislikes men, but wants a baby, so I sold her a ticket for the Time when women can become pregnant by taking an electric shock. 'What do you want?' 'I want to see the red-headed dancer.' 'You won't need a ticket for that, just go upstairs and down the path.' 548

"Down the path was a brook and Esky saw the Red Headed Dancer in swimming. 'Hurray!', he shouted, 'At last a pretty girl to look at.' 'Esky—you darling, won't you join me?' But before he could a Western-Postal girl tapped him on the shoulder: 'Follow me. You are to be the judge of beauty in Finnegan's Dell.'

"Esky followed and so did the Red Head, dressing as she walked."

From that it appears that she was nude when she came out of the pool in front of Esky.

"The Western Postal girl started to sing singing telegrams: 549

"A happy birthday, Aunty Bess,
Every day I like you less."

"But Esky wasn't listening—to one side of the path Esky saw the most perfect creatures disporting themselves in a Corot-like clearing. But the Red Head explained: 'That is the abode of the Libidos. Where they gather when they are

550 not on men's minds." Esky wached them play gracefully or loll indolently by a tinkling fountain. The sound of their mellow voices lured Esky toward them like a magnet, but the Red Head grabbed him and held him. The Libidos joined in a ballet while leaves rustled an accompaniment. 'Why do so many look like Movie Stars?' asked Esky. 'Oh, they belong to men who are too lazy to imagine their own perfect woman so they adopt the likeness of a star and if you will look close, you will see one Old Hag, the libido of a man who just don't give a damn.'

"Esky saw a mess drift by. 'Come,' said the Red Head,
551 'if you don't get to Finnegan's Dell, I'll be attending Esky's wake." And the three of them hurried to the amphitheatre. The Western Postal girl explained: 'This contest is the result of an argument between Hollywood Big Shots as to which studio has the star with the best shape. Each has its queen garbed in a bathing suit and all you do is pick the prettiest.'

You understand by these Esky cartoons, Doctor, that Esky is Esquire? A. Yes.

Q. And this is one of the activities of Esquire as pictured in this cartoon strip. Is that your understanding? A. Yes.

552 Q. Do you see anything indecent in these cartoons or the text or the inferences to be drawn from them? A. I do not.

Q. Page 93, the picture "Broadway for the Boys, the Juke Joint Scene from the Eve of St. Mark," and the first two paragraphs of the text boxed in under the title, the picture showing a girl seated in a soldier's lap with her arm around his neck and another soldier seated at a table with a girl close by. The text:

"These soldiers have come from a discussion of a hygiene lecture in which it was estimated that in the Army 20 per cent don't, 20 per cent do, and 60 per cent might.' 553

What does that language convey to you, Doctor? A. Well, in view of the whole thing I think it may mean that 20 per cent go juking, and 20 per cent don't go, and 60 per cent might. This is a juking scene here.

Q. Continuing with the text:

"They are Quizz West (played by William Prince) and Francis Marion (James Monks), and they have already made considerable progress with the Bird sisters, Lil (Joan Dolan) and Sal (Toni Favor), perched on Quizz' lap.

"Lil tells how dull it was in town before the Army moved in, but hints there can be too much of a good thing. 'This is practically inflation, what we've got now', she complains. One thing leads to another, and another leads straight back to barracks when Quizz decides he belongs to the first 20 per cent. 'I have a hell of a hankering,' says Marion, 'But you're the strong, solid man, and you bear the purse. I bow to your judgment and follow.' " 554

Do you draw any indecent, obscene, lewd, or lascivious inferences from the text I have read and the accompanying picture? A. I do not. I contend that this refers to juking. This is a juke scene.

555

Mr. Cargill: Doctor, after you read that first paragraph—it says, "These soldiers have just come from a discussion of a hygiene lecture."

The Witness: In a hygiene lecture the intimate contacts with women are discussed and it does not have to be the extreme relationships with women, because they are lecturing to the soldiers now, and in all hygiene lectures they tell them to avoid such places

556 as the juke places because that might lead to other extremes.

This picture is clearly a juking scene, and a hygiene lecture would not necessarily discuss what might be implied from this, namely, sex.

Mr. Cargill: Following again in the second column in that box: "Besides he belongs to the first 20 per cent". Does that still have reference to juking, in your mind?

The Witness: This is in the second column. "One saying leads to another and another leads straight
557 back to barracks when Quizz decides he belongs to the first 20 per cent." It could refer to sex.

Mr. Cargill: In other words, Doctor, in giving your opinions and your interpretations here, are you leaving out the things that it might refer to, and only giving your opinion on those things that might be on the better and glorious side, or are you giving us an unbiased opinion?

The Witness: I am trying to give you an unbiased opinion. Let us assume for the moment that this does refer to sex. I think it is still not indecent. I think it still portrays a moral, especially the article.

558 *By Mr. Hassell:*

Q. Is your understanding of the practice of juking, dancing, Doctor? A. Yes, dancing and social intercourse in restaurants and cabarets where they don't have an orchestra, but have juke boxes for music.

Q. In this picture there is no juke box and they are not dancing. One girl is sitting on a fellow's lap. A. That is true, but it says "The juke joint scene from The Eve of St. Mark." That is what gave me the idea of juking.

Q. That is, your reaction to that picture and that wording was associated with the remembrance of the play, that the scene in the play was like that? A. I didn't see the play. 559

Q. You didn't see this play? A. No, I didn't see the play. It was by the sub-title and the heading that I got the idea that it was a juke joint scene.

Q. Now, coming to the July issue, the first title on page 10, The Sound and the Fury, what purports to be a letter from one Fred Appel of Paradise, Pennsylvania, in which Fred says:

"I am willing to pay my half buck just for a peek at the Hurrells and Vargas."

Do you think that reflects an average reaction of the readers of Esquire? A. Yes, I think a great many like the Hurrells and the Vargas. I think that is perhaps the chief attraction as far as the photographs and pictures are concerned. 560

Mr. Cargill: I am afraid I didn't understand that question. Did you say the principal attraction of Esquire is the pictures?

The Witness: No, as far as the pictures and photographs are concerned, I thought the Hurrells and Vargas were the chief interest. That is only a part. There are seven parts of Esquire, as I understand it. 561

By Mr. Hassell:

Q. Didn't I understand a while ago that you had not examined all these matters and all these issues, but you had confined to the matters cited and pointed out? A. That is right.

562 Q. So you are not able to testify as to what is in the balance of the issues? A. No, I am not.

Q. I believe you stated that the picture on page 76, "Broadway for the Boys," and excerpts from "By Jupiter", the central figure in that picture showing the woman kneeling with her left leg up and her long dress pulled up to her middle, and showing a large portion of her breasts, is not indecent or has no salacious appeal? A. Well, in my opinion, she doesn't show a large portion of her breasts and, in any case, in my opinion, it is not indecent. It is a typical stage scene and in no way obscene.

563 Q. Page 87, "The Exploits of Esky," again, and the cartoons and text thereunder numbered 55 and 56:

"Esky unsnapped his wallet and riffled a roll of greenbacks. Immediately the surrounding water was filled with mermaids. 'You see—women are women the world over'.

"Esky turned to Verne: 'Say, there's something I've always wondered about mermaids.'

'I wouldn't know,' replied Verne."

What is your testimony now, Doctor, that these pictures, accompanied by these cartoons, are not indecent? A. Yes, it is.

564 Q. I believe you said on direct that the something Esky might have always wondered about mermaids might have been whether they had feet, is that right? A. How they got along on the ground.

Q. How they got along on the ground? A. Yes, whether they were amphibious or not.

Q. But that text, and these cartoons, together with the money, or riffling of bills, would not convey any other idea? A. It doesn't convey any indecent idea.

Q. And it wouldn't convey any idea as to how the mer-

maids are constituted as to sex? A. It didn't, particularly, but it might. Even if it did, I wouldn't say they are indecent, or that the text is indecent. 565

Q. Page 141, there is some verse and doggerel boxed in on this page:

"Dog's Worst Friend."

And I read that verse:

"People
who have dogs
who shouldn't have dogs
I hate them.

"People 566
who have dogs
and a mink coat
and think they are doing their dogs a favor
by taking them out for a walk
and walk very fast
and pull at the leash
so that the dog gets no chance to smell a hydrant
or a tree
or another dog
I hate them.

"People 567
who have dogs
French poodles
wise and sapient dogs
and clip them fore and aft
so that they look
and feel
like goddam fools
I hate them.

"Who the hell are they to make dogs foolish"

568

"People
Who have dogs
Pomeranians
Pekingeses (except one)
Chilhuahuas;
Who carry dogs like muffs
who train dogs to carry packages in their teeth
put sweaters on them
bows on them
polish on their toe-nails (they do so help me.)

569

"I would like to plant them in Central Park
in a long row
and introduce a lot of dogs to them.

"By Robert Paul Smith."

Do you see anything filthy in the matter I have read? A. No, I see nothing filthy. It is a sort of a doggerel and it is perhaps poor taste and it is silly. I see nothing in that that would corrupt morals or that is indecent. Apparently somebody who doesn't appreciate dogs and is writing his feelings. I see no excuse for it; it is one of those silly doggerels.

570

Q. But you think it is perfectly proper to refer to the habits of dogs as referred to here? A. It is not obscene, it is poor taste.

Q. I didn't ask you whether it is poor taste, I asked you whether it is filthy. A. No, it is not.

Q. It is not filthy? A. No.

Mr. Cargill: Doctor, what would be your basis for saying that that was not filth?

The Witness: The fact that it is a very commonplace thing and something that we do every day, those of us who own dogs, and it is obviously the recitation of a crank, and there really is no filthy language in that, no filthy language expressed by implication. You know what he means by the habits of a dog, but there is nothing directly expressed there. It is all by suggestion. 571

By Mr. Hassell:

Q. Do you contend, Doctor, that you can't convey filth or indecency by suggestion? A. Yes, you can, but I contend that what is conveyed here is not filthy. 572

Q. That subject is not filthy? A. No, it is not.

Q. I wonder what you would think if you were planted as suggested in that article for the use of dogs? A. Well, that is probably what happens when we are possibly in a burying ground and the dogs run over the burying place. It is a silly article.

Q. You probably would think it was filthy if something like that would happen to you, wouldn't you? A. I wouldn't know anything about it.

Q. Page 146, the advertisement of Esky cards, Esky Buy Products. You say there is nothing lewd, lascivious, obscene, or indecent in the pictures in this advertisement? 573
A. I do.

Q. The central figure, or picture, in this advertisement? A. Yes.

Q. Appears to be clothed, does it not, solely and entirely by there having been dropped over her back— A. That is right.

Q. —or buttocks and thighs a very transparent hat of

some sort, or piece of clothing, is that right? A. That is
574 correct.

Q. You say there is nothing indecent in that? A. No, not in my opinion.

Q. On page 148, the cartoon at the bottom of the page showing a perfume counter and a girl behind the counter, apparently a sales girl, and placard or card on the counter reading: "Burning Desire." And nearby another placard or card reading: "Baby's Breath." And the language underneath: "I think, Miss Hill," from the floor manager or floorwalker who is on the opposite side of the counter, "it might be advisable to display those a little farther apart."
575 The floorwalker or manager is an elderly baldheaded man, grey or white haired.

What is the inference that you got from that cartoon? A. Well, the inference I got from that cartoon is that it is a play on the words that are used for perfumes, and this happens to be "Burning Desire" and "Baby's Breath."

Q. Why should they be possibly a little farther apart? A. Well, I suppose that implies that burning desire might lead to something and babies might result from it. If you want to stretch your imagination that far. It is a silly, innocuous thing.

Q. You think you would have to stretch your imagination
576 a great distance to arrive at that? A. Not very far at that.

Q. And there is nothing indecent in that cartoon? A. I still think it is not indecent. I think it is bad taste.

Q. Would you say it is vulgar? A. No.

Q. Filthy? A. No, nor lascivious nor lewd.

Q. Coming to the August, 1943, issue, page 10: "The Sound and the Fury," and in it "Considered Opinion," in the first column:

"In your May issue (this year, too!), page 93, article entitled Broadway for the Boys, it is said 20 per cent don't, 20 per cent do, and 60 per cent might.' While in no way representing the opinion of the Navy Department, it is the considered opinion of this patrol squadron that 20 per cent don't, 20 per cent do, and 60 per cent don't get the opportunity. Now, you guess which category we fall in! The Boys of VP-73." 577

Doctor, do you think the writer of that missive reproduced in the pages of this publication got a different idea of the text of the cartoon in the May issue which we adverted to awhile ago, the picture "Broadway for the Boys," than that which you expressed? A. I think I finally expressed or said that we agreed that it referred to sex, didn't we? 578

Q. I thought you said that you might. A. I thought at first that we agreed to it, and I accepted the fact that it might refer to sex, and I now accept the fact that this writer may think that that refers to sex.

Q. And even if that picture in the May issue did refer to sex, as indicated by this considered opinion, you don't think the picture and text in the May issue, from this considered opinion, is indecent, vulgar, filthy, obscene, lewd, or lascivious? A. I do not.

Q. Page 30, "Many Wives Too Many." The article, "Showing some of the pitfalls to that sporting but foolhardy professor who advocates plural marriage in England." By David Emory. Under the word "article" which is directly under the name of the author appears an RX. Do you know what that means? A. That is the abbreviation that is seen on all prescriptions. It is from the Latin *recipe*, meaning take thou, and it is a medical term which is on every prescription that a doctor writes. It means take thou the following. 579

580 Q. Do you know what it means in Esquire? A. As a matter of fact, I never noticed it until this moment.

Q. In the March issue, page 6, the meaning of the symbol is set forth as it appears in Esquire, in the first paragraph. A. Yes, I have seen that.

Q. That little symbol— A. Yes, *recipe.*

Q. "That little symbol by which we have for the last couple of years designated those of our editorial dishes which the chef couldn't bear to think of your passing up."

Now, coming back to the article on page 30 of the August issue, "Many Wives Too Many," I believe you stated that
581 you had read this entire article? A. Yes, I have.

Q. Column two, the top of the column, page 30, it says: "In figuring out a schedule for a six wife batting order—which is something that should be done before it's too late—the team probably would go on a weekly timetable about like this:

"Amaryllis, the wife to go out to dinner with—Four times a week. Unless Amaryllis knows the places that have made arrangements with the Black Market and unless Dr. Joad is lush with shillings, she can count on one of the four sessions being at a fish and chip coop where she will have to perch her fanny on a peg or stool. She will have to try to
582 turn on her charm where there are no soft, flattering lights. A great risk in one of those places is that Amaryllis may see in them a soldier, sailor, marine or shipbuilder who looks like he would be good to go out with after going out to dinner. That would leave Dr. Joad with the check for a souvenir.

"Priscilla, the wife to go to church with—Twice a week. Sunday and prayer meeting night. Every time the parson referred to the seventh commandment, Priscilla probably would nudge her gentleman friend and whisper: 'What are

you, a man or a louse; letting him make that crack at us?'"

Do you think there is anything indecent in those paragraphs I have read, Doctor? A. No. 583

Q. On page 31, the first three paragraphs:

"Rosamund—The Wife to make love to. Something seems to indicate that when the roster includes five other wives, Rosamund will have plenty of time for keeping up with the latest books and movies. It is chivalrous, however, of Dr. Joad, who was born in 1891, to have the assortment include a wife for loving. This can be on a high spiritual plane if both of the loving couple get in that mood at the same time.

"Experience of many who have run some test heats on the six-wife idea is that each woman is apt to get the notion she is the wife to make love to. The cook stove wife may consider as part of the deal, her loving six-time papa giving her at least an adoring pat on the sunny south as she's bending over the cookstove and letting her pores drip onto the skillet. The game-playing wife, when gazing at a map of the Lake district in deep study and thinking of the jolly times Coleridge, Southey and Wordsworth spent in that territory, might get in the frame of mind for a little loving herself. 584

"In fact about the only wife of the stable who might not rate herself as a competitor of the wife-to-be-made-love-to possibly would be the wife-to-go-out-to-dinner-with. That woman would be no dummy in calling her shots on the menu and elsewhere. When it came time for the oversexed spouse to get around to his loving assignment, the feeding female might also have other arrangements in mind, and out of the entire sextette she might be the one least inclined to cause any loving trouble. As long as the six-timing boy chum would show up in time for her to tuck her bib up, she would be easy to get along with." 585

Does that language convey any indecency, obscenity, las-

586 civiousness to your mind, Doctor? A. No, it does not. The article as a whole must be considered and not parts of it, and it is a satire on too many wives, and, in my mind, it is not lascivious, lewd, or obscene, neither do I think it is a very elevating article. I think it is a common article.

Q. But this article is prescribed by the editors and publishers of Esquire. Do you think the purport or intent, or purpose or moral to be drawn from the article is that we shouldn't have polygamy in the United States? A. I think so, absolutely.

Q. You think there isn't any necessity for any such propa-
587 ganda? A. No, I really don't.

Q. You wouldn't think that this article, from start to finish, was written with the idea of permitting the reader, the salacious inclined reader of this publication to make excursions into the idea of polygamy? A. No, I don't think it was printed for that. It is somewhat entertaining, and it is the type of literature that a great percentage of the population likes, and it is entertaining to some, to a great many, I suppose, even though it doesn't appeal to us.

Q. Was it found entertaining by any of the 40 people you submitted it to? A. As a matter of fact, it was; it interested two people very much.

588 Q. What were their ages and sex? A. They were married people.

Q. Married males or married women? A. A married man and his wife.

Q. Now, referring to the Varga girl picture on page 38, would you say that the breast and thighs of this model are over-emphasized? A. I would not.

Q. What do you think should be drawn by the fact that one of the shoulder straps of her most abbreviated costume has come loose and is being held in her hand, hanging as

though she was beginning to drop it? A. I think that very frequently women on the beach remove their shoulder straps so as to get the suntan all over, so that when they put on an evening gown they will have an even tan and the marks of the straps will not show. That was the implication I got from that. 589

Q. Regarding that gesture of the model in connection with the smile, or whatever you may call it, on the face of the model, would you say there is any connection there? A. No, none whatsoever.

Q. You don't think she is teasing? A. I didn't get that impression.

Q. Page 73, the picture "Mood For Red Hair." Doctor, did you note that apparently this figure, and this is supposed to be a color photograph, the model apparently has no clothing on whatsoever, but there is loosely thrown across her breast and one arm—the breast and the body—a transparent veil and a piece of some material across her midsection? A. I don't know how you can assume that that woman has no clothing on underneath those drapes. 590

Q. Do you see any? A. No, but the fact that the drapes are thick and cover her—she could have on a brassiere, and she could have on a covering over the midsection and not show with those drapes, and even if she doesn't have anything on underneath, those drapes cover every possible part of the body that could be criticized, and that is an artistic picture, photograph, really, that I can't see how it could be objected to. 591

Q. You don't think that the manner in which this model is draped was adopted to facilitate the mental processes of the purchaser of this magazine in removing the drapes entirely and regarding her without any drapes? A. I honestly don't. I hadn't thought of that. I suppose you could make

592 that interpretation, but I hadn't made that interpretation. I suppose you could mentally undress any woman.

Q. Would you say that this model is in a reclining posture? A. I think she is in a reclining posture.

Q. Page 89, this is the "Paste Your Face Here" picture. This shows a phony sea, or background, where the girl is posed with a sailor's white hat on and a blue brassiere and very scant panties, seated over the sailor's shoulders, with his head between her legs.

Mr. Bromley: Now, when you say brassiere, you
593 mean the top piece of her bathing suit, don't you?

Mr. Hassell: I wouldn't call that a bathing suit.

Mr. Bromley: You wouldn't?

Mr. Hassell: No.

Mr. Bromley: Well, that is what it is.

Mr. Hassell: Well, I am glad to have counsel's statement on that. It certainly doesn't appear to be a bathing suit to me. There is no water in that background in this picture. As far as the picture is concerned, the sea might be a thousand miles away.

The Witness: Well, that is not true on this one here. It is a deep sea, and ocean waves are represented
594 behind this.

By Mr. Hassell:

Q. Well, you may call that ocean waves, but it don't look like ocean waves to me, but you think that pose of a girl seated astride the shoulders of a sailor, designed for some sailor to paste his picture there, is not lascivious and one would not get a lascivious enjoyment from the pose? A. No, I don't get that impression.

Q. Well, it says, "Paste Your Face Here." A. That is right. 595

Q. That means any of the seven hundred thousand people who purchase this magazine, doesn't it? A. That is right. It doesn't have to be limited to those. I assume anybody could.

Q. Why would anyone want to paste his picture there? A. Well, as more or less of a joke, I suppose.

Q. You say there is nothing indecent, lewd, lascivious, or obscene in that— A. I do.

Q. —picture? A. I do.

Q. Now, on page 90, the cartoon, "She Came Directly From The Wedding—Boy! That's Patriotism." 596

Doctor, do you think there is any indication or any design in showing that cartoon that this young lady who has gone directly to the war factory in her wedding gown is passing up great pleasure that she might enjoy on her honeymoon evening? A. Well, I gather that she came directly from the wedding to her work. For what reason, I don't know.

Q. Your imagination wouldn't follow you any farther? A. Yes, that she left her bridegroom and came to work.

Q. But, "She Came Directly From The Wedding—Boy! That's Patriotism." A. Well, I think that she is not wasting any time. She is pre-occupied with her war effort. She is willing to sacrifice any personal interest. 597

Q. You don't seriously contend that that is the fact to be drawn from this cartoon, do you, Doctor? A. Yes, I do. I see no reason why it should not be in these times. After all, this magazine portrays the times and the present mores.

Q. You have heard of such a thing happening? A. No.

Q. You would be amazed if you ever heard it happen? A. I would think it was an extreme situation.

Q. Page 105, the cartoon at the lower right-hand corner

598 of that page, showing south sea damsels and what appears to be a male figure in rather loose shorts, clinging to what looks like might be a cocoanut palm, and another male figure in a sailor suit with a paddle and some sort of a canoe making his way to shore and the statement: "Thank God—Help at Last."

What sort of help do you think this forlorn male figure on shore is to get from the man in his boat? A. I think he is to be rescued from this desert island, from this group of natives who are standing in the back. They are apparently female natives.

599 Q. Do you get any sex connotation from that? A. One could get a sex connotation from that, yes, indeed.

Q. You think it is entirely decent, and not lewd and lascivious? A. Well, I think it is not lewd or indecent. I think it is commonplace.

Q. Page 110, the cartoon at the bottom, center of the page, with the legend underneath, "That's Miss Blimpton, our special nurse for low blood pressure patients!" Note the eyes of the male person in the lower right-hand corner of that picture as he glances around back at the female figure. Note the male figure in the upper background with the walrus mustache who has just lost his hat, or his hat is

600 flying up in the air. Note the whispering comments of the intern, or attendant standing near the elevator talking to the doctor, I presume, who has a small satchel in his hand, and note the size of the breasts in proportion to the balance of the figure of this nurse.

You say that that cartoon is not indecent? A. No; I think it is plain down-right silly. There certainly is not any indecency about it. As a matter of fact, the breasts that you think are so large I think is a nurse's bib on the front there.

Q. A nurse's bib? A. Yes, which tends to exaggerate the breasts which, in this picture, are only vague in outline in the lower part. 601

Q. Why was the name Blimpton chosen? A. I haven't the slightest idea.

Q. To donote the size of the breasts, would you say, Doctor? A. I hadn't thought of that before.

Q. You hadn't? A. No, I hadn't.

Q. Well, how about "Our special nurse for low blood pressure patients"? A. Well, that is a very common expression when an attractive nurse goes along, I think. I think it is just a silly joke. I see nothing indecent about that, or obscene. 602

Q. In other words, her presence would give some sexual excitement or stimulation to the patient requiring a boost in blood pressure? A. One could make that interpretation, I suppose.

Q. But you don't? A. I don't.

Q. And you think it is perfectly decent? A. I think it is silly, but respectable.

Q. Page 127, here we have a cartoon or an illustration of female figures. One figure lying among pillows wearing only a yellow filmy brassiere and panties of the same material, the panties being loosely put on, and showing very little between the legs, and under this illustration appears these words: "Hew to the Line, Bertha, Let the Skirts Fall Where They May." 603

Do you think this picture or illustration is intended for the male readers of this magazine, Doctor? A. I think it is intended for both. As I understand, this caters to the man and also to the woman, and it is in keeping with the mores of the times. They are painting stockings on the legs and I think that is a bathing costume that the girl has on,

I think it is. I cannot see how there could be any improper
604 exposure, even in that position. There certainly is none portrayed here.

Q. How can you call it a bathing costume when there appears to be a fence in the background with a house in the distance and some greenery around? A. Well, the costume is a bathing costume, I am sure, because it looks like many bathing costumes that I have seen.

Q. Have you ever seen any brassieres and panties— A. Never decorated like that.

Q. You never saw any like that? A. No.

Q. There might be, though? A. There might be, yes.

605 Q. You think the women, if this is intended for women, would get any exhilaration from that cartoon and the position of the young woman lying down on the ground with one leg up in the air? A. No.

Q. It would be the man who would benefit by that, Doctor? A. Possibly.

Q. You say you see nothing indecent, vulgar, lewd, or lascivious about that? A. I do not.

Q. Did you read the article "Offensive On the Home Front"? A. What page, please?

Q. Beginning on page 56, with material on page 144, in the third column. A. Was that specified or cited material?

606 Q. The material in the third column on page 144. A. Oh, yes.

Q. You did not read this entire article, did you, Doctor? A. I don't recall. Yes, I think I did. I recall it now with the specified material, or the marked material, on the third column, 144.

Q. You don't recall what the article is about? A. I don't recall it in detail.

Q. Well, beginning down there in the third column:

"Women in his walk of life didn't hit their men, nor did they hit their women. Once he had slapped a prostitute in Bordeaux who had persisted in keeping his hat, but that didn't count. He was amazed to find himself slapping his second woman. 607

"Dorothy began to cry loudly and headed out of the room. Dizzy and with the taste of blood in his mouth, he noticed how large the uniform made her behind look."

Do you think there is nothing indecent in that language? A. I do not.

Q. That is perfectly proper to refer to that portion of a woman's anatomy? A. I think it is. It is common, but I think it is not indecent, certainly. It may not be in good taste. 608

Q. Now, coming to the September issue, page 10, do you think the "conservative suggestion", Doctor, on this page reflects or is intended to reflect the reaction as is obtained by readers of this magazine? A. I don't. I think that is the exceptional case. He signs it "The height of expectation". I expect that would be, and it is my opinion, that that is from an extravert; or might even be a pervert.

Q. Why do you think the editors of this publication should pick that out of probably thousands of letters they receive for publication? A. I think he does it to show both extremes. I think this is one that shows that: There are very few of those letters that show that sort of thing and there are many letters received. 609

Q. But you have no definite, factual information as to why this letter was selected? A. Yes, to show the extremes.

Q. You have that? A. I have that information from Mr. Gingrich.

Q. You have that from Mr. Gingrich? A. Yes.

Q. He claims that this is to show that they have readers

610 who want these Vargas entirely in the nude? A. I wouldn't say that. I wouldn't attempt to testify for Mr. Gingrich. I simply quote what he has told me, that he introduced this letter to show the extremes in letters. He will probably testify for himself.

Q. Now, page 38 we have another Varga girl picture entitled "Military Secrets", and this one is clad in. I guess you would call them sandals and the garment which covers the small part of her back comes down a little way on her thighs. That does not obstruct the view of her figure in the least, does it, Doctor? A. It displays her figure.

611 Q. Completely? A. I would say.

Q. In this picture what would you say that those marks on the side of this model purport to show or represent? Her ribs? A. No, I think those are the folds of the muscles. They are not rightly placed for intercostal spaces which show that these are not drawn up from real life, but from dummies. Anatomically those folds are incorrect. That is the fold you refer to on the side of the thorax.

Q. Doctor, would you say that this model as shown in this picture in life-like print is practically unclothed so far as garment is concerned? A. Yes.

Q. The expression on the model's face, the thing that
612 appears there on her hand labelled "Diary" coupled with "Military Secrets", taking all of those things into consideration, do you consider this picture to be indecent, vulgar, obscene, lewd, or lascivious? A. I do not.

Q. What would you think that the military secrets has reference to in connection with the diary in her hand? A. Probably a date that she has.

Q. But it says secrets. A. The date is a secret to her, probably.

Q. Now, the verse under there:

"Now, no one can peek
At this Book of the Weak— 613
In wartime I have to be cagey.
That boy in the Army
Would certainly bar me
If he knew I dated a J. G.;
That boy in the Navy
Whose hair is so wavy
Would tear it right out at the roots
If he found that I
And a Leatherneck Guy
Were now in romantic cahoots!"

614

So, would you say the secrets might refer to dates with a boy in the Army and one in the Navy? A. That is right.

Q. And one in the Marines? A. That is right.

Q. With this expression in connection with the expression on her face and with the very scanty costume, that does not convey to you any idea of indecency? A. No.

Q. On page 43, I believe you said on direct that this cartoon with the legend underneath "Sold American" brought to your mind the chant of the tobacco auctioneer. A. Well, it brought to my mind the idea of that, I thought, because there was an American boy here with a cigarette in his mouth and the old sheik is saying "Sold American". 615
I thought it was a play on that "Sold American" that comes on the Lucky Strike hour.

Q. What has been "Sold American", two slave girls here? A. Possibly.

Q. They have a loose jacket on the upper parts of their bodies and apparently nothing else. Is that right? A. Well, it looks as though they had white trousers on in this picture.

616 Q. Yes, but I say on the upper part of the body. A. Oh, yes.

Q. What would an American soldier—apparently, there is a tank in the background and the fezzes and other costumes indicating North Africa—what would he be doing with two slave girls? A. Well, he might be going out with them for a good time.

Q. He would buy two slave girls to go out for a good time? A. I don't think he would buy them; he might rent them.

Q. The legend is "Sold American". A. That is why I
617 think it is a joke. The girls are being presented to the group of people and the American boy is holding up the money and has a cigarette in his mouth. I don't think there is any question about that.

Q. He is buying the girls to take them out for a good time? A. He might be.

Q. You don't get any sexual connotation from that? A. I don't.

Q. You don't get anything indecent from that? A. I don't. It happens too often. It is commonplace and poor taste.

Q. Now, coming to the cartoon on page 65, this picture
618 is of a man dressed in a red checked apron, half-way out of the back door of the house, and a red-headed young lady dressed in rather tight fitting slacks and a tight fitting garment around the upper part of her body, and under the cartoon this legend: "Come back later, sweet—my wife hasn't left for the factory yet."

Do you say that this cartoon has no indecent connotation? A. It has not. It is a satirical cartoon depicting the ten-

dency of the times when many women are working and it puts the man in the kitchen. 619

That is done on the stage and in various ways and it is the reverse of the iceman coming years ago. It is silly. It doesn't connote any obscenity. It is just a joke.

Q. This girl is the milkman? A. That is right, and the housewife has gone to the factory and the man of the house is doing the housewife's work. It is a cartoon on the mores of the times.

Q. And the attitude of the individual leaning out of the kitchen door and the expression on his face, coupled with the words in the legend, don't convey to you the idea that there is going to be any off-side shenanigans between this individual and the young lady? A. No, I think it is just a joke. I can't take it as literally as that. 620

Q. And the cartoon on page 66 at the top of the page, showing a young lady seated on a young man's lap, lolling over him with her arms around his neck and his arms folded around her, in very close embrace, apparently kissing, and the conversation between the charwomen who come upon this scene is reported in the legend underneath: "It's the only time that her and her young man have for courting—they both work nights in a war plant."

That is apparently the explanation of the woman with the feather duster in her hand to the charwoman who has an amazed, blank, open-mouthed stare on her face. 621

You contend that this cartoon is not indecent and has no indecent connotations? A. In my opinion it depicts the times as the description underneath indicates. It is a take-off, it is a joke.

Q. Page 84, the cartoon showing a young sailor seated on

622 a couch and a young girl seated beside him in a red dress, she with her arms around his neck and he with his arms around her, and they being engaged in what might be described as a wet kiss—the young lady's mouth appears to be open—the old folks peeping around the door, and it says: 'Every night he tells her he is sailing tomorrow."

Would you say that this pose and this cartoon and the language underneath, especially the kiss, has nothing of indecency in it? A. I would say that it is nothing indecent and is in keeping with the mores. This is a sailor and it is a silly joke. One has to have a far-fetched imagina-
623 tion to paint anything indecent into such a commonplace thing as that.

Q. Page 86, Doctor, "Goldbricking with Esquire", at the bottom of the first column:

"A sergeant was home on emergency furlough to be with his wife who was expecting a baby. One morning on his way to her room, he passed the baby's ward and stopped to have a look at the recently arrived children; in one corner he noticed two of them in a serious conversation. He reports it went something like this:

"First: 'I'm a girl. What are you?'

"Second: 'I'm a boy.'

624 "First: 'You look like a girl to me.'

"Second: 'Well, I'm a boy. Wait until the nurse leaves and I'll show you.'

"The nurse did leave and the boy lifted the covers: 'See blue booties.'"

Is it your testimony, Doctor, that there is nothing indecent in that alleged joke? A. No, it might have a double meaning. Blue booties for boys and pink for girls.

Of course, that is intended to take away the double mean-

ing, which, in spite of that, is probably there in your mind which would mean that they exposed their sex organs. 625

Q. Don't you think, Doctor, as a matter of fact, that is the only reason that alleged joke was published? A. So what? What if it was?

Q. If it was? A. So what?

Q. That would not be indecent? A. No, it would not.

Q. I see. On the other page, the third column, at the bottom:

"She: 'Would you like to see where I was operated on for appendicitis?'

"He: 'No—I hate hospitals.'"

A. That is a silly joke. Suppose she did show where she was operated on for appendicitis. If it was a McBurney scar she would not be displaying anything. If it was a right rectus scar it would be up near the umbilicus. 626

Q. Do you think this was put in this man's magazine for any other purpose than to convey the idea that this fellow was a moron and he didn't know when he had an opportunity to see something? A. I think like most of these jokes it was a little humor to the boys and older than the boys enjoy it. It is silly and innocuous and silly to think of it in the way it is presented here.

Q. I am glad to have your reaction. A. I have very strong feelings about this. 627

Q. Apparently so. Page 102, this cartoon showing a man in a ragged white shirt, with staring eyes and mouth wide opened and fingers spread apart, and the girl in a brassiere and panties, lying on what appears to be the beach, with her legs cocked up, underneath which appears: "Ain't it a damn shame? Plenty of water on this island, plenty of food, and now I get hallucinations!"

628 Do you get any indecent, lewd, or lascivious connotations from that cartoon, Doctor? A. I don't. As a matter of fact, there is a double meaning there and if there is a double meaning there it is an hallucination. Apparently there is a young lady lying on the beach.

Chairman Myers: We will adjourn at this point. Would it be convenient for counsel on both sides to start at 9:30 instead of 10 tomorrow morning?

Mr. Bromley: Yes, Mr. Chairman.

Chairman Myers: If that is agreeable, we will ad-

629 journ until 9:30 tomorrow morning.

(Whereupon, at 5 o'clock p. m. the hearing was adjourned until 9:30 o'clock a. m., Thursday, October 21, 1943.)

630

HEARING OF OCTOBER 21, 1943.

PROCEEDINGS RESUMED.

631

Chairman Myers: We are ready to proceed.

KENNETH J. TILLOTSON, a witness called by and on behalf of the Respondent, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination by Mr. Hassell (Continued):

632

Q. Doctor, let's take up the October, 1943, issue of Esquire. On page 10 under "The Sound and the Fury", the sub-title "The case of the classy chassis", in the latter half of the last paragraph the writer says:

"Though my liking for the Varga wenches is supreme, I would not replace the chassis on page 10 for a Varga dame. It is too bad you could not provide a larger of such photo so that we, who appreciate shapely forms, could pin up. A spot has been reserved on my wall to deposit such a dish."

633

Do you think that is an average and natural reaction to the Varga pictures as they appear in Esquire in these issues? A. Yes, I think it is. I think most of the Varga girls are depicted for that purpose, for pin-ups.

Q. And aside from any sexual gratification this writer and similar writers might get from such pictures, what other gratification— A. I don't concede that they get sexual gratification. I consider that they might, but I think we can't necessarily say that. I think they like beautiful women

634 and these are portrayed as the type of American beauties of the times.

Q. Why does a man like beautiful women? A. I think for the same reason you and I do, probably.

Q. That is really a foolish question? A. It is not a foolish question. It is the sex instinct in us.

Q. And it is a fact that the normal virile adult male likes beautiful curves and the curves of the body, and the more he can see of them the better he likes it? A. The more he can see of the curves?

Q. Yes. A. Perhaps, yes.

635 Q. Speaking of the curves and the erogenous zones, you have indicated in your testimony heretofore that there were two erogenous zones. I assume you have reference to erogenous to the male through his vision? A. That is right.

Q. When he looks at a woman. These two zones are the pubic area and the breasts. Are there any others? A. Well, the feet and the hair and everything might stimulate sex thoughts, but that is not the same as the erogenous zones. The mouth, of course, is an erogenous zone.

Q. How about the curves of the body? A. I think they probably are part of sex and suggest sex in the female. I am not saying these Varga girls aren't sexey. I didn't give you
636 that impression, did I?

Q. You admit they are sexey? A. Yes. But I definitely say they are not lewd, lascivious, filthy or obscene, because the so-called erogenous zones which you just mentioned and the things you show in those nude photographs—I think they are obscene. I call that obscenity. That is what we have to guard against and that is the important distinction we have to make, that there is no indecent exposure.

Q. Those nude photographs— A. Those are obscene.

Q. Don't you recall that the females depicted in those photographs didn't have alluring figures— A. I didn't study them very carefully. 637

Q. Their breasts were pendulous, nothing beautiful about them, no beautiful features, the figures were not beautiful. Why would you say those would be more obscene than pictures such as the Varga pictures, which are manifestly drawn to appeal to those susceptibilities in a man? A. Because the important thing is that in the Varga girl pictures there is no indecent exposure, whereas in those nude pictures, the genitals and everything else is exposed.

Q. Do you consider it to be a fact that in a great many persons indecency is disgusting? It doesn't stimulate sex. 638 A. I am not saying these would stimulate sex in everybody. I am saying that they may stimulate sex in some.

Q. You mean the nude pictures? A. We are talking about two different things. I thought we were talking about the Varga girls. These nude pictures, of course, would stimulate sex in some people. That is a variable thing.

Q. This whole subject is very variable, isn't it? A. Very variable.

Q. For instance, take you and I—you have studied these eleven issues in Esquire for ten days to two weeks, possibly the great amount of compensation you have had with respect to them in the past few days and they cause you to 639 grow calloused to it, become disgusted with it, as with a spicy joke that is repeated once too often. Isn't that true? A. I think if we have got the proper fundamentals of respectibility and decency, our working with Esquire for the time suggested isn't going to in any way change those fundamental principles of decency in our attitude of what is right and wrong, and what is good for the public to have, which is after all what we are trying to determine.

640 Q. Aside from Esquire, would you say that it is possible for the average normal, this ideal person, that through your testimony is set up here? A. Not the ideal, the average individual.

Q. The ideal average? A. Yes.

Q. That it is quite possible that such a person might become surfeited with obscenity or salaciousness? A. I don't think the average individual is, no, indeed, I don't think so. I think the average individual, as I can see them, is quite guarded and draws the line in his own experience pretty carefully.

641 Q. As a matter of fact, his own experience and his environment and his upbringing have a great deal to do with it? A. That is right.

Q. So when you attempt to define the average or normal individual you are attempting to take off and put into one minute package all the environments and experiences in life, not to say anything of the physical condition of the individual; you are attempting to put all that into one package? A. You would attempt to make an evaluation of it.

Q. But you don't think this average or normal individual you spoke of would become surfeited or calloused or
642 grow tired of obscenity, with the constant repetition of obscenity, or filth or lasciviousness? A. I think if he were subjected, the average individual, he would very quickly become disgusted with it. I think the average individual doesn't like obscenity and filth and so forth.

Q. So if you were in business to appeal to the average individual you wouldn't give him too much, too constant filth or obscenity, would you? A. If I wanted to sell a magazine or appeal to the American public I would shy away from what I considered lewd, lasciviousness, and filthy obscenity. I don't think it goes across.

Kenneth J. Tillotson—for Respondent—Cross.

Q. Now, Doctor, coming back to your experiences and your training, I believe you testified that as a part of your 643
qualifications you have gone into the sex life of a great many of your patients. A great many patients who have consulted you about others? A. That is correct.

Q. You have had occasion over the past 15 or 20 years to spend a great deal of time on sex, haven't you? A. That is right.

Q. Yet you think you are still in a position that you haven't grown calloused or anything of that sort? A. Well, I will answer that by telling you that I was asked by the Bishop of our Diocese to lecture to the clergymen of the Diocese of Eastern Massachusetts last winter on psychia- 644
try, touching on matters pertaining to psychiatry, with special reference to sex adjustment, and to advise them how to give advice to families and young people about neuro-psychiatric disorders, and I gave them ten lectures and two clinics, and I gave those clergymen that course, which was very well received and appreciated. I don't think my Bishop would have asked me to do that if I had become a calloused, loathsome creature and hardened to sex.

Q. Don't misunderstand me, Doctor. A. I never have.

Q. I didn't mean that you were becoming loathsome. A. I know that.

Q. I said calloused— A. I think a person who is cal- 645
loused to sex and those things is more or less loathsome. He is to me, and to my standards.

Q. Now you say those lectures were given to clergymen? A. Yes, the Episcopal clergymen of the Eastern Diocese of Massachusetts.

Q. You consider clergymen within this class of the aver-age or standard individual? A. I certainly do. That is a higher standard, clergymen and priests.

646 Q. Well, let me see, now. You say higher standard, Doctor? I thought we had defined that, we had just one standard, or one average. A. What are you speaking of now, in regard to what?

Q. You are speaking of the effect that this material would have on the average person. A. I would put clergymen above the average.

Q. You wouldn't put them in this class? A. The average men?

Q. This class we are speaking of. A. I would say a little higher than the average.

647 Q. Would you submit these eleven issues of Esquire to any of those clergymen, or any clergymen? A. As a matter of fact, one of the priests who visited me recently, one of my parish priests, looked over these Vargas with this material in mind, and he expressed his opinion.

Q. I see. Now, coming to page 37 of the October issue—

Mr. Bromley: May we have, please, what that opinion was, before we leave this subject?

Mr. Hassell: I think we have too many opinions now.

Chairman Myers: Did you ask for it?

648 Mr. Bromley: No, he didn't ask for it.

Mr. Hassell: No.

Mr. Bromley: I thought he should have, having gone that far.

Chairman Myers: Perhaps you can take it up on rebuttal.

Mr. Hassell: I am not interested in the opinion of the clergyman. If you put a clergyman on the stand perhaps I could ask him some questions.

Mr. Bromley: I thought you kind of opened the door a crack.

Kenneth J. Tillotson—for Respondent—Cross.

By Mr. Hassell:

649

Q. The cartoon picture at the lower right-hand corner, page 37. I notice this picture is in an apparently tropic setting, there being a cabbage palm in the background. A. I can't hear you.

Q. This picture appears in a tropic setting. There is a tropic tree and palm of some sort in the background. There is a man seated on the beach, clothed only in trousers, nothing above his waist. He has an identification tag around his neck. He very likely is a sailor or soldier. He has tatooed on the biceps of his right arm what appears to be a semi-nude figure. It looks like she has a grass skirt on but nothing above that, and the lines are drawn adjacent to the biceps so as to indicate that he is flexing his biceps so as to make the middle of this figure's anatomy move backward and forward, and a half-naked native girl is gazing at this figure.

650

Do you mean to state to the Board that this cartoon has no indecent sexual implication? A. I mean to say just that. This is a very common thing. Many marines and sailors have these tatoo things on them and this depicts surprise in the Hawaiian girl, or hula-hula girl, to see this American sailor have this model on his arm. I don't think there is any sex in it at all. I don't think the girl has that in mind, her eyes show surprise clearly at this performance.

651

Q. You don't think this was included in this issue of this magazine with the idea of giving any sex angle to the readers of the magazine? A. Well, it may be the idea of burlesque in the mind of the sailor. I don't think it is particular sexey.

Q. It is not sexey to you at all? A. No, it is not.

652 Q. Now, coming to page 38, the article "Wise Men Pick 'Pyknic' Girls. Scientists recommend for marriage the honest-to-God woman, built as nature intended, with more curves than brains."

I believe you said on direct that this article by J. George Frederick is based on some scientific or alleged scientific investigation? A. Yes. The terms are derived from the work of Kretschmer. Kretschmer tried to relate emotions and personalities with body structure and body build, and the Pyknic is a certain type, Leptosome-asthenic is another type. There are many other types. We don't need to go
653 into that. But those are the two extreme types of body people. The Pyknic type being the short, squat type, and the Leptosome-asthenic the tall, not athletic type, but rather thin, tall type, and as depicted on this page, page 37, showing the tall woman beside the shorter man.

Q. Doctor, you wouldn't classify Esquire as a scientific magazine? A. No, indeed.

Q. How many readers of Esquire, or what proportion of the readers of Esquire, do you think know about the scientific Pyknic? A. I wouldn't know, I haven't any idea.

Q. Would you think that the average reader of Esquire would have this reaction, a Pyknic is something to play
654 with, a good time, or entertainment? A. That is they think of a Pyknic as a picnic?

Q. Yes. A. That is right. I think the average would think that, but if they read the article it would explain it to them.

Q. You think this article would explain it? A. Yes, I do.

Q. Now let us read a little of this article:

"Want your love life, your marriage, to be one long,

joyous, satisfied picnic, with the least amount of upset and snarl in it? Then pick yourself always a 'Pyknic' type of girl, never a 'Leptosome-asthenic' type. 655

"Don't blame the pun on me, but on the scientists who invented the word Pyknic to describe the kind of woman who it is widely agreed has so much more desirable a body and disposition, so much better adaptation to love, marriage, motherhood.

"Why do you need to be told all this?. "Because the Pyknic woman doesn't get the breaks, as a rule, in most beauty contests, model selections, and other preferments based solely on idealized eye appeal, even though what she's got to offer is plenty! Statistics show that in reality she does 656 get the breaks when it comes to marriage, for which she is superbly fitted. Men who follow their basic instincts usually pick her."

Now do you think that is a correct statement, Doctor, "Men who follow their basic instincts usually pick her"? A. No, I don't think that is necessarily true.

Q. If that were true then the question is why should anybody read this, take up time to read this stuff? A. Well, I think it is in the nature of entertainment, and it is informative in referring to a really scientific background. The article, as is expressed in the paragraphs you read, is a play on the word picnic, and is a pun, and I think 657 most of us would agree that pun is the lowest form of humor, but it is there.

Q. Continuing with the article:

"But many men wonder, or waver and take a chance, and thus take on a considerable extra load of difficulty."

Over in the next column we have a paragraph numbered one, descriptive of the Pyknic type, as follows:

"Tending to be short and stocky, well-built, fairly well

658 rounded, short neck, more or less round head, somewhat ruddy complexion, graceful wrists, bone frame that is not heavy; and there is a slight tendency to stoutness after twenty. The nose is never thin, bony or aquiline. Her pelvic regions are markedly well developed, with definite rear curves.

"The Pyknic type of woman is always very markedly and decidedly feminine; soft, jolly, yielding, loving, peaceful, sunny, good-natured temperament, adaptable, loyal, forgiving, and healthy, extravert and particularly competent in sex and child-birth and child care. She is not particu-
659 larly a mental type, it is true; but then she is not given to neurosis; intransigence, self-seeking ambition, obsessions. On the contrary, she is much given to seeking her happiness in catering to those she loves. She is humanistic, sympathetic, warm, social, but it is true, inclined to be rather easy-going, vain and careless. Love of comfort is strong; she knows how to relax, she likes food and people." A. You know, that is undoubtedly taken from Kretschmer's book. It sounds like the English translation, very much. That is really a scientific paragraph you have just read.

Q. Would it happen that you had ever read any so-called horoscopes? A. I have heard them read.

660 Q. You don't see any similarity in this language to the matter described— A. As a matter of fact, a scientist by the name of Jung in Zurich has accused Kretschmer of just that sort of thing. He says it is a horoscopic view of human make-up and personality.

Q. I am glad to hear that. I have had to read a great many of those things and this whole article sounds very much like it. A. You understand, I didn't say I accepted this scientific theory, but it is a valid one, it is one of many.

Q. Coming down further in this article to the lower half of the fourth column on page 38: 661

"Pyknic types (about 60 per cent of all women).

"'Short-slender' with busts 30-34 (5 per cent of all women.

"'Short-normal', with busts 34-40 (10 per cent of all women).

"'Medium-normal', with busts 34-40 (25 per cent of all women).

"'Short-heavy', with busts 36-46 (6 per cent of all women).

"'Medium-heavy', with busts 38-46 (14 per cent of all women). 662

"Average height, 5 foot, 3 inches; average weight, 128 at 25 years of age; average neck, 15.27; average waist 29.15; average hips, 38.62; average ankle, 9.25."

Then he gives the measurements of the leptosome-asthenic types, and in each of those he gives the measurements of the busts and at the bottom the hips. I guess the idea is that before a person picks his company he should apply the tape measure to her. Is that the idea? A. I didn't get that. This is a part of the article showing the various anthropological variances in the human being. Those of us who have been interested in Kretschmer know how much emphasis he has put on anthropology in trying to 663 determine these body structures and body builds, and I concluded that since this article referred to that, this was a reference to measurements of the parts of the body that would naturally be measured in making anthropometric comparisons.

Q. As far as its being useful to readers of Esquire, do you think those details are of value? A. I think it might be of interest to us in estimating whether the breasts we have been talking about are over-emphasized or not.

664 Q. How about the average reader of Esquire? A. I think the average reader wouldn't pay much attention to this.

Q. Further down in that paragraph in that column—the next paragraph—

"You can see how many of the measurements of the Pyknic type 'suffer' in contrast with standard eye-minded ideas about 'beauty'."

He refers to the Venus de Milo, "the truly beautiful woman, who is a Pyknic woman, (as practically all Greek women were and are), with the pelvic development that meets the great test of the ages for womanliness." A. You

665 know what that means in scientific terms, don't you?

Q. Do you think, Doctor, that this writer is putting too much emphasis upon the bust development and pelvic development of women? A. No, I do not.

Q. And going further down, at the bottom of that column, the article says:

"The Pyknic woman scores high here not only because she is far and away the most generally satisfactory love partner, wife and mother, but because she blends well with all types." A. That means she is an extravert instead of an introvert.

Q. At the bottom of the third column, page 39:

666 "The Pyknic type of womanly beauty, frankly, is Mother Nature's masterpiece of good, hearty practicality and adaptation to woman's earthly chores, as well as man's comfort and delight. She is a 'natural', not a wraith intended for some other world or a soul that doesn't look at home here below! The Pyknic woman can take it and give it."

Do you still say that you don't find any undue emphasis upon the portions of a woman's anatomy that the average male reader of Esquire would get a sexual kick from in this article? A. I do not see any undue emphasis.

Chairman Myers: In the second column of page 39 they refer to Pyknic men. 667

The Witness: Oh, yes, this isn't just for women. Kretschmer's theory is applied to both sexes.

Mr. Hassell: I think if you will read the article in its entirety you will find that very little space in proportion is devoted to men. We are discussing women.

Chairman Myers: You know, man is the weaker vessel all the way through.

Mr. Hassell: The female is played up.

By Mr. Hassell: 668

Q. Now, the Varga picture at pages 43-44. Doctor, this is a reclining posture, isn't it? A. Yes.

Q. And the covering on this model is quite flimsy, isn't it? A. Yes.

Q. Are these the ribs we see through this garment? A. I think we see the interspaces.

Q. But you see the umbilicus there, don't you? A. I see the depression.

Q. Do you see the nipple on the right breast? A. I see a point there. You can't see the nipple. I suppose the nipple is underneath that. It is pointed on the right, in 669 profile.

Q. Do you still say that there is nothing indecent in this posed picture as shown here? A. I do.

Q. Page 49, we come back to the iceman-milkman motif, in a full page cartoon showing a very hefty red-headed guy or man with—I don't know what you would call that smile on his face—certain of ultra-ultra satisfaction as though he was about to consume a choice dish. He has

670 his arm around this lady, who is seated in his lap, and the lady's breasts are, I should say—or would you say, Doctor,—rather over-sized for her waist measurements?

Would you accept that? A. They are prominent.

Q. Very prominent. And there is a cocktail table or a coffee table with a cocktail shaker and apparently two cocktail glasses on the table.

The man who is holding the woman in his lap has on overalls, apparently. He looks like he might be a workman. The husband—I assume he is the husband—with the very glaring eye and this stare at the sight he sees

671 comes in dressed in topcoat, cane, spats and hat, and we have this legend at the bottom of this cartoon:

"Hello, dear—this is the gentleman who sells us our fuel oil."

Do you say, Doctor, that there are no indecent sex implications in this cartoon? A. I say there are no indecent sex implications. I think it has sex implications, and I think it is coarse and commonplace and rather cheap. I don't personally like the cartoon.

Q. In a situation of that sort what would be the natural assumption of this irate husband if he came in and found his wife in this position after having partaken of cocktails

672 with the fuel oil man? A. I suppose he would be very indignant.

Q. Why? A. I think anybody would be indignant if that is his wife, as you assume, and if she had her arm around the fuel oil man in this position—I think he would be indignant. It indicates they are making love to each other.

Q. The husband shows indignation on his face, doesn't he? A. I can't tell whether that is a smile or a leer or surprise; perhaps it is all of them.

Q. It is a fact, isn't it, Doctor, that some men have been killed for less of an offense than this fuel oil man is committing? A. I have heard of such things. 673

Chairman Myers: They call that the unwritten law.

By Mr. Hassell:

Q. You find nothing indecent, lascivious, or lewd in that picture? A. I do not. I think it is coarse and commonplace.

Q. Page 56—no. 128. A. It begins on page 56. 674

Q. And goes to 128, the article "Portrait Above the Fireplace." I believe you described this story in your direct examination. A. Yes, sir.

Q. Rather accurately, as I recall, except that you didn't read the language of the friend of the hero in the story who imparted to the hero the information that the picture he had idolized was the picture of the madame of a bawdy house. A. I don't know as I used that expression, but I thought I conveyed that idea.

Q. In the fourth column, page 128, it reads:

"Tressant hesitated, but he went on. 'Of course, you don't know, John. I hate to think of anyone ever laughing at you. But that is a portrait of Mabel Haynes. She was the madame of the highest class house in the old district.'"

Doctor, do you say that that story does not have any filthy or indecent implications? A. I do. 675

Q. Do you think it would be perfectly proper as a subject of conversation between two male friends for the one to indicate to the other that a woman whom he has proclaimed as his mother, or the picture of a woman he has proclaimed to everyone as his mother, was, in fact,

676 the madame of a bawdy house? A. Yes, if he knew that to be the case and wanted to be that frank. He was intoxicated.

Q. You say there is nothing indecent or filthy in that? A. Nothing indecent or filthy. It may be poor taste and commonplace writing.

Chairman Myers: Is there anything in the story to indicate she may not have been his mother?

The Witness: Yes, there is.

Mr. Hassell: Yes, but he accepted it as a picture of his mother. He didn't know who his mother was.

677 The Witness: I think that brings out respect of womanhood. Even after he was told this.

By Mr. Hassell:

Q. Coming to "Goldbricking with Esquire". A. Page, please?

Q. On page 93. In this connection, these alleged jokes in this magazine—all of the off-color jokes have not been pointed out here. I so stated to Mr. Harding in my letter. We will only cover those that I pointed out to counsel.

The second alleged joke on page 93 reads:

678 "Five times the beautiful woman stared invitingly at the man sitting in the lobby of the hotel. Then growing bolder she approached him. 'Hello,' she said, smiling sweetly.

"'Don't bother me, madam,' he replied brusquely 'Liquor is my weakness.'"

Doctor, do you contend that there is no indecent implication in this alleged joke? A. I contend that is not indecent. Unquestionably it refers to sex.

Q. In other words, this woman manifestly tried to pick this man up. A. That happens all the time. 679

Q. The third item in that column:

"A pullman porter who had started out on an all-night run had his trip cancelled. Returning home unexpectedly, he took a look around the house, then took out his razor and stropped it vigorously.

"'What you doin', Sam?', asked his wife.

"'If dem shoes stickin' out from under the bed ain't got no feet in 'em, ah is gonna shave.'"

Do you find any indecent implications in this joke? A. I do not.

Q. What would you say the joke means? A. I think the implications are that if there is somebody under the bed he is going to attack him with the razor. 680

Q. Why would somebody be under the bed and why should he attack him with the razor? A. Because he would probably have been visiting his wife.

Q. And having been caught almost in the act— A. Possibly in a compromising position.

Q. Yes. The Pullman porter indicates that he may take revenge on him. A. Yes.

Q. Handle him roughly. A. That is correct.

Q. You say there is no obscene, lewd, lascivious, or filthy implications in that joke? A. No. 681

Q. I believe the next one I called attention to was No. 17 which is the second from the top on page 93, the last column. This reads:

"'What does f-e-e-t spell, Johnny?', asked the teacher. Johnny didn't know.

"'What', persisted the teacher, 'is it that a cow has four of and I have only two?'

"Johnnie's answer was as surprising as it was unexpected."

682 Now, what would have been the expected answer to that question? A. I suppose "feet".

Q. Well, what would have been the unexpected answer? A. I suppose tits.

Q. So with that explanation of that alleged joke you wouldn't say that that is indecent, obscene, lewd, and lascivious? A. No.

Q. Or that it has a filthy implication? A. I don't think it has. I don't think tits is an indecent word.

Q Now, pages 104 and 105: "The Sporting Scene."

683 "Nature's darling discovers that a little learning of sports can be much too much."

Now, Doctor, isn't this a story of a woman war-worker who became fatigued by reason of having been required to pose for pictures in addition to her work, and so forth, and required a rest and was given a vacation? She goes on a vacation. Her name is Libretta. A. Luberta, isn't it?

Q. L-u-b-e-r-t-a? A. That is right.

Q. She goes on a vacation and when she gets to the vacation spot she tries various diverting sports. She tried— A. Golf first, I think.

Q. Was it golf? A. Yes.

684 Q. I believe it was golf. Some man playing golf tried to pick her up and she repulsed him, and then she tried tennis, and the remark is made in the lower part of the second column, "She was not one to injure eyes in her tennis outfit. When her playmate got a load of her lines, he wondered if he could change his room."

Then she goes, I believe, to swimming, and over the first column of page 105, near the middle of the column, it is said:

"Luberta in her bathing suit was not one to be passed up except by a man who had to tap his way around with

a white cane. She dove in quickly and was splashing around, strictly minding her own business, which was very lovely business fore and aft to look at. 685

"Then, be damned if a man didn't swim right into her and go into his act," and so forth.

After repulsing him she gets disgusted and starts back home and on the train, and I am reading from the last column:

"On the train when she gave the conductor her ticket she growled, 'I will slug the S. O. B. who says I'm not doing this right.'"

She was criticized by each of the others who tried to make contact with her heretofore. 686

What do you understand the line, or word, S. O. B. stands for? A. I think we understand what that is. Do you want me to repeat that? I will say that it is a coarse, commonplace expression. I think we all understand what that means.

Q. Well, following this paragraph I read:

"The conductor gulped, but said nothing to Luberta. To a brakeman he whispered, 'Keep an eye on that woman. She's nuts.'

"When Luberta got home she spent the rest of her vacation sitting around the house, or in movies, or saloons. She married a 4-F guy and they were very congenial, having twenty-one progeny just as fast as nature would allow. 687

"One day her husband said, 'Kids are handy as tax exemptions but when I think of bills I feel faint.'

"Luberta went to her spouse and patted him tenderly 'I know, Honey, but you don't realize how much fun something can be without so damn much advice.'

"She meant doing the children's washing, possibly."

Just what did she mean, Doctor? A. Probably having a family and having children or sex life, perhaps.

688 Q. The great satisfaction obtained out of sex relations with her husband? A. Possibly.

Q. You say that there are no obscene, lewd, lascivious, or indecent implications to be drawn from that— A. I do.

Q. —article or story? A. I do.

Q. That was perfectly proper? A. I do.

Q. There was one matter in connection with the "Portrait Above The Fireplace" at 56 and 128.

You will note on page 56, Doctor, that that is one of the prescribed stories or articles in this issue of the magazine. It has the Rx. A. Since you call my attention to
689 that I have looked over these magazines pretty much, and I find that there are a great many of them.

Q. But that is— A. That is one, yes.

Q. "Especially recommended by the editors"? A. Yes. I notice that it has that *recipe* sign there.

Q. Now, coming to the November issue, Doctor, at pages 45 and 46 you have a large two-page picture of the Varga girl with the verse, "Virtue Triumphs," which should be read in connection with the pose and the expression on the face:

"The look of alarm
690 On this bundle of charm
May set up some foolish illusions.
Her state of attire
May also inspire
Some rather ignoble conclusions.
Perhaps you've surmised
That the gal's been surprised
By a villainous sort of a louse—
But, Brother, you're wrong,
You're been wrong right along—
It wasn't a wolf . . . but a mouse!"

Do you say that this pose which, I will be glad to have the record show, happens to be not a reclining pose, she is seated with her legs crossed, that there is nothing indecent, lewd, lascivious in this picture, or the verse accompanying it? A. It is my opinion that there is nothing lewd, lascivious or indecent or obscene in the picture or the verse accompanying it. 691

Q. What sort of garment would you say this lady has on, Doctor? A. I think it is a corset, or corset-like garment.

Q. Do women wear corsets now? A. Yes, some do.

Q. I thought they called them girdles. A. No they are now wearing a girdle material with certain dresses, or corselette, or corset-like materials; and many patients of mine wear supporting corsets. 692

Q. They are the over-stout or misshapen ones, aren't they, Doctor? A. Well, yes. Yes. That may be a girdle. I will accept that correction.

Q. I wasn't correcting it, Doctor. A. I think you may be correct. You are more correct than I. I think that may be a girdle.

Q. Page 52 we have another of the cartoons, the sheik motif cartoons. I will call it such, the full-page cartoon, showing one Oriental gentleman in the background with his arms about two ladies who are none too heavily clad, you might say, walking away, and in the foreground an Oriental gentleman, possibly a sheik, he has a feather or something on his turban, with three other females, dressed in filmy trousers. I guess you might call those jackets, with only partly covered breasts, under which is this legend: 693

"Such a neighbor—always borrowing."

Doctor, what do you think the neighbor is borrowing, these two— A. Women.

694 Q. What shall we call them? A. Harem girls?

Q. Concubines? A. Yes, harem girls.

Q. What do you think the neighbor is borrowing the two girls for? A. Well, you can let your imagination go and say for sex purposes.

Q. Will you say there is nothing lewd, obscene, lascivious, indecent or filthy or having sex allusions or implications that can be drawn from this cartoon? A. I do.

Q. Now, coming to page 60, we have the colored photograph on page 60, and on 61 under the title and description, "The Esquire Canteen. The girls from the Folie
695 Bergere."

The first sentence in that reads:

"Here are five perfectly good reasons why service men and mere civilians pause for laughter, libation and libido at the Folie Bergere."

What does libido mean, Doctor? A. Sex instinct.

Q. Sex entertainment referred to here? A. Well, entertainment of the libido would be entertainment of the broad sex instinct.

Q. Well, they are referring here to—this sentence I have read to you refers to entertainment, doesn't it? A. Yes.

Q. "Pause for laughter, libation and libido at the Folie
696 Bergere." A. Yes.

Q. You still say that that wording, that language, coupled with the very scanty costumes of the females pictured on page 60 doesn't have any obscene, lewd, lascivious or indecent implication? A. I do.

Q. Now, on page 66, we are back again to the half-naked native girl motif, in a cartoon at the top of page 66. This shows two soldiers with their hands upraised surrounded by, on one side, three females clothed in, what do you call those, sarongs, that covers the buttocks only, and nothing

above the waistline? Each of them have a spear, or two of them have a spear and there is one shield, possibly. 697
On the other side two females similarly clad with spears and shields and underneath is the legend: "It's no use, Sarge—we're outnumbered—Yipppppeeee!".

Apparently these soldiers are extremely elated over being outnumbered in this instance, aren't they, Doctor? A. Yes. They seem to have laughter and elation from their expression. They seem to be elated.

Q. Why would you think they would be elated? A. They might be attracted by these girls here surrounding them.

Q. They are attracted by the half-naked women? A. Yes. 698
Q. Who are surrounding them? A. Yes.

Q. Anticipating sexual gratification? A. Possibly.

Q. Doctor, you would still say that that cartoon has no indecent, obscene, or lascivious implication? A. I do, yes.

Chairman Myers: Suppose we recess for ten minutes.

(Whereupon a recess was taken.)

Chairman Myers: All right, proceed.

By Mr. Hassell: 699

Q. Now, Doctor, next we come to the picture appearing on page 73, which appears to be a photograph in color entitled: "Golden Mould." This lady is apparently reclining, is she not? A. She is.

Q. And this silk-like material thrown across her body indicates that aside from that material she is nude, doesn't it? A. I would think so.

700 Q. Apparently the material is so sheer or else it is wet and clings to portions of her body, isn't that true? A. That is right.

Q. You can see the umbilicus here, can you not? A. Yes.

Q. Now, how about the shadow down below that? Would you think that might be the pubic hair showing through the material? A. No, I don't.

Q. The breasts are very definitely defined in this photograph, are they not? A. I would disagree. They are rather indefinite there; pretty well covered completely.

Q. You mean to say the lower outline, more than half
701 of the lower part of the right breast, you can see that, can you not? A. I thought it was rather poorly outlined in this, but I will accept, if you want to say so. Let us assume that it is.

Q. Your imagination wouldn't be strong enough to define the metes and bounds of that breast? A. You are talking about the right side?

Q. Yes. The left as you look at the picture? A. Yes. You can see that there is a breast there, but I think it is poorly defined.

Q. Now, Doctor, in view of the pose, the method employed in covering the model, the exposure of the form,
702 and so forth, don't you say that this picture has any indecent, lewd, lascivious, sex implication? A. I don't.

Q. On page 77, "First Nights and Passing Judgments," an article, the sub-title of which reads: "If play producers give a damn about making this member of the audience happy, they can skip the following." By George Jean Nathan.

The first numbered paragraph in the first column starts out, "Simple interior sets," down to about seven or eight lines which has—perhaps I better read the sentence:

"Simple interior sets, otherwise perfectly all right, which, for no good reason, and merely because their designers can't resist a little artistic self-expression, include such stairways as have seldom been encountered outside the Palazzo Vespucci, or an old-time St. Louis sporting house." 703

Do you know what that refers to, that St. Louis sporting house? A. I don't know exactly, but I will assume that it might be a house of prostitution.

Q. Over in the paragraph numbered 10, this language:

"Young floozie characters wearing short skirts that tightly embrace their hinterparts and who interpret their roles by crossing their legs three inches above the knees and dangling red handbags big enough to hold the books of the Corn Exchange Bank." 704

Their hinterparts are what? What does that have reference to? A. I suppose to the buttocks.

Q. In paragraph 15:

"Any more plots about someone who mistakes an innocent institution for a bawdy house, or vice versa."

There is no doubt about what bawdy house means?

A. No.

Q. Then, column 4, paragraph 21:

"Den don't gimmie any more a dat crap."

What does crap mean? A. Jargon, I suppose.

Q. What is that? A. Any of that back talk. 705

Q. I mean what does the word mean ordinarily? A. It is the vernacular for cheap talk, isn't it?

Q. Does it mean anything very filthy actually? A. It could be, in another sense, not in this sense, but in another sense the word itself could mean something else. I think it could mean dung or manure.

Q. And then it goes ahead:

"What da Hell did yuh tink I wuz gonna do? Hang

706 around dis dump waitin' fer Santa Claus tuh take care a me, fer Chris' sake? Looka you! What a yuh got? Six years yuh went tuh college an' what da Hell a you got?' A lousy handout a thoity bucks a week! Not fer me! Yeah, I got mine, but I took it'" A. That last paragraph, of course, is from The Dead End Kids and these paragraphs are all, as I see it, criticisms and are meant to show up—it is a passing judgment, it is meant to show up and in that way I think they are justifiable.

Q. Does the fact that filthy, indecent, obscene, lewd and lascivious language happens to appear in some play justify
707 the inclusion of that language in a magazine of this sort? A. Well, I don't—

Mr. Bromley: Wait a minute. I object to that question on the ground that it assumes that the language is filthy, indecent and obscene.

Chairman Myers: Read the question.

(Question read.)

Chairman Myers: It seems to me there is an assumption.

Mr. Hassell: I submit the question is entirely hypo-
708 thetical.

Chairman Myers: Well, but it is assuming something, just the same.

Mr. Hassell: I am asking this witness, who is qualified as an expert, and I am assuming that such filthy language is taken from a play, and I am asking him if it is justifiable to include it in a magazine.

Chairman Myers: But are you assuming that it is included in the magazine, or are you stating that as a fact?

Mr. Hassell: I haven't stated that as an assumption applied to this magazine or it is any magazine, generally speaking. 709

Chairman Myers: Well, on that basis, I think the question is proper.

The Witness: On that basis I certainly don't think it should be included in a magazine.

Q. I see. Now, Doctor, do you think this language we find in this article, the language I pointed out to you in several paragraphs which I have read, is filthy, indecent, lewd, lascivious, or obscene? A. I do not. I think it is coarse, profane, and borders on vulgarity. 710

Q. Coming to page 83, the cartoon in the upper left-hand corner of this page which carries other cartoons, showing two girls, possibly of the floozy type, conversing with a man in the background with his face turned away, and apparently dancing couples shown through the door, and to the back of the lady seated in the red overstuffed chair there are what appear to be hats, and under this cartoon appears this legend:

"My date's at the awkward age—all hands and no dough".

Doctor, what do you think that statement made by the female character shown at the left of the cartoon, who has her mouth open, is intended to convey? A. That he probably wants to make love to her, but probably hasn't any money to pay for the dancing. 711

Q. Love how? A. Probably wants to hold hands or put his hands on her.

Q. Would that indicate he wanted to feel the lady on parts of her body? A. That I think is stretching it a bit, possibly.

Q. You don't think there is any such inplication in this cartoon or the language underneath it? A. There might be something of that nature, yes.

712 Q. That had not occurred to you before in your study of this? A. Yes.

Q. It did. A. Not when I looked at the cartoon.

Q. It had not occurred to you when counsel questioned you on direct about this cartoon? A. No.

Q. It just occurred to you now? A. It just occurred to me since I was in here yesterday.

Q. I see. Now, coming to page 89, which is what appears to be a picture in colors with the title "Stage Door Esquire. Backstage at the Greatest Show on Earth," and shows in full two women, portions of two other fully clothed women, one seated and the other one possibly standing, and a hobo 713 clown in the center, the female figure at the lower right clad in an ornate turban effect hat, something draped around her neck that hangs over her breasts, under which appears possibly a brassiere, and three fans of brown crystallite material surrounding her middle or buttocks, with nothing visible in front of her anatomy.

Would you say that this figure in this picture is not indecent, lewd, or lascivious? A. Definitely not.

Q. Now, coming to pages 94 and 95, another one of the usual Esquire features, "Goldbricking with Esquire", purporting to reproduce certain jokes or alleged jokes.

714 Doctor, I believe on direct examination either with respect to this matter or similar matter appearing under the same heading, there was some reference either by counsel or yourself to the fact that this matter was taken from publications produced in Army camps. A. I didn't make that statement.

Q. You did not? A. I know nothing about that.

Q. If that is so, do you think that would affect the question of whether the matter should be regarded as obscene, lewd, lascivious, or filthy? A. No.

Q. Now, we have first, item 4, which is the last item in column 1 of page 94. This extends over to the top of column 2 of that page, and reads: 715

"The corporal was going home on a furlough and was lucky enough to have a Pullman reservation. When he got ready to retire and pulled back the curtains to climb in his berth, he was astonished to find two luscious"—note the word "luscious"—"blondes reposing there. He carefully checked his ticket, reservation and berth number to make sure he wasn't wrong, then said: 'I'm deeply sorry, ladies. I'm a married man—a man of respect and standing in my community. I cannot afford to have a breath of scandal touch me. I am sorry—one of you girls will have to leave.'" 716

You note the statement that one of the girls will have to leave? A. He should have said both of you will have to leave.

Q. And that these are luscious blondes. The implication is, isn't it, Doctor, that he will willingly, gladly, and anxiously spend the night in the berth of one of the luscious blondes? A. That interpretation can be made.

Q. What other interpretation could be made? A. But in his embarrassment in coming on the luscious blondes he should have said, "Both of you ladies will have to leave."

I don't think there is any humor in the fact that he was going to get in bed with one of them, but the humor is in the fact that he said one would have to leave rather than both of them. That's the way I take it. 717

Q. Had the publishers of Esquire so printed the joke, do you think anybody would have gotten any kick out of it? Do you think the publishers of Esquire would have printed it at all? A. I think that is funny. Here is a respectable man in a community—yourself, for instance, Mr. Hassell—who goes to his berth and says, "I am a perfectly respectable

718 man, I work for the Government, but one of you will have to leave."

You would want both to leave and I would, too.

Q. Being a married man, anybody who told such a joke about me would be uttering slanderous words, actionable. A. Certainly, I agree with you.

Q. But, do you think there would be any reason for including this joke at all, or would it have been a joke had it been worded as you indicated? A. Of course, not, that is the point of the joke.

Q. And certainly the obscene, lewd, lascivious implica-
719 tions in that joke— A. There are no such implications. If you cut that sort of a joke out, you cast all American humor in the ash can. That is the most innocent joke and it is as old as the hills and as common as the leaves on the trees.

Q. The fact that it is old does not make it less obscene or lewd or lascivious? A. No, but it is not obscene.

Q. You don't think there is any obscene, lewd, or lascivious implication to be drawn from the story that puts a respectable man in bed with a luscious blonde, a perfect stranger to him, in a Pullman? A. But the man didn't get in bed, did he? We don't know that.

Q. But the joke leaves that impression, that he is willing
720 and anxious and desirous. A. I am sorry, I didn't get that at all.

Q. The next one of these items is item 15— A. Is that on page 94?

Q. The fourth column of page 94. This reads:

"He: 'I see your husband has been promoted to a master sergeant. I suppose he's brillant and knows everything.'

"She: 'Don't fool yourself. He doesn't suspect a thing.'" A. That probably refers to some friendship that she has had with this particular man, with the "He".

Q. Some sub-rosa liaison with this "He", who is talking to this married woman? A. Some sort of friendship or relationship. You can go as far as you like.

Q. Something that is concealed from the husband? A. That is right. 721

Q. The natural implication is that it is a sexual relationship. Isn't that the implication? A. I think that is what most of us think of first.

Q. So, with that in mind you would say there is nothing lewd, lascivious or indecent in this alleged joke? A. No.

Q. Now, the next is item 24, which is the first item at the top of column 2 on page 95, which reads:

"Home on furlough the soldier was surveying his sweetie whom he hadn't seen in months: 'Slimmer, aren't you?', he asked.

"'Yes,' she replied, 'I've lost so much weight you can 722 count my ribs.'

"'Where,' asked the G. I. with a gleam in his eye, 'do I start?'"

Doctor, do you think this implies or conjures up a vision of this G. I. soldier, home on furlough, starting on a manual excursion of the body of the lady to whom he is talking? A. I didn't get that.

Q. You didn't get it? A. No.

Q. I see. So you think there is no obscene, lewd, lascivious implication in this joke? A. I do not think there is any obscene, lewd, lascivious or filthy implication in this joke.

Q. Or indecent? A. Or indecent. 723

Q. Item 27, which is the last item on column 2 on page 95 and extends over to the top of the next column and reads:

"The beautiful Army hostess, newly arrived in camp, thought she would take a nude dip in the clear blue lake while the men were out on drill and no one was nearby. It so happened that a rookie K. P. was sent down to the lake for a bucket of water, and seeing her pink clothes on the bank, sat down to watch. The beautiful Army hostess re-

724 mained submerged up to her neck until she could no longer stand the chilling water, whereupon she scampered up the bank and found an old dish pan half buried in the mud. Hurriedly digging the pan out, she held it in front of her like a shield and came ashore.

"'You wouldn't have such a smirk on your face if you knew what I'm thinking', she said.

"'Oh, I know what you're thinking, all right,' said the K. P. 'You're thinking that pan's got a bottom in it.'"

Now, what portion of the anatomy of this nude female do you think, Doctor, that pan was covering? A. In imagination we could say that it covered her genitalia. Apparently 725 it didn't.

Q. Here we have a joke and, as near as words can approximate it, a picture which definitely shows the pubic regions there. This young woman exposed to the view of this young man— A. We have in this a joke first. Secondly, words which lead some imaginations, probably not all, to conclude what you have just stated about it. I still feel it is not lewd, filthy, indecent, or obscene.

Q. But this joke does point to the most erogenous zone as far as the male eye is concerned, does it not? A. It may connote that. It is by connotation only; it does not describe 726 it.

Q. What, aside from that, does it describe? A. Just what it says. You and I are now talking about this joke, the connotations of what is written here.

Q. The natural implications, the natural or the perfectly reasonable picture that any man would get from reading those words. That would be a visualization of just what is said here, would it not? A. That would be a visualization of genitalia. What his visualization of that would be might be different from yours or mine.

Q. What else could it be? A. Nothing else.

Q. In view of that, you still say that there is nothing lewd, lascivious, obscene or indecent in this joke? A. In this joke, yes. 727

Q. Now, the next item is 28, which is the second item appearing in the third column at the top of page 95. This reads:

"Have a good time at the party, daughter dear, and be a good girl."

"Make up your mind, mother."

You say that that alleged joke has no obscene, lewd, indecent, lascivious implications, Doctor? A. I do.

Q. You think it is perfectly reasonable to presume that this girl could not be a good girl— A. And have a good time. 728

Q. And have a good time? A. I am assuming that, yes.

Q. But that doesn't convey to your mind anything indecent? A. Not as a joke, no.

Q. The next item in number 30, which appears in the second from the last item in column 3 on page 95 and reads:

"Buck private: 'I'm afraid we can't have much fun tonight. All I have left of my pay is some small change.'

"Sweet young thing: 'Well, how much do you think it takes to send my kid brother to the movies—a five dollar bill?'"

Would you say, Doctor, that you don't think there is anything indecent, lewd, lascivious, or obscene in that alleged joke? A. I do not. 729

Q. No such implication? A. No, sir.

Q. Would your approach to these alleged jokes be altered, Doctor, by the fact that they are carried in a magazine purportedly for men only, or for men and a magazine that features such things as this and the cartoons that we have called attention to and the pictures that we have called at-

730 tention to? A. I don't think I would call them any differently anywhere.

Q. The next item is number 31, the last item in column 3 on page 95.

"'Pardon me, Miss,' said the sentry. 'But it's against regulations to swim in this lake.'

"'Well, for Heaven's sake!,' exclaimed the maiden, 'why didn't you tell me before I undressed?'

"'It ain't against regulations to undress, lady.'"

Would you gather that this sentry, who is talking, gets any sexual gratification from viewing this young lady who was
731 about to swim in the lake in the nude? A. I couldn't get that interpretation of what the soldier gets from it. I think he was being very technical and it is sort of a coarse joke.

Q. You say it is coarse, but not lascivious, lewd, obscene, or indecent? A. That is right.

Q. Now, the next item is 35 or 36. I assume the cartoon probably does go with this joke.

Mr. Bromley: That is a picture of soldiers camouflaged as trees. They are undoubtedly looking through the holes, too.

Mr. Hassell: At two nude females in the water.

732 Mr. Bromley: You bet.

By Mr. Hassell:

Q. And another one removing her clothing on shore. And under the cartoon appears this legend: "You're sure there are no soldiers around here?", but from the way the trees are leaning, some peeking behind others, apparently there are soldiers there.

Now, under that follow this—I think it is separate from the next item, 36—that appears to be a joke in itself. 733

Here is the fourth item, the cartoon and legend at page 95, column 4. And under that is item 36, the fifth item on that page, which reads:

"A beautiful young lady went for a swim in a secluded spot, but forgot to take a towel. She had a swell swim then came out on the bank and was allowing Nature's balmy breezes to dry her, when she heard a rustling in some nearby bushes, 'Whose there', she cried in alarm.

"'It's Willie,' answered a rather high-pitched voice.

"'How old are you, Willie?' asked the girl.

"The answer came quickly: '79, darn it.'" 734

Now, taking the cartoon, Doctor, item 35, which we referred to first here, do you accept counsel's statement that there are soldiers camouflaged as trees in the background, peeking at these girls in the nude and getting nude and preparing to swim? A. I will.

Q. Would you say that there is nothing indecent, obscene, lewd, or lascivious in the implications to be drawn from this cartoon, and the legend underneath it? A. I do.

Q. Do you think it is perfectly proper for soldiers or males to peek at females surreptitiously while such females are in the nude or in bathing? A. I do not.

Q. You think it is perfectly proper to recount that in a joke of this sort? A. I do, in a joke. 735

Q. And you think no obscene, indecent, lewd, or lascivious implications can be drawn from the cartoon? A. I feel certain of that.

Q. As to the other item, 36, there is an individual lady in that alleged joke and it appears that Willie is in the bushes peeping at this individual nude who has come out of the water and is drying herself in the breeze without a

towel. Here we have the peeping Tom motif, don't we? A. It could be.

Q. It could be? A. Yes.

Q. And why does 79-year old Willie say, "Darn it", when he tells his age? A. He probably doesn't get much sexual inspiration from the nude figure.

Q. But the person who would buy such a book as Esquire and read such jokes as this, probably would get some sexual gratification from reading that? A. I wouldn't say that.

Q. You wouldn't yourself, would you, Doctor? A. No.

Chairman Myers: While Mr. Hassell is waiting, perhaps you will clear this up.

As I understand, when you refer to mores, you mean the habits, customs, traditions, institutions, and other undefinables that make up conduct in the life of people in a given time and place?

The Witness: Yes, I do.

Chairman Myers: That is like Professor William Graham Sumner's definition attributing all human conduct to four particular things, hunger, fear, love and hate.

The Witness: Yes.

Chairman Myers: And you are in the medical field to psychiatry what the surgeon would be in another field of medicine?

The Witness: That is right.

Chairman Myers: You have made a special study of that line?

The Witness: Yes.

Mr. Cargill: Possibly you could define, Doctor, the sexually normal person. What would be the sexually normal person?

The Witness: First of all, there are a great many variations within the normal sexual individual, and it is a pretty broad field to define, but I would say the average normal individual gets his sexual gratification in the normal way. I would say that the average normal individual abides by the conventions and standards of our society and does not get any real sex stimulation from anything that is presented here, that has been interpreted as inspiring sex. 739

As a matter of fact, in thousands of cases I have studied it is only a minimum, even of the abnormal, who get any sexual gratification from pictures, sex material, and those individuals are usually sex deviates. 740

I defined the normal person who would read a story or a joke with a double meaning and get a laugh out of it, but that wouldn't inspire him to read more material or to impure thoughts or to sex activities. Most of the sexual psychopaths, the deviates, don't get any kick out of these magazines. They want something, they want the real thing, they want something that really goes to town. Something that is really obscene and vulgar without any question. The normal individual, on looking at these magazines, as I view it, doesn't get any particular sex inspiration out of them. They get the humor and they get the play on the instinct of sex and they get the thrill. 741

For instance, I asked a boy at the induction center "Do you like to go out with the girls"?

He says, "Doctor, don't you like to go out with women"?

I don't think there is anything sexual except in a broad way in that. I mean when the average American

742 individual—for instance, in thinking it over, I think the 20 who do, and the 20 who don't, and the 60 who don't get the opportunity, is about right. I think that refers to the expression of sex. I suppose that expresses sex in the unmarried, but in my work with the normal at Harvard College I would say that far less than 20 percent of the boys have had sexual experiences. I would say that well over 65 percent have sexual problems in adolescence. I would say well over that. I would say 65 percent that come to the psychiatrist, or hygiene department, for clarification, and never have any of those men been troubled except one or two deviates with current literature books, either Esquire or any other. They know more than that. They are wise to the facts of life; in fact we give it to them in very good books, like Kuykendahl's "Sex Practice in Young Men." We cite case histories in that.

743

The older patients—I think our education now is to try to educate the younger people so they won't have to go through the experiences that my middle-aged patients or older patients have gone through, where, if they had known more about it, and the sex wasn't frowned at, or wasn't tabooed, and the forbidding of this material led them not to get a proper orientation.

744

Does that answer your question?

Mr. Cargill: That is very good.

Now will you give me a definition of the sub-normal?

The Witness: Sexually?

Mr. Cargill: Yes.

The Witness: Well, we run into sex problems, or sub-normal sex problems, in two groups. First of all is the feeble-minded group. The group who haven't the normal intelligence, and many of them are in institutions, and, of course, many of them are outside, unfortunately, and they would be the group that wouldn't necessarily be able to read and write very much, but they are interested in sex. They are the low moron type, and they get into such difficulties. 745

I think a good part of the prostitution are in the mentally deficient and the low intellectual standard as well as low moral standard.

Then we have the sexual psychopaths, the individual who may be a most intelligent individual, he may occupy a very important part of society. He may be a clergyman, or priest or doctor or lawyer or anyone, and he may be quite successful, yet part of his life is devoted to really trying to satisfy some craving in his sex instinct, and he doesn't quite know what it is. He may have a perfectly satisfactory married life, or it seems to be, and yet it is unsatisfactory, and he may go scouting around for lewd pictures, or obscenity, or things like that. 746

There are many deviations. I haven't touched on homosexuality or the numerous deviations in sex, but that gives you a general idea. 747

Now, there is no way of knowing what percentage of the population has sex problems. I can't judge that, but in the so-called neuropsychiatric group that I see, and I have seen a lot, I think sex plays an important part in some way in at least one-third.

Mr. Cargill: Would you say, then, that one-third of the people of the United States would be sub-normal?

The Witness: Oh, no, I didn't mean that at all.

748 Mr. Cargill: Have you any idea, or could you give us any estimate of this sub-normal percentage?

The Witness: No, it would only be a guess. But from my work at the induction center I think that the intellectual average of the men who come through the first corps area, this is just men, is just about what we think that it should be. We have had sometimes, in 500 men a day, rejections, as sub-normal mentally, for the Army, of as many as 25.

Mr. Cargill: Twenty-five out of 500?

749 The Witness: Five hundred, yes.

Mr. Cargill: It would be five out of a hundred?

The Witness: Yes.

Mr. Cargill: Five percent?

The Witness: Yes. That is a little high for our area. Other days it wouldn't run more than one or two, or three percent.

Mr. Cargill: Do you think there is any difference in that percentage between men and women?

The Witness: No, I wouldn't say so.

Mr. Cargill: Would you say it would be the same?

The Witness: About the same, I should think.

750 Mr. Cargill: Doctor, what would be your definition of sexual impurity?

The Witness: You mean as an act?

Mr. Cargill: No. We have used the word sexual impurity here during this hearing.

The Witness: Well, anything that stimulates lasciviousness and inspires sexual desires that are illicit. Anything that stimulates the sex impulses so that it might be difficult for the individual to control that impulse, I would say, would be inspiring impure sexual thoughts.

Mr. Cargill: Do you think that pictures or reading material would inspire the sexual impure thoughts in this five percent, or sub-normal people? 751

The Witness: I am sorry. That five percent wouldn't be able to read sufficiently to get it, but those were the real illiterates. But let us take a group higher. It would be a group higher than the group you referred to and that would be, I would say, arbitrarily, another five percent, and I think that five percent, if they saw grossly obscene and indecent things would get some inspiration out of it. They wouldn't be able to see double meanings or get double meanings out of things such as the jokes we have had here. 752

Mr. Cargill: Do you think that having those inspired thoughts that would lead to further acts?

The Witness: Not necessarily. They might in some.

Mr. Cargill: Well, Doctor, do you believe in the normal and the sub-normal and the super-normal that they practice any time during their lives up to, say, 25 or 30 years, that they practice sexual impurity any time?

The Witness: Do you mean by that masturbation?

Mr. Cargill: Yes. 753

The Witness: I think the majority of both men and women up until adolescence masturbate, a great majority, and after that—

Mr. Cargill: What percentage would you say that is?

The Witness: Well over 90 percent. They may do it more or less unconsciously, but it is masturbation, and I think most of that would be conscious.

Mr. Cargill: Then 95 percent of our population through adolescence does perform this act?

The Witness: I would think so.

754 Mr. Cargill: Do you think that pictures and literature have a tendency to excite or cause this practice to be more prevalent than it would be ordinarily?

The Witness: I do not, except in the exceptional cases.

Mr. Cargill: Doctor, having studied these magazines, these eleven magazines, and having devoted considerable time to them, do you think that the magazine features sex as a feature?

The Witness: I do not.

755 Mr. Cargill: Do you think that the cartoons play on that—

The Witness: Yes, they do.

Mr. Cargill: —on that particuar feature?

The Witness: Yes.

Mr. Cargill: Sex?

The Witness: Yes.

Mr. Cargill: And the cartoons are a regular feature of the magazines, aren't they?

The Witness: Yes.

Mr. Cargill: Then would you say—

The Witness: Yes, sir.

756 Mr. Cargill: —that that is one of the features?

The Witness: Yes, sir.

Mr. Cargill: Of this magazine?

The Witness: In a general survey, yes, it is.

Mr. Cargill: Would you say that those cartoons depict loose morals?

The Witness: No. The cartoons?

Mr. Cargill: Yes.

The Witness: Those are the pictures. Certainly some of them do.

Mr. Cargill: And yet they are a feature, are they not, of the magazine? 757

The Witness: Yes.

Mr. Cargill: Would you say that the pictures and the cartoons and the reading material in these magazines properly portray the customs of our times?

The Witness: Yes, I think that they do.

Mr. Cargill: You don't think that the magazines at large are loose and immoral?

The Witness: No, I don't think that those are immoral or loose.

Mr. Cargill: Yet you say that the cartoons do depict times and customs of our times? 758

The Witness: I think they do. The jokes are characteristic of jokes you see in other periodicals.

Mr. Cargill: Turning to these magazines, would you give a definition of them as sexey magazines? Would you put them in that category, in your opinion?

The Witness: Yes, I think they are somewhat sexey.

Mr. Cargill: That is all.

By Mr. Hassell:

759

Q. You refer to the young adults with whom you came in contact at Harvard College as being sophisticated and educated on sex matters? A. More or less.

Q. That the education along that line is to remove the veil of secrecy, bring sex out into the open? A. Bring it out as a biological fact of life, and as a biological component of the well integrated individual.

Q. That is the philosophy of the nudist, isn't it? A. No,

I wouldn't think so. I think the nudist is the extremist.
760 Yes, he may adopt that philosophy, but I think as a rule they are extremists.

Q. Have you read any nudist books? A. Yes, I have.

Q. Isn't that the philosophy they preach, Doctor? A. They do in an extreme degree.

Q. How do you mean extreme? A. Well, they are extremists.

Q. They are bringing sex into the open, aren't they, Doctor? A. That is true.

Q. They have the sex commingled; they have the two sexes commingled to get accustomed with one another. A. That
761 is not what I am talking about. I don't approve of that at all.

Q. Their contention is that that militates against the impurity and immoral sex conditions. A. That is not what I am talking about at all.

Q. Would you admit, Doctor, that you cannot predict what would be the reaction of any particular male who reads these pages of Esquire magazine? A. That is true.

Q. You cannot say for certain that it will not, or portions of it will not arouse libidinous thoughts and ideas? A. I cannot.

762 Q. You cannot? A. No.

Q. Now would you say that any intelligent person, normal intelligent person, can easily and readily and quickly decide for himself the effect, from a sexual standpoint, that these things in these magazines would have upon his mind? A. That is right. I think he could.

Q. Now, Doctor, you have spent a good deal of time, haven't you, before you came here? Ten days or two weeks in studying and conferring about the matters involved in these magazines, have you not? A. Yes, I spent a good deal of time.

Q. Your time is valuable? A. I consider it so.

Q. You are, in fact, being paid a substantial fee for being here to testify aren't you? A. I expect to be. 763

Q. You have been offered, or promised that? A. I have been given to understand that my regular fee would be forthcoming and, as a matter of fact, my regular fee will be somewhat lower than usual because I am interested in the fundamental issues as I see them here. I went to a great deal of time and trouble to cancel important engagements today in Boston to stay here and see this thing through.

Q. So you are somewhat here in the capacity of a crusader? A. I think the freedom of the press and so forth is involved here. It has been sold to me that way, anyway. 764

Q. You are here, then, somewhat in the capacity of a crusader? A. I am, and my successors are.

Q. Would you want to tell the Board what fee you are being paid? A. I don't know yet.

Q. You don't know? A. No.

Q. You said your regular fee. What is your regular daily fee? A. My regular daily fee is $500 a day for going to court to testify.

Q. Have you testified as an expert on obscenity in any court cases? A. In several cases where obscenity has been involved in Massachusetts. I can't cite the cases at the moment, but I have. 765

Q. You were called to testify as an expert to advise the court as to whether or not the matter involved was obscene or was not? A. I have many times done that.

Q. Can you cite us one such case? A. By the Attorney-General of Massachusetts, Bushnell. I can't cite the case. He has the file.

Q. The Attorney-General Bushnell of Massachusetts called you and you actually appeared in court to testify as an

expert on obscenity? A. No, I think I conferred with him
766 I was in consultation with him and advised him concerning cases on obscenity.

Q. But you didn't testify in court? A. I can't recall definitely any specific cases in court."

Q. You can't recall any case, or one case, in which you testified as an expert on obscenity? A. In court?

Q. In court. A. No, not at this moment.

Q. You think you are an expert on obsceneness, lewdness, lasciviousness, and filth, do you, Doctor? A. I think my capacity as a psychiatrist which deals most intimately with the human mind in all of its variations and its normalcies
767 and abnormal states leads me to have a better than average knowledge of what is obscene and what is the effect of obscenity, lewdness, lasciviousness and all these terms that have been mentioned here, what effect they would have on the individual, the normal and average individual.

Q. Just what experience have you had as an obscenity expert? A. I don't call myself an obscenity expert.

Q. You don't? A No, indeed.

Q. You don't call yourself— A. I don't know what it means. I didn't know there were such things.

Q. An expert on lewdness or lasciviousness? A. Not at all.

768 Q. Indecency or filth? A. Not at all.

Q. You don't call yourself that? A. I don't call myself an expert on any of those categories, neither have I ever heard of one.

Q. Just how much experience have you had in examining to determine whether or not there are lewd, lascivious, obscene, indecent or filthy books, pamphlets, pictures, papers, writings under statute, local, state or federal statute? Just how many of such things have you examined in the course

of your experience? A. Not many statutory, except those specified. I don't know what the statutes are. I don't know what the legal situations were, except that I have been asked in connection with case studies, and in connection with legal action against individuals to examine the material as well as the individuals. 769

Q. In this case in which you advised the Attorney-General of the State of Massachusetts in which obscenity was involved, was your conclusion and recommendation accepted by the attorney-general and acted upon by him? A. I believe it was.

Q. You believe it was? A. I know it was because he called me on all matters pertaining to psychiatric and related subjects. 770

Q. You are now testifying that as a matter of fact he has acted upon your advice in bringing indictments and prosecutions under Massachusetts' obscenity statutes? A. I don't know whether he brought indictments or not. You will have to confirm that with him. I know he usually takes my advice in matters of this kind. Probably he takes other advices, too.

Q. How does he take it if he doesn't indict? A. I don't know. I can't speak for the Attorney-General of Massachusetts.

Q. He tells you he takes it, does he? A. Yes, he does. 771

Q. Or you understand that, or get that impression? A. I get that impression. I know him very intimately.

Q. I see.

Mr. Hassell: That is all.

Redirect Examination by Mr. Bromley:

772 Q. Doctor, in any one of your answers did you mean to intimate that, in your opinion, the magazine, as a whole, was sexey, did you? A. No, I did not.

Q. Your answers to the member of the Board who addressed the questions to you were intended only to characterize the questioned material being sexey? A. The questioned material in these eleven issues?

Q. Yes. Let me ask you this: Do you mean to say that the questioned material is sexually impure as distinguished from being sexual? A. Definitely not.

773 Q. Would you mind telling us, then, what the priest said when you submitted the material to him? A. The priest said that he saw nothing obscene or indecent about any of the material that he glanced over, and he saw no reason why—he thought that the magazine fulfilled a public need.

Q. Never at any time in any of your clinical, public or private, experience did the magazine Esquire play a part as a factor in any patient's sex problems? A. It did not. It has not.

Q. Would you say that our current day moral standards are featured by a frankness and forthrightness of expression about sexual matters which is far different from what prevailed 25 years ago or more? A. Very definitely.

774 Q. Do you believe that as far as the youths of the country are concerned frankness and forthrightness of expression in sexual matters may very well, in the majority of cases, build up a resistance against lewdness, lasciviousness, and sexual impurities rather than break down the moral stamina? A. I do.

Q. Will you tell me this, Doctor: In connection with some of the items you have used the term "commonplace."

Is it your position that although some of the material is coarse, or even profane, the material does not become obscene or lewd or lascivious or filthy? A. Yes, sir. 775

Q. Referring to burlesque a moment, you stated to Mr. Hassell that burlesque has a sexual appeal to many people. Assuming that burlesque has a sexual appeal to many people, would that fact, in your opinion, render the descriptions of burlesque, or the illustrations thereof contained in any of the questioned issues, either obscene, indecent, lascivious, lewd, or filthy? A. It would not.

Q. Now, adopting Mr. Hassell's interpretation of the 20 percent do, 20 percent don't, and 60 percent might, in connection with the juking scene referred to in the "Eve of St. Mark" play, does that change your opinion that that material, text and material, is not obscene, indecent, lascivious, lewd, or filthy, and has no tendency either to corrupt morals, lower standards of right and wrong, or stimulate sexual impure thoughts? A. I believe it does not. 776

Q. Adopting Mr. Hassell's interpretation of the apparel on the various Varga girls and its nature, does this in any way change the opinion which you have expressed on your direct examination with reference to these drawings? A. It does not.

Q. Similarly, Doctor, adopting Mr. Hassell's interpretation, or indeed any other interpretations that have been suggested by anyone to your knowledge, as to any of the complained of material, are your opinions expressed in your direct examination on any of the complained of material changed in any way? A. They are not. 777

Q. In connection with your cross-examination, relating to the take thou sign in the August number, beneath the title, "Many Wives Too Many," will you turn to the table of contents, please, in the August number and read from the

778 names of the articles in that table which carry the take thou sign? A. "Many Wives Too Many," "Reporter to the Nation," "Carry on Mr. Barnes," "Credo for a Soldier," "The Eagle Stirs the Nest," "The Esquire Sports Poll."

Q. Do you find in that list any undue emphasis on sex in the take thou sign? A. I do not.

Q. Now, an inspection of each issue, and the table of contents thereof, will indicate in connection with what subject-matters that take thou sign was used, will it not? A. It will.

779 Mr. Bromley: That is all.

Recross Examination by Mr. Hassell:

Q. Doctor, I thought you testified on cross-examination that you were not familiar with any of the matters in this magazine excepting and save those pointed out in this case. A. I did.

Q. Now you are testifying as to what the table of contents means and shows with respect to all the other articles. A. I know, I didn't mean that.

Q. Now, what material did you show this priest from Esquire? What issue, what particular material? A. He
780 picked it up but I can't say—he looked at a couple of issues and he consulted with me concerning this action. He happened to be in my home soon after this thing occurred, and I don't take any stands that I don't consult the priest about.

Q. And at that time were you acquainted with all of the items that attention was to be called to here? A. No, Mr. Hassell. I think we only had a part of the specified material. I think subsequently I received some more.

Q. And he picked up a couple of these issues and casually glanced through them? A. I think he looked at them rather carefully. 781

Q. How long did he look at them? A. He spent all evening with me and I think he spent at the magazines a half to three-quarters of an hour.

Q. A half to three-quarters of an hour on two magazines? A. Yes.

Q. And he thought everything in the magazine was perfectly proper? A. He didn't say they were improper. He said he thought they fulfilled a purpose.

Q. Do you want to state the name of the priest? A. I will. If this was in the nature of a confidential thing I would not, but I will if you want it. 782

Q. Doctor, you are making use of him here. A. I didn't make use of him. You brought him up.

Q. You brought him up to support your testimony. A. I didn't bring him up at all.

Q. You cited him to support your testimony. A. I cited him as an answer to a question of yours.

Q. But you brought it up. A. Let us review the record and see.

Mr. Bromley: The record is counsel asked you whether you had ever shown it to a clergyman and you said, you had to tell the truth because you were under oath, you said you had. 783

Mr. Hassell: I don't recall asking that question, but if I did I stand corrected.

The Witness: I think you did, Mr. Hassell. I did not intend to bring him in.

784 *By Mr. Hassell:*

Q. Doctor, did you know everything that figured in the sex or case histories of every single patient or individual you have examined professionally? A. I don't, and neither does any other psychiatrist or human being.

Q. Now, patients are inclined to be secretive about their sex habits and lives, are they not? A. As a rule.

Q. And particularly those who might forget? Those who might not recall at the time what effect this material had on them when they were talking to you? A. That is right.

785 Q. They might not recall it when talking to you? A. That is right.

Q. You can't say definitely that none of your patients ever were influenced in their sex life by the material they saw in Esquire, can you? A. I cannot.

Mr. Hassell: That is all.

Mr. Bromley: That is all.

Chairman Myers: May the Doctor be excused?

Mr. Hassell: Yes.

Mr. Bromley: Yes.

Chairman Myers: All right, Doctor.

786 (Witness excused.)

Chairman Myers: If there is nothing further we will adjourn until 1:30.

(Whereupon, at 12:00 o'clock, noon, the hearing in the above-entitled matter was adjourned until 1:30 o'clock, p. m. of the same day.)

AFTERNOON SESSION.

787

(The hearing was resumed, pursuant to the adjournment, at 1:30 o'clock p. m.)

Chairman Myers: Proceed, gentlemen.

Mr. Bromley: I will call Mr. Smith.

HERBERT W. SMITH, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Bromley:

788

Q. Your name, please? A. Herbert W. Smith.

Q. And you live where? A. 180 Prairie Avenue, Chicago, Illinois.

Q. Your business is what, sir? A. Principal of a school.

Q. What school? A. Francis W. Parker School.

Q. What kind of a school is that, Mr. Smith? A. Co-educational school for boys and girls, beginning approximately at the age of four and continuing up to college.

Q. Your educational background is what, sir? A. Bachelor of Arts degree, Harvard University, Master of Arts degree, some subsequent study, but no additional degree.

789

Q. Where did you receive your preparatory training? A. Boston Latin School, a public latin school in Boston.

Q. Following your graduation from college you became an instructor in English at Harvard? A. I simultaneously held two appointments, assistant in English at Harvard, and one as instructor in English at Massachusetts Institute of Technology.

Q. Did you follow that profession from 1912 to 1917? A. Four years at M. I. T. and five at Harvard.

790 Q. Thereafter, did you become head of the English department in the Ethical Culture school, from 1917 to 1929? A. I did.

Q. What is the Ethical Culture school and what kind of a school is it? A. The Ethical Culture school is in New York City, Central Park West. That also is co-educational, covering the same age range. It was and is conducted by the National Society for Ethical Culture.

Q. And thereafter did you become the principal of the Fieldston School in New York City? A. I did.

Q. And were you principal from 1925 to 1938? A. Yes.

791 Q. What kind of a school is that? A. That was the six upper grades, really, of the Ethical Culture school which were separate and were sent to a site on the outskirts of the city and were affiliated as a part of the ethical culture school system.

Q. In 1938 were you assistant professor of education at Ohio State University? A. Yes, during the summer.

Q. And in 1929 and 1930 were you a lecturer in education at New York University? A. During the winter semester.

Q. And from 1937 to 1940 were you instructor in education and administration in the Harvard School of Education in summers? A. That is correct.

792 Q. Were you a director of Graduate Teachers College at Winnetka, Illinois? A. Was and am.

Q. Were you associate director of the American Review from 1923 to 1924? A. Yes.

Q. You are a member of the School and College Conference on English, Progressive Education Association, Country Day School and Headmasters Association? A. Yes.

Q. And are you now president of the Association of Private School Associates? A. No, I was last year.

Q. Are you now secretary of the National Council of Independent Schools? A. National Council of Independent Schools, not the National Council of Education. 793

Q. And since 1938 have you been the headmaster of the Francis W. Parker School in Chicago? A. The title is "Principal".

Q. What kind of school is that? A. That again is a co-educational school for ages approximately four to college age.

Q. So, it would be correct to describe you as an educator in the field of pre-college youth? A. Yes.

Q. How many children do you have in your own family? 794
A. Four.

Q. What are their ages and sex? A. A man is always embarrassed when his wife is near and that question is asked. One is approximately 31, 29, 22 and 18. The two older are girls and the two younger, boys.

Q. Is one of your sons a pilot in the Army? A. Yes.

Q. And the other is in the Army? A. The other is in the A. S. T.

Q. Now, have you had any special experience with boys or girls from the age of 11 to 20 in the course of your professional career? A. Practically all of my experience has been especially in dealing with boys and girls of that 795
age, as instructor in English and in various departments in English I was responsible for guiding the reading, talking with them about the reading, reading what they wrote, both about their own reading and about their own experience.

As principal, I, of course, have had wider responsibility in guiding the personal lives. This would tend to extend beyond the age of those people, so that I am now teaching some of the children of the people whom I have taught in school in previous years.

796 Q. Where were you born and brought up, sir? A. Boston.

Q. Have you, at my request, Mr. Smith, examined the cited and specified material which has been charged here as being obscene in the magazine, Esquire, for the months January through November, 1943? A. I have.

Q. On the basis of your knowledge and experience and particularly your contact with youth of high school and lower school age and college age, are you able to give an opinion as to the likely effect of this material on normal average human beings of high school age or younger? A. I think so.

797 Mr. Hassell: What was the answer?

The Witness: I think so.

Mr. Hassell: "I think so"?

The Witness: I am willing to alter that and say I am.

By Mr. Bromley:

Q. Have you examined with particularity all of the Varga girl drawings in all of the eleven issues, and are you familiar with them and the verses accompanying them? A. Yes.

798 Q. Now, will you tell me whether or not in your opinion you found anything in those pictures and verses which is obscene, lascivious, lewd, filthy or indecent? A. No, I didn't.

Mr. Hassell: I object to an answer to this question. This witness obviously, by reason of the fact that his particular experience, as indicated in his answers to the questions thus far, is not qualified to furnish a helpful reply to such a question as that asked.

I think I can recall to the experiences of each member of this Board the fact that during his early 799
youth and adolescent life he did not make it a practice, nor did his associates make it a practice to parade opinion respecting sex and his attitude towards sex to his school teachers. I don't think this witness is qualified, and I don't think the testimony that is proposed to be adduced through him will be of any value whatsoever on the issue here involved, and at this point, before this witness was produced, I failed to renew my motion to the testimony of the preceding witness.

I would like to have it understood that I object to 800
all this sort of opinion testimony respecting this material we have here, and I would like to enter a general motion that the prior witness' testimony be stricken and that all of the testimony up to this point be stricken as to this witness.

Chairman Myers: The motion is overruled.

Mr. Bromley: Will you read the question?

(Question read.)

The Witness: I have not.

801

By Mr. Bromley:

Q. Now, in your opinion, Mr. Smith, is there anything in those drawings that would stimulate sexually impure thoughts in the classes of youth which you have referred to? A. May I ask whether the question refers to the Varga drawings specifically or all the material?

Q. I am referring now only to the Varga drawings and all of them in all the eleven issues. A. In my opinion, it would not.

802 Q. In your opinion, is there anything in any of those Varga drawings or verses which would have a tendency to corrupt morals of youth? A. On the contrary.

Q. By the answer "on the contrary", you mean what? A. That is a question I should like to answer at some length, if Your Honors will permit.

Chairman Myers: Go right ahead.

The Witness: I mean something specific there. The policy of education for at least the last fifteen years has been to do everything that could be done to free young people from the idea that the body itself was necessarily obscene or anything to be ashamed of.

803

The drawings as presented in Esquire, in my opinion, do not present the body in such a way as to make it obscene, shameful, but, indeed, tend rather to idealize it.

Under those circumstances, it seems to me that they perform a valuable function.

By Mr. Bromley:

804 Q. Now, sir, in your opinion, is there anything in the drawings or the verses which would tend to lower the standards of right and wrong of youth, so far as regards sexual matters? A. I think there is some variation in the different drawings. I would rather answer with reference to the individual drawings on that question.

Q. Can you answer this question generally: Is there, in your opinion, anything which would tend to stimulate impure sexual thoughts in any of the drawings or the verses? A. No. I think there is not.

Q. Now, will you open the January issue to the collection of 12 Varga drawings and comment on the question which you said you would have to look more specifically with regard to? A. May I have the question read? 805

(The record was read as directed.)

The Witness: As the question is phrased I can answer it without looking at the individual drawings. The crucial words are right or wrong. I think there is nothing in the pictures which would tend to lower the standards of right or wrong.

Mr. Cargill: Will you speak a little louder, please? 806

Mr. Bromley: Will you please read that answer, Mr. Reporter?

(Answer read.)

By Mr. Bromley:

Q. Now, will you make what comments you desire in support of your opinions, taking up the 12 pictures in the January issue as briefly as you can? A. Yes. The first of these pictures is obviously of a girl who is by herself, thinking of her absent lover in the innocent sense of the word. There seems to be no suggestion of anything else. He has given her the possession he is proudest of, she has given him her affection. I fail to see anything that would be even suggestive in the evil sense of the word. 807

Q. The possession of his is the medal to which you refer? A. The possession is the medal.

In the February picture again you have a figure as fully revealed as convention allows. The verse that goes with it again makes it clear that the girl is thinking of her

808 absent lover and longing for the time that they can go on with the dreams that they have had.

Mr. Cargill: Doctor, when you say "dreams", what do you mean by that?

The Witness: I would expect they were dreams of married life and the future. She says:

"February makes me dream
Of castles in the air,
The castles that we'll live in
When it's over over there!"

809

That would seem to point directly to the fact that she is thinking of the man she is engaged to or hopes to be engaged to, and, when the war is over they will go on with their lives.

Shall I go on?

By Mr. Bromley:

Q. I only want to give you the opportunity, Doctor, to make comments as to such of these drawings as you said you desired to, if any. A. I think it would be worthwhile
810 —unless you wish me to comment on every drawing—I think it would be worthwhile to explain what I meant by saying I thought the drawings varied, although I did not think any of them would affect adversely the sense of right and wrong.

I am sorry, there was another of the Varga girls I had in mind, not one of this series, and I will take that up when we come to it later, if I may.

Q. Now, will you take up the next item in the January

issue, which is the "Star and Garter Blues" review, by Seldes, on page 83, particularly on page 119. 811

Do you find anything in that article as a whole which, in your opinion, is obscene, lewd, lascivious, indecent, or filthy? A. I do not.

Q. Do you find anything in it which, in your opinion, would tend to corrupt morals or lower standards of right and wrong in youth? A. I do not.

Q. Now, proceeding to the cited material, have you examined page 6, the excerpt from the Army paper? A. I have.

Q. What is your opinion with respect to that article and particularly the references to Esquire in the first paragraph 812 and the two references to juking, further down in the two columns? A. The reference to Esquire in the first paragraph clearly indicates that the writer, represented as a private in the Army, thinks of the cartoons in Esquire as having some sex content.

The reference to juking also clearly has some sex content in it, it is defined so specifically.

The definition in the paragraph at the bottom of the first column "juking is something Woodhead thought up which puts sex, dancing, manners, drinking and risque behavior in one package" obviously has reference to sexual 813 matters.

Q. Now, in your opinion, and from the standpoint of youth, does that make the references lascivious, obscene, lewd, filthy or indecent? A. It does not, no.

Q. Would it tend to have any adverse effect morally upon the classes of youth with which you are familiar? A. It would not.

Q. Is this magazine in any sense a banned magazine in your school or any of the schools with which you have been connected? A. No.

814 Q. Do you know whether or not the pupils in your present school have access to it in the school or outside the school? A. In the school, so far as I know at the present moment, not, unless individuals bring it in.

A year or two ago, however, we did allow the students to have and furnish for themselves a room to be used as a recreation room and they brought in chairs, magazines and books, and one thing and another, and many of the magazines brought in were copies of Esquire.

At that time it never occurred to the parents or faculty or the administration of the school that this magazine

815 should be banned.

Q. Did you ever receive from a parent or associate instructor or board of directors, any complaint about the fact that this magazine was displayed in the recreation room of your school? A. No.

Q. Did it ever occur to you that this magazine should be taken up and proscribed? A. No.

Q. Do you think now it should be proscribed, sir? A. I do not.

Q. I say "proscribed", and not "prescribed". A. I noted that, sir.

Q. Will you now look at the verse on page 45, "Benedicts. Awake", and I direct your attention to the opening line of

816 each of the three stanzas which Mr. Hassell has emphasized, being "Men sleeping besides your wives, awake!"

What is your opinion of that poem? A. I have read the poem as a whole and it seems to me rather a good poem certainly not a poem which would in any way be susceptible of any obscene or filthy interpretation.

It is a statement which I am sure has already been brought out adequately in this room, of the fact that happy married life is being interrupted as men are being drawn into the

armed services. It is a fact that is tragically obvious to a great many of the young people whom I have known best. 817

It seems to me that the poem is in good taste and is a rather fine piece of work. I don't think it is great literature.

Q. In your opinion, would it have any morally adverse effect on youth? A. On the contrary, I think it is of great value to youth to hold before them the possibility of fine sex relations in marriage.

Q. Keeping in mind this first sentence "Men sleeping besides your wives, awake", would you comment, for the benefit of the Board, what is customary instruction for youth of high school age in a play such as Hamlet, or other Shakespearian plays? A. That is a rather sweeping question. 818

Q. As much as you care to comment on it. A. Hamlet is or was, four years ago, when a survey was made, the most commonly read book in preparation of college admission.

In the play of Hamlet, as I am sure you are aware, the strained emotional relations between Hamlet and his mother and the unfaithful conduct of his mother are very clearly and explicitly portrayed, so that it is almost impossible for any boy or girl to go through high school without having attention drawn to marital relations.

Hamlet explicitly urges his mother to absent herself from the incestuous bed of his uncle, and the language is most explicit. 819

Q. And does that have to be explained to students of high school age, who are studying Hamlet? A. It seldom has to be explained, but it is called to their attention.

Q. Does the word "whore" occur in Shakespearian plays? A. Frequently.

Q. Does it occur in the Bible? A. Frequently.

Q. Do educators generally make any attempt to ban the

820 word "whore" from the references there referred to? A. Not even in books prepared for school use.

Q. Do you think the printing of the line "Men sleeping besides your wives, awake!" would have any greater tendency to coarsen or shock or deprave than the references in the play of Shakespeare to which you have just referred? A. I do not.

Q. The reference on page 123 to that column of jokes entitled "Dear Doctor Diddle". What have you to say with respect to the suggestive interpretation which I understand Mr. Hassell has made with respect to the word "Diddle"?

821 A. I don't know. I was not present on his examination.

Q. I am sorry. Do you know whether the word "diddle" is contained in the dictionary? A. I do not.

Q. Do you know what its meaning is? A. I know its meaning in the connections with which I have heard it.

Q. What is it? A. It means to act trivially and with no outcome, to diddle around. I can give a quotation, as I recall it, from a college student who said: "I wish we wouldn't begin French early in our school year because when we begin it we should begin it systematically and not diddle around with it."

Q. Now, do you see any obscene or lascivious connotation

822 in the use of the word "diddle" alone or in connection with anything in that column? A. I do not.

Q. Is there any joke in the column which to you is indecent or has a filthy connotation or has any sex connotation of any kind? A. The second unquestionably has a sex connotation.

Q. What is the second? A. The second is "Dear Doctor Diddle: I am a beautiful brunette, but I have a serious problem. Every time I take a bath I blush. What shall I do?

"Dear Twenty: Before you undress, put on a blindfold."

The point of the joke is, as I construe it and as I believe most of the boys and girls with whom I come in contact with would construe it, is that the beautiful blonde is unduly disturbed at the sight of her nude body when she takes a bath. 823

Q. Is there anything indecent about it? A. No, but you didn't ask me that.

Q. I do now. A. No, there is nothing indecent about it.

Q. Does that have a tendency to adversely affect the morals of youth? A. On the contrary. I am looking to be sure. Well, there is one other. 824

Q. What is it? A. That has some sex content.

"Dear Doctor: I am a lady 40 years old. I have been married to eight different men in seven different countries. Please tell me what I have to look forward to. Anxious."

Mr. Hassell: Where is that?

The Witness: That is the fourth in the last column of page 123 of January, 1943.

"Dear Doctor: I am a lady 40 years old. I have been married to eight different men in seven different countries. Please tell me what I have to look forward to. Anxious. 825

"Dear Anxious: I'm not positive about what you have to look forward to, but, lady, you sure have a hell of a lot to look back on".

Unquestionably, that suggests a good deal of sex experience.

By Mr. Bromley:

Q. Is there anything indecent or obscene? A. On the contrary.

Q. In it? A. No.

826 Q. Now, will you turn to page 137, the cartoon? Do you find in that any obscenity or any tendency to corrupt morals or lower standards of right or wrong? A. I do not.

Q. What is the basis of your opinion? A. What I construe to be the point of the joke is what I believe the young people, I know, would also believe to be the point of the joke.

Q. What is it? A. That a man who is outside, possibly in the cold, certainly in the night, is looking down into a warm and cozy studio where art students are drawing, pre-
827 sumably from a model, wishing that he also were in the presence of a pretty girl and drawing her, instead of on the roof, looking.

Q. Now, will you turn to the February issue? I want to ask you generally in the February issue, based on your examination and study, whether you found anything in the material complained of which is obscene, indecent, lascivious, lewd or filthy? A. No, I have not.

Q. Have you found anything in the magazine which, in your opinion, would tend to corrupt morals of youth, lower their standards of right and wrong, or stimulate impure sexual thoughts? A. I have not.

828 Q. Look at the Varga girl picture on page 34 and see if that is the one you wanted to make some special comment about. A. No, that is not the one. What I said about the others will apply to that.

Q. I direct your attention to page 65, the Sultan cartoon, "What am I bid for this 100 pounds of sugar?" What is the basis of your opinion with respect to that cartoon? A. My opinion with respect to that is that the attention, the point of the joke, is directed to the incongruous juxtaposition of the idea of rationing and the idea of selling a slave in an

Oriental slave market. That point is made by the double meaning in the use of "sugar", which is unquestionably slang for a very attractive girl and is also the literal word for a commodity which is rationed and hard to get now. 829

Q. You mean juxtaposition of American slang and an African slave market, Mr. Smith? A. No, I mean presenting the ludicrous use of rationing which was the current American situation; applying that to the Oriental slave market. It was that juxtaposition that I meant.

Q. Now, will you turn to page 77? Have you read the entire story "Home Sweet Ruby Street"? A. Yes.

Q. Have you studied the picture at the bottom of the page? A. Yes. 830

Q. Especially in the light of the text which appears at the left-hand side of the picture? A. Yes.

Q. What is the basis of your opinion with respect to that text and picture to the effect that it is not obscene or morally detrimental to youth? A. I think that is a rather different category from the other things we have been discussing before. I think very few of the students that I know, if any, would read the story in the first place. I think the illustration is not by itself either attractive or salacious. I don't think that the text is easily comprehended, so I don't think the two would be likely to be put together. If they were put together, I still think that it would be sordid and in bad taste, but I don't believe that it would tend to corrupt morals of youth or to make them believe that the extra-marital sex relationship implied there were attractive. 831

Q. At page 95 reference to those parts of the story regarding The Unsinkable Sailor, what is the basis of your opinion with respect to that material? A. I don't think that can be discussed as a whole. Shall I take it up individually?

Q. Take it paragraph by paragraph. We have had pointed

832 out in the first paragraph, by Mr. Hassell, the reference to Las Palmas. A. Of the establishment known as The Black Cat?

Q. The establishment known as The Black Cat and the fact that the subject of the story was a contact man at one time in his life for that establishment. A. I think that is clearly implied, and I think that a reasonable proportion of the high school boys and girls would realize that it was, but I think the context in which it occurs, "The less said about that phase of his life, the better", there is nothing unduly stimulating about it.

833 Q. You think the reference would be clearly interpreted by the average youth as the fact that it was a house of prostitution and the fact that the subject had worked there? A. I wouldn't say that.

Q. What would you say? A. I would say that there would be a considerable number to whom it would be clear, but I don't think it would be the majority of high school students. On the other hand, I don't mean to imply for the moment that that minority should not be protected.

Q. Now, with respect to that minority who would understand it, do you think that that would tend to corrupt their morals? A. No.

834 Q. Or lower their standards of right and wrong? A. No.

Q. Or do you consider it would be obscene as to them? A. I do not.

Q. The next reference is in the third paragraph, where the word "sonovabitch" appears spelled phonetically. What is the basis of your opinion that there is nothing obscene about that? A. The fact that the word occurs so frequently in current fiction, which they are fairly sure either to have read or to have heard when it is presented on the talkie movie screen. I think that that is an instance of a word which would have

been regarded as filthy some years ago, but which at the moment—I am thinking of, for instance, such books, of course, as Grapes of Wrath or Of Mice and Men, by Steinbeck and Hemingway, which are commonly read by high school students. I don't think that that is any longer a filthy and obscene word. It is a rough word and a word in bad taste. 835

Q. Do you know that it is the policy of many of our newspapers today to print the word out and spell it correctly? A. I think so and I have seen it in the Chicago Tribune.

Q. The next reference to which Mr. Hassell and the Department objects is contained in the third column, which speaks about the bottle and the sample which the sailor had to leave in the hotel manager's safe when he left town. Are you familiar with that? A. I am. 836

Q. What is the basis of your opinion as to that? A. I think very few high school students would understand the reference. Very few of them have had the experience of leaving a sample of urine. I think some of them would know what it referred to.

Q. Now, with respect to them what, in your opinion, would be the effect, if any, on their moral standards? A. None. I think they would either think it was funny or disgusting, but I don't think it would affect their morals and standards at all.

Q. The next reference is that where the subject of the story goes into the union hall where there is a new secretary and he utters the words: "How's chances to lower the boom on you, sister". Have you read that? A. Yes. 837

Q. And then in the same paragraph, several sentences later, it is explained that while it shocked and frightened the girl, it was only the sailor's way of asking her for a couple of dollars. What is your opinion with respect to that paragraph? A. That again applies to a somewhat different cate-

838 gory than the other paragraph we have been discussing, because the paragraph creates, I believe, an ambiguity, and one of the possible answers to that ambiguity is an improper one. On the other hand, it doesn't direct attention to that any more than it does to the one which is perfectly innocent. I am perfectly sure that a good many high school boys and girls would be aware of the ambiguity and would be interested in the fact that a completely innocent interpretation was put on it.

I can amplify that by giving you an incident which occurred rather recently, when a boy in a senior high school
839 class spoke of the bee as attacking the flower and there was a ripple of amusement that the word that should be used was an ambiguous word which was in the public print and the daily paper, associated with criminal assault and sexual contact, but I don't believe that the knowledge of that ambiguity would be a new thing to them or would be a thing that would in any way affect their standards of right and wrong.

Q. Now, in the March issue there is an advertisement on page 9 of the Thorne Smith novels by the Literary Guild of America. What is the basis of your opinion with respect to the contents of that advertisement? A. That applies to a kind of advertisement that might, it seems to me, the Post
840 Office could object to reasonably on the ground that it promised more than the goods delivered. It has been customary ever since the time I was in college to advertise Balzac and de Maupassant as if they were salacious books, and I think the advertisement is rather misleading and contains a hint of being salacious books, not all of which I have read. I have read one or two of them.

If you mean do I think the advertisement in and of itself might corrupt youth, and if you are referring to the subject which is being covered, I don't think that that will have any effect on them at all.

Q. Are those books lascivious books? A. Well, I haven't read all of them. 841

Q. The ones that you have read. A. The ones that I have read certainly are not.

Q. Now, are they banned by any organization from the mails? A. Not to my knowledge.

Q. I notice a reference in the descriptive texts to one of the books named Topper. Are you familiar with that? A. Yes, I have read Topper.

Q. Is there anything lewd, indecent, lascivious, obscene, or filthy about that book? A. Not to my knowledge.

Q. Do you know whether or not some movie company made a movie of that story? A. I don't know that. May I add one word about Topper, since you mentioned it? 842

Q. Please. A. Years ago it was not lewd or lascivious in its connotation to those young people. Well, our board of trustees is curiously conditioned and frequently gives out opinions which carry weight in the community. One of the ladies has as the family nick-name for her husband, Topper, and she and the children refer to him in that connection right along, so an allusion to Topper in Thorne Smith is certainly not in the mind of the family, or even what is promised here, revelry.

Q. Now, looking at the cartoon on page 49, another Sultan cartoon, tell us the basis of your opinion with respect to it, please. A. I think that again the point of the joke is similar to the joke in the other Sultan cartoon. It is a juxtaposition of two ideas that are not ordinarily together or that do not ordinarily appear opposite each other. A very familiar sort of humor. One is the idea of getting a birthday present, of having an Occidental slave girl given to him for a birthday present, and the other is the idea of sugar and rationing. It is perfectly possible that I missed the point of the joke, but the point of the joke is, it seems 843

844 to me, incongruous. The humor is due to the juxtaposition of the two incongruous ideas; one, the idea of getting birthday presents as we Westerners do, but the idea of having a slave girl given to one as a birthday present, and that is a ludicrous situation. It doesn't seem to me to be anything but a ludicrous situation.

Q. Now, will you refer to page 68, which is the article by Seldes writing about perfumes and clothing, entitled "The Fall of the Flattering Word". What is the basis of your opinion with respect to that article? A. Well, I was a little at a loss to see why that was in the cited material, because it seems to me to be a factual comment on advertising prac-
845 tices and not an article which had any sexual connotation. Seldes is drawing attention to the paradox of using very extreme and suggestive language by the advertisers of perfume and the fact that advertisers of clothes, which certainly are more ordinarily associated with stimulating the attractiveness, sexual attractiveness of the wearer, is comparatively demure, so it seems to me not in any way likely to rouse ideas that are in any way impure. It is written on advertising practices.

Q. Now, attention has been called to the third column where the words "fly-front" are used in connection with the advertising of clothes. A. Yes. Well, again "fly-front" is
846 an instance of something that happens again and again in the use of the words. A word which was at one-time regarded to be taboo and not to be mentioned in mixed society or decent society, presently becomes perfectly innocent, and vice versa words like specifically in Shakespeare you see the use of the word "wanton" is likely to mean nothing much more than a spoiled child, and it is necessary to explain that to boys and girls with regard to showing it is Elizabethan English.

On the other hand, "wanton", as you know, means an abandoned woman. Accordingly, the change in meaning of 847
fly-front, particularly since the change is in the direction of a more innocent application, seems to me entirely impossible of indecent connotation.

Q. Near the end of the second column reference has been made to the first sentence: "Now, it must be a rare odd thing that clothes which do enhance the sexual attractiveness of women are sold to them for smartness."

Can you see any immoral connotation in that sentence? A. No. If the clothes do not enhance the sex attractiveness of women they would not be bought. We cannot try to deny that clothes do enhance the sexual attractiveness of both men 848
and women, at least it is the hope of the buyer and of the advertiser that they believe it.

Q. On page 107 there is a hill-billy cartoon, with the subtitle "Seems like somebody's allers clammerin' to somebody to open up a second front, don't it?"

What is the basis of your opinion with respect to that cartoon? A. Well, again I think the cartoon is one that is in bad taste and not very funny, but I don't think it is obscene from the point of youth, of the high school boys and girls that I know. To them it is a hill-billy cartoon of a hill-billy annoyed and commenting on the fact that the other child wants to be nursed at the same time. If what is com- 849
plained of is the sight of a woman nursing her child and that it is indecent or obscene, I do not agree with that suggestion at all.

Q. There are many, many of those hill-billy cartoons published in all sorts of publications? A. Yes.

Q. And have been for many years? A. Yes, and ballads about them, also.

Q. Have you any comment to make with respect to the Varga girl? A. No, that is not the one.

850 Q. Now, in the April issue the Varga girl is on page 38. Have you any comment with respect to her or the verse? A. No.

Q. Look at the front cover. A. Yes.

Q. The Department says that that is obscene because the breasts of the two dummy models are over-emphasized. What is the basis of your opinion with regard to the character of that cover? A. The character of that cover doesn't seem to me to differ materially from the character of the other covers. I don't like the covers of Esqufre; I think they are in general rather cheap, but my objection to the covers on
851 Esquire is much more to the bulgy eyes of Esky and the implication that he is looking for everything unpleasant that he can see rather than to the caricatures of the dummy. The dummies are obviously caricatures; they are not meant to look like human beings. You will notice there are other features of the female figure that are emphasized, the eyes are far more distorted in proportion to the actual size of the eyes than the breasts are.

Q. You don't like the covers? A. I don't like the covers.

Chairman Myers: I always thought that Esky ought to be examined or changed.

852 The Witness: On the other hand, I don't think that this point of view is rendered unattractive by the covers for the boys and girls who wish to read Esquire.

By Mr. Bromley:

Q. You know, Mr. Smith, you are supposed to be on our side. A. That was your risk.

Q. Will you turn to page 60, an article on "The Court of Lost Ladies", by Edmund Gilligan? A. Yes.

Q. What is the basis of your opinion with respect to that article? A. My opinion of that article is that it is surprising 853
to find it inside these covers, because instead of being a flippant and facetious article, it seems to me a very fine and serious study of a very important social problem.

I can't imagine anything that is better for these young men to have, these men who are going to the Army immediately, than to have as careful and artistic a study of the consequences of impure social behavior as this is.

It seems to me in every way an admirable story. May I say one word more in that connection?

Q. If you will say it to the Board. A. The only character 854
there who is in any way rendered admirable is the Judge who is made a very fine and admirable figure. For the rest, the story is that the wages of sin are disease and death.

Q. Now, sir, in the May issue, the Varga girl is on page 38, and I call your attention to the comic strip on pages 86 and 87, and ask you to state the basis for your opinion with respect to items 29 to 32, inclusive. A. Yes, sir. I don't like the cartoons any better than I do Esky's appearance on the outside of the magazine, but again I fail to see anything that is suggestive of improper behavior or likely to corrupt the morals of boys and girls who might happen to see it.

Q. Does that include the text as well as the picture? A. 855
It includes the text as well as the picture.

Q. Have you read, on page 32, the article "The Savage Beast In Us," by Paul Gallico? A. Yes.

Q. What is the basis of your opinion with respect to that, including the illustrations? A. I think the illustrations are disgusting, and I think they are meant to be disgusting.

I think, however, that they must be construed in connection with the text which they are supposed to illustrate. That text is a report on the burlesque type of show and the report-

ing is certainly not such as to maintain the attractiveness of
856 the show—quite the reverse.

Q. Mr. Hassell read from the second column of the article two paragraphs which you considered to be obscene, near the bottom:

"The 'bump' appears to be a violent twitch whereby the artiste gathers up all of the area immediately south of the chest and hurls it in the general direction of the audience, aimed at hitting some man, in the fifth row, right between the eyes.

"The gesture is held to be fraught with aphrodisiac signifi-
857 cance, a sure fire yank on the hair-trigger that is supposed to control the beast in us. Oh, yeah?"

Do you see that immediately following the paragraph he read this morning? And there follows this paragraph:

"Outside of the fact that the movement is awkward, unrhythmic, and hideous to behold even when backed by an orchestra of symphonic proportions, it just won't work as a beast-rouser. What it makes me think is that some gent in the company, having somehow achieved invisibility, has stolen up behind the danseuse and administered a good swift kick *a derriere*.

"The sight of an entire stageful of coryphees performing
858 this gesture, as is sometimes arranged by dance directors under the impression that it is Hot Stuff and will sell tickets, is enough to ruin the *apres-midi* of any faun."

Taking the whole reference, as I have read it, do you find anything obscene in it? A. It seems to me it is objecting to the burlesque and holding it up to ridicule and is not obscene in itself.

Q. And this reference: "The supposedly sultry 'grind' in which the performer revolves her hips in time to music while the rest of her stands still, may have practical value as a

slimming exercise, but performed in public and by herself I must report that from the viewpoint of the average susceptible male the results are negative. On the contrary, it has undeniable comic aspects. A lady engrossed in delivering herself of these revolutions, her face transfixed with the curious false stare resulting from the muscular effort reminds me of nothing so much as a gal who has backed herself up against a tree or a wall and is attempting to scratch an itch she can't reach." 859

Is there anything obscene about that? A. No. It is coarse and coarsely put, but it is not obscene.

Q. And the last paragraph of the article which was not read this morning, I desire to call your attention to as follows: 860

"I trust that I have faithfully exposed my argument: that Broadway flesh-peddlers think they're putting on hot shows, they have another guess coming, and if guardians of the public morals are worried about me and the other guys becoming corrupted by those dull, imbecilic, puerile gyrations over which they are currently exercised, they can quit worrying, because it just ain't so."

Now, what comment, if any, have you to make with respect to the whole article? A. I would like to call attention to one other part of the article, if I may, the paragraph beginning: 861

"It is bad enough when these poor, chilly looking monkeys are marching about, or merely trying to sing a song in unison. I will not touch upon the caricatures that occur when, thus clad, they engage in tap dances or acrobatic numbers," and so forth.

It seems to me the net effect of the article is critically astringent and antiseptic rather than the opposite.

Q. Will you turn to page 48, the cartoon? That is the one, is it not, in which the two air raid spotters are looking, at

862 night, and one of them, through glasses, and the sub-title is "She looks more like a B-17 than a P-40." What is the basis of your opinion with respect to the character of that cartoon? A. It seems to me, ordinary, without any tendency to produce impure conduct or to change for the worst the standards of right and wrong.

I hate to use a formula, but it is difficult to say these things and not have to follow a pattern, the same pattern.

Q. Do you think the average child or any child would think the airplane spotter with the glasses would be looking through a window in which the shade was up? A. I think
863 that is clearly the implication.

Q. And the child might think the man was looking at a woman who was undressed? A. There is nothing to change that assumption.

Q. Well, make that assumption. Do you find anything obscene about it? A. May I say one word on that point?

Q. If you say it over that way (indicating the Board). A. I never knew a man to object so much to being talked to.

I would like to say, with reference to this type of joke, this type of cartoon, that it consists of leaving a blank which the person himself can fill in and, accordingly, it is susceptible of many interpretations.
864

It seems to me that my criterion in saying that a given cartoon is obscene or not obscene, is whether the attention is directed primarily to the worst of the possible meanings.

Now, even in this case, even if it seems to a high school youngster that two men on the roof were looking through a window at an undressed figure, it still does not seem to me that it would change their standards of right and wrong or make them likely to be more indelicate themselves.

Herbert W. Smith—for Respondent—Direct.

Q. Now, I call your attention to page 92 which is the picture from "The Eve of St. Mark," and the accompanying text on the opposite page being "The Juke Joint Scene from the Eve of St. Mark." 865

What is your basis of opinion with respect to the character of that material? A. I think that illustration has to be construed in conjunction with the text that goes along with it.

It says at the outset:

"These soldiers have just come from a discussion of a hygiene lecture in which it was estimated that in the Army 20 percent don't, 20 percent do, and 60 percent might."

It concludes by saying that these boys—one of them— belonged to the 20 percent who don't, and the other had to go along with him because he had the money and was taking the lead. 866

The picture, looked at in the light of that text, is obviously a picture of two boys in the forces who have been out in the evening with two town girls, but who got home without having had any immoral relations with them.

Q. You know that the Eve of St. Mark is a play by Maxwell Anderson which has enjoyed a tremendous run in New York and has been seen by hundreds and thousands of people, don't you? A. I do. 867

Q. And you know that is merely a report of the dialogue which accompanies that scene between the two soldiers and the two girls in the juke joint? A. I do.

Q. Do you think there is anything obscene or indecent in a magazine of general circulation reporting scenes which have gone on on our public stage for a number of years in plays of high literary value? A. No.

Q. Now, coming to the June issue, the Varga girl appears on page 34. A. That is no exception to the others.

868 Q. The next reference is on page 134 which is that article about the rough western editor and what he published in his newspaper.

What is the basis of your opinion with respect to it? A. Will you give me the page again, please?

Q. 134, in the middle, "Libel Suits." A. Yes, I have it. I assume the reason for pointing this out as being obscene is the epitaph "Here lies the body of poor old Charlotte," and so forth. I think it is a coarse jingle, but I do not believe it is likely to corrupt the boys and girls who read it.

The context of the article is that this is an editor with
869 the roughest style who handled it, and this is an instance of the rough style of handling.

There is one further thing I ought to speak about, and that is the second paragraph in the second column: "In the future, all communications to the Muldoon will be marked—"

I call your attention to that because it seems a clear indication of the importance of the context. I read that at least four times without realizing at all the vulgar point of the joke, and I think unless it is read aloud or in what is called double talk, that is, the twisting the meaning of the words, you simply won't see the point of it.

870 At least, I didn't.

Q. Suppose they do see the point of it? A. It would not affect the standards of right and wrong.

I have already spoken of Hemingway and Grapes of Wrath and Of Mice And Men which are familiar reading. They are also fairly sure to see such plays as Dead End and come in contact with such language.

Q. The word "ass" appears in print in respectable literature, doesn't it? A. It is in Lawrence of Arabia.

I would like to qualify that answer, if I may. It does

not ordinarily appear in that sense and, correctly spelled, in books that boys and girls read. 871

In that respect it is quite different from such words as "bawdy" and "whore" which do.

Q. Assume this is equivalent to having printed the word, is your opinion of it as to its obscenity the same? A. No. I think if the word were printed fully it would seem to the boys and girls I know as obscene.

Q. What about the use of it as made here, the use of the asterisk? A. That does not seem to me obscene in the sense about which we are talking about it here, because of two facts.

In the first place, I doubt if any of them would understand it and, in the second place, those who did would be the ones who were looking for that kind of thing, to whom it would be no news. 872

Q. Now, in July there is a colored photograph from "By Jupiter" on page 76, and Mr. Hassell has called particular attention to the degree to which the low-cut show gown exposes the breast and the degree to which she has lifted her left leg.

Noticing those two features, particularly, what is the basis of your opinion that there is nothing obscene in that picture? A. The amount of exposure of the body in those photographs— 873

Mr. Hassell: What issue are you on now?

Mr. Bromley: July.

The Witness: On page 76. That amount of exposure of the body is customary in advertising and other illustrations.

By Mr. Bromley:

874 Q. That, again, is a scene of five show girls from a Broadway play with Ray Bolger, which has run for many, many months, sir, isn't it? A. I don't know.

Q. Look at the advertisement, page 146. Attention has been called to the middle postcard with the Varga girl stretched on her stomach with a hat over her back.

What is the basis of your opinion with respect to that picture? A. In the first place, I don't think it is likely to be noticed at all, and even if it is, it doesn't involve any indecent exposure.

875 Q. On page 87 we have the second and last so-called comic strip. I call your attention to items 55 and 56 and ask you to state the basis of your opinion with respect to those two parts of the strip. A. It would seem to me the only possible objection to them, except for the general objection to strips, comic strips, on the ground that they are cheap, is the nudity of the torso, the ambiguity of the text, "There's something I've always wondered about mermaids."

The figure is only remotely human, anyway. That way of representing mermaids in comic strips goes back to one I remember looking at as a boy called the "Voyage of Captain Nemo," or something of the kind, and the im-

876 plication in saying "There's something I've always wondered about mermaids." here is again a case of the blank you can fill in in your own way, and half a dozen perfectly innocent and perfectly reasonable meanings for any one obscene meaning I can think of that anyone would be likely to attach to it.

Q. Assume the worst meaning that you can attach to it. Is there anything obscene about it, in your opinion? A. I think that is not a question you can answer. You assume

the worst possible interpretation that can be put on anything and, of course, it is obscene, but that does not seem to be an assumption I usually make in dealing with boys and girls. 877

Q. What I am trying to get at, and I don't seem to be doing it gracefully, is: Does the fact that Mr. Hassell contends that that might refer to the ability of a mermaid to have children or have intercourse, change your opinion with respect to the character of the strip? A. No. I am glad to answer that categorically. It does not. It is impossible in presenting material to the general public, and even to children, to guard against all possible obscene interpretations that might be placed upon it. 878

In this instance it seems to me that no attention whatsoever is directed to any possible obscene meaning.

Q. Now, the poem on page 141, "Dog's Worst Friend," has been pointed out as filthy because of the last lines of the poem:

"I would like to plant them in Central Park
In a long row
And introduce a lot of dogs to them."

A. And the possible interpretation is that dogs can defile their graves. I do not think it is either obscene or filthy. 879

I think, again, current practice must be referred to. In movie after movie reference is made to the hydrant. These children see continual reference to dogs urinating, and it seems to me there is no obscenity involved. Obviously the man is writing coarsely his condemnation of people who abuse dogs.

Q. T[illegible] to page 148, the cartoon at the bottom. That's the one with the two perfume signs displayed side by side.

880 "Burning Desire," and "Baby's Breath," with the sub-title "I think, Miss Hill, it might be advisable to display those a little farther apart."

Will you give the basis of your opinion with respect to this cartoon? A. A juxtaposition of incongruities. I think what incongruity there is is between a mere juxtaposition of incongruity using such an absurdly exaggerated phrase as "burning desire" alongside of a very innocent one such as "baby's breath." And the only thing that could involve any sex at all is that one is cause and one is consequence, and even that doesn't seem to me to be obscene.

881 Q. In the August number the Varga girl is on page 38. A. That is not the one I referred to.

Q. And page 30 has an article "Many Wives Too Many," to which reference was made by Mr. Hassell this morning.

What is the basis of your opinion with respect to the character of that article? A. The article seems to me to be discussing a proposal of Dr. Joad to the effect that the terrific shortage of men after the war might be corrected by polygamous marriage.

The article is making fun of that by pointing out that from the point of view of the average man the absurd and impossible consequences of following it out. I don't see

882 anything remotely obscene in that.

Q. Reference has been made particularly to the second column beginning "In figuring out a schedule for a six-wife batting order" and going to the middle of the third column.

I wish you would look at that particularly and see if you see any reference there which could possibly affect your opinion. A. I do not.

Q. On page 31, in the left-hand column, beginning "Rosamund," reference is made to all that column. Will you

examine that? "Rosamund—the wife to make love to" and so forth. Does anything there, to which I have directed your attention, change your opinion? A. No. 883

Q. Now, on page 65 there is a cartoon, and opposite it on page 66 there is a cartoon. A. I don't find any cartoon on page 65. I am confused.

Q. I withdraw that and ask you to direct your attention to page 73, the color photograph "Mood for Red Hair." A. I have it.

Q. What is the basis for your opinion with respect to that picture? A. It seems to me that is in no way either suggestive or obscene. It is an attempt to use the color camera for artistic purposes compared with those obtained by oil. 884

Q. Suggestion has been made that the drapes over the girl's arms, chest, and stomach, have deliberately been so arranged that a beholder would inevitably mentally seek to remove them.

What is your opinion with respect to the reaction of a child or a youth with respect to those drapes, or the way they are placed? A. I don't see any remote suggestion to them.

Q. Turn to page 90. That is the girl in the wedding gown who is working at the lathe. The sub-title is "She came directly from the wedding—Boy! that's patriotism." 885

What is the basis for your opinion in regard to that? A. I see no reasonable likelihood of a lewd inference being drawn from it. These boys and girls are familiar with the need for women workers; they hear over the radio and they see the urgent requests for them.

The inference, it seems to me, that the average high school boy or girl would be likely to draw from it, is that fun is being made of the urgency of the appeal. And the girl is a little patriot to go to work before she changes her dress.

886 Of course, there is another inference that could be drawn.

Q. What is the other inference? A. That she goes to work in the shop before the marriage has been consummated.

Q. Is there anything dirty about that? A. No, I don't think it would occur to the average high-school student.

Q. Suppose she went to call up her mother before it has been consummated? A. The same.

Q. Now, look at the "Paste Your Face" cartoon. A. That is one of the series and if looked at closely does not seem to me obscene. That is the picture I should most regret finding in all the cited material.

887 I would like to explain my reasons for saying that, and I still say that I don't think it is obscene or likely to cause the moral standards of boys and girls to deteriorate.

I think the picture, like somewhat similar pictures without the paste-in feature in Life recently, suggests an unwise degree or imprudent degree of close contact between young men and young women, and, accordingly, I think it is an undesirable picture to place before young people.

I do not, however, believe the picture is obscene in that it does anything more than that.

In other words, I think it suggests that it is a perfectly acceptable type of thing to do, to have a girl in a bathing
888 suit carried on the shoulders of the young man, and I think that is not a desirable thing for high school students to be encouraged to do.

I think also that from a first look at it you get a more startling effect because the white space there makes you think the girl is entirely unclothed. But if you look closely at it you see something quite different.

I would like to say a word more about the place of that picture in a series. It was, as you called to my attention when talking this material over, sir, one of a series in

which the service man was supposed to paste his face and use this as a sort of joke. 889

I think that that does affect the construction that should be placed on it, but I repeat it is a picture I am sorry to see placed in a magazine that is made easily accessible to high school boys and girls.

Q. I show you the other two pictures in the series. A. That is what I have reference to.

Q. The girl on the left has the same blue bathing suit that the girl has who was sitting on the shoulders of the sailor in the August issue? A. Yes.

Q. We had a little discussion with Mr. Hassell as to whether in the August issue she had a bathing suit on. 890 Doesn't the picture I show you, that I hold in my left hand, make it perfectly plain? A. What page is that, please?

Q. 89. I haven't any doubt but what that is a bathing suit on page 89. Do you have? A. Oh, no.

Q. And do you see it is the same bathing suit as the other?

Mr. Hassell: And the same waves and same ocean, counsel?

Mr. Bromley: By the way, you said there were no waves. Are you changing your mind? 891

Mr. Hassell: I think that anyone would reach that conclusion.

The Witness: May I put in a word for the lake in the Middle West?

Mr. Bromley: You think it is a lake?

The Witness: Well, I am from Chicago.

Mr. Cargill: Did the witness express himself as to wheth[illegible] that picture was obscene?

892 **The Witness: I said it was not obscene. I thought it was an injudicious picture to put before young people because it would tend to produce undue familiarity but not obscenity.**

By Mr. Bromley:

Q. On page 105 is a cartoon with the title, "Thank God, help at last".

What is the basis for your opinion with respect to that? A. Again, what seems to me the point of the joke is it would appear to high school boys and girls that the rather
893 **frail, ship-wrecked white man is outnumbered by large and gleeful colored girls.**

It doesn't seem to me it would be construed any farther than that by high school boys and girls, as I know them.

Q. Will you turn to page 110, which is another cartoon entitled "That is Miss Blimpton, our special nurse for low blood pressure patients."

What is the basis for your opinion about that cartoon? A. That cartoon is satirizing the well-known fact that almost all boys and men like to look at a pretty girl.

It is exaggerating the shapeliness of the legs, the dress is a little shorter than the present average, the breasts are
894 **clearly outlined, but it doesn't seem to me to be obscene.**

Q. Do you see any filthy connotation in the use of the word "Blimpton" as referring to her breasts? A. No.

Q. Is the picture made obscene by the fact that the old gentleman's hat is blowing off his head? A. No. That is part of the satire of masculine susceptibility.

Q. Or the pleased look on the face of the interne or the man talking with the doctor? A. Certainly not.

Q. Turn to page 127, if you please, the fashion page, which has the sub-title "Hew to the line, bertha. Let the

skirts fall where they may". That is the girl painting stockings on the girl lying on the sand. 895

What is the basis for your opinion of that? A. I don't think that is intended to be a joke at all. It is simply an illustration of the way in which stockings are being painted on, and the girl says to the other girl who is doing the painting, "No matter how high you have to paint up the leg, go ahead and paint the stocking on."

Q. Is it of a type that is common in fashion magazines, or wouldn't you know that? A. As far as I know, but I don't know very much about that.

Q. Page 144. Have you read the article "Offensive on the Home Front?" A. Yes, I have. 896

Q. When I say "article", I mean story. A. Yes.

Q. Two places near the end have been pointed out as obscene. In the third column near the bottom it has been pointed out that the reference "Once he had slapped a prostitute in Bordeaux who had persisted in keeping his cap, but that didn't count," is obscene. I direct your attention to that. A. I do not consider the use of the word "prostitute" to make it obscene. In writing, a reformed prostitute is the principal feminine figure in Mice and Men, if I am not mistaken, and in Shakespeare the equivalents, strumpet and whore, are frequently used, so that in and of itself is not obscene even to young people. 897

Q. Is the reference in the next paragraph, where the author says:

"He noticed how large the uniform made her behind look" obscene in your opinion? A. No, I think that is coarse and intended to be coarse; but the whole story obviously portrays a revulsion against the silliness of the opposite sex. That has been done repeatedly in literature and in literature that is read commonly by high school students.

898 Chairman Myers: Suppose we recess at this time for about thirty minutes.

(Thereupon, a brief recess was taken.)

Q. Will you state the basis of your opinion with respect to the Sultan cartoon on page 43 of the September issue, subtitled "Sold American", please? A. Yes. Again the point of the joke, the thing that is in the center of focus for the person that reads it is the incongruity of an American boy going to an auction and doing what I daresay his mother has done at home: Finding everybody else bidding
899 and bidding for an article that is going to be embarrassing after he has got it. It seems to me that is the primary point.

Q. Will you answer the same question with respect to the cartoon on page 65, sub-titled "Come back later, sweet—my wife hasn't left for the factory yet". A. Yes. That seems to me to have two points. One, it is the man bites dog point. That is the inversion of the usual situation where the old ice man joke, of course, implied that the ice man liked to call and pay attention to the wife, and here it is the milk girl who presumably would like an uninterrupted call with the husband if she came back
900 later because the wife had gone to work. It is primarily because of the statement "my wife hasn't gone to work—left for the factory yet", implying that she is a war worker.

Q. On the next page, the cartoon with the sub-title "It's the only time daughter and her young man have for courting—they both work nights in a war plant." Will you give us the basis of your opinion on that? A. Well, the incongruity there, of course, is with the rather violent petting going on in the daytime, and there is also, I think,

a certain amount of humor in the understatement, in apologizing for both of them who are courting in the day time, 901
and in thinking it necessary to apologize for their rapt embrace in which they are engaged. Those, it seems to me, are the two centers of focus.

Q. That is the mother who is the second of the two women, isn't it? A. I inferred that, yes.

Q. And the next cartoon is on page 84. A cartoon with respect to the same subject. Will you give me the basis of your opinion with respect to that? That is entitled "Every night he tells her he's sailing tomorrow." A. Well, the source of humor, it seems to me, is different there. The source of the humor, it seems to me, is in the cynical way 902
in which the boy who is going to sail eventually makes the girl more affectionate by calling attention to the fact that he is going to leave her soon, and I was rather interested in the fact that Shakespeare wrote a sonnet on precisely the same subject. I won't quote the whole sonnet, but he says to the girl, "Don't worry about the fact that I am older than you. The fact that I am going soon is the reason you should treasure me more."

Shakespeare put it:

"That time of year thou may'st in me behold,
When yellow leaves, or none, or few, do hang". 903

Now, it is not to be used for humor in Shakespeare, but there you have the same thing because the boy is telling the girl he is sailing tomorrow in order to get a larger degree of demonstrative affection which he is not entitled to, but I don't see anything in the fact that this is not the girl he is going to marry or there is anything lascivious in the cartoon in that connection.

904 Q. The inference is that the two adults are the father and mother of the girl, is that it? A. Yes.

Mr. Cargill: May I interpose a question?

Mr. Bromley: Yes.

Mr. Cargill: In this testimony is this opinion that you are expressing now, as to the effect it would have on the minds of school children between the ages of four and twenty?

Mr. Bromley: Yes.

Mr. Cargill: Or is it his personal opinion that he is giving? I am just asking for information.

905 Mr. Bromley: I don't blame you, because my procedure has been a departure from what should have been done. I asked the witness if it was his opinion that this material would affect the boys and girls with whom he comes in contact and he said he found nothing in it that was obscene or would corrupt morals. I am assuming that that answer applies to every one of these things and it is related especially to youth. Instead of repeating those questions which would have been too tiring, I was asking him not to repeat his answers in the same light but to expand further on them.

906 The Witness: That is the sense in which I have been construing my answers also.

Mr. Cargill: All right.

Mr. Bromley: All right.

By Mr. Bromley:

Q. Now, on page 86 we have a double page spread of jokes from Army papers entitled "Goldbricking with Esquire"

The matter that is complained of starts at the bottom of the first page, with the first joke, and it is the one about the two babies in adjoining cribs, one a boy and one a girl, and they talk to one another, and they ask whether they are a boy and a girl, and the boy says "As soon as the nurse leaves I will show you", and when the nurse leaves he pulls up the covers and says "See, blue booties". Do you recall that one? A. Yes. 907

Q. What is your opinion with respect to any effect of that on youth? A. Well, I don't think it would seem obscene to youth because there is nothing wrong from their point of view in two people of the same sex comparing any parts of the body. I think the point of the joke is, of course, a substitution of a very secondary characteristic, blue booties for babies, for the primary sex characteristics. 908

Q. Well, these are two babies of opposite sex, aren't they? A. I beg your pardon. I read carelessly and misconstrued entirely. May I re-read?

Yes, the situation is of a different sort, that they are going to compare people of an opposite sex, and again it is a matter of substituting at the end, but with a much less innocent implication than I had in mind. I still wouldn't call it lewd, lascivious or obscene from the point of view of the boys and girls, but it is rather innocent.

Q. One other joke is at the bottom of page 87: 909

"She: 'Would you like to see where I was operated on for appendicitis?'

"He: 'No, I hate hospitals.'"

What is the basis of your opinion with respect to that? A. Again, I think the point of the joke is the surprise reply and not the suggestion as indecent exposure, because I don't think it seems indecent to boys and girls any more than it is to men and women to expose the area in which an appendix scar exists.

910 Q. Now, the cartoon on page 102. What is the basis for your opinion with respect to it? The sub-title being "Ain't it a damn shame? Plenty of water on this island, plenty of food, and now I get hallucinations". A. Well, I can't answer why that was cited unless it was implied that a girl lying on her back in a bathing suit was by definition too provocative. She certainly is not lying in a position that would suggest what might be called any sex play, and I do think that the point of the joke is perfectly obvious. He simply cannot believe that there is a girl there, just that this is too good to be true.

911 Q. She is in a bathing suit? A. She is in a bathing suit, and she is completely covered, as much as the girls do when they go swimming.

Q. Now, turning to the Varga girl in the October issue on page 43. A. That is not the one.

Q. I call attention to page 49, which has the fuel salesman cartoon. "Hello, dear, this is the gentleman who sells us our fuel oil."

What is the basis for your opinion with respect to that cartoon? A. Again it is a matter of a general context in society. It is obvious that the meaning of the cartoon to young people would be no different than what it is to older ones. That is, that the wife finds it necessary to bribe and

912 flatter and cajole and caress a person through whom they can get fuel oil, but the humor of the thing is in the idea that you can't get fuel oil unless you go as far as that, rather than unusual sex conduct.

Q. Now, on page 56, there begins this piece of fiction "Portrait Above the Fireplace". Have you read that? A. I have.

Q. What is the basis for your opinion with respect to this article? A. It seems to me an entirely serious study of

the effect of the unknown portrait on the young man who buys it when he has apparently no future before him, and who is inspired to succeed by what he imagines is his mother, only to find that it is the portrait of a keeper of a house of ill fame. 913

There does not seem to me to be anything in that that would be obscene or suggestive. The mention of a house of ill fame is not—he certainly is not in any way stimulated by the previous connections of this portrait that he admires. It is perfectly clear to those young people that even a prostitute is a person who is capable of redemption and through whom redemption could come.

Q. Will you turn back to page 37 in your October issue. I am skipping around out of order by mistake, and will you look at the cartoon in the lower right-hand corner, being one of a sailor with the tattoo on his arm, and the hula-hula girl looking at it. What is the basis of your opinion with respect to that? A. Well, it seems to me not to have any other connotation or any other meaning to the girl or boy who looks at it except he has the trick of vibrating his arm and making this hula girl look as if she were doing a dance, and the girl who actually does the dance seems amazed at the miniature reproduction moving about and performing the trick, so to speak. 914

Q. Do you find anything obscene in that? A. I do not find anything obscene in that at all. 915

Q. Have you read the article on page 38 "Wise Men Pick Pyknic Girls"? A. Yes.

Q. What is the basis of your opinion with respect to it? A. Again, it seems to me to be a popularization of a theory of two types of women and not to be in any sense considered indecent or inelegant or provocative.

916 Q. You find in it reference and repetition of the word "bust" in connection with the measurement of the Pyknic type at the bottom of the fourth column on page 38 and running over on page 39? Does that connote anything lewd or lascivious? A. No, because I am sure if these boys and girls see it, lewd or lascivious means directing your attention to things that are not there, not spoken about, and not seen, and bust measures and references to busts are completely familiar and completely familiar even in this kind of connotation.

917 The measurements of the Atlantic City beauty girls are always completely given in detail in mentioning them, and I see no greater reference there than there is in other measurements that are given.

Q. Turning to page 93, I believe there are three jokes complained of reproduced here from Army papers. The first one is on page 93 in the first column ending "Liquor is my weakness".

What is the basis of your opinion with respect to it? A. The ridicule is directed to the person, the prostitute who tries to accost a man and is told "You have no attraction for me." I don't see that that is in any way affecting adversely the standards of right or wrong of the boys and girls.

918 Q. Right below it is the joke about the negro Pullman porter which ends "If dem shoes stickin' out from under the bed ain't got no feet in 'em, ah is gonna shave."

What is the basis of your opinion as to that joke? A. Well, again, the humor is in the implication that if there is a man under the bed "I will attack him with a razor", but the humor consists in drawing the inference from the perfectly ordinary statement "Well, if everything is all right, all I am going to do is shave".

Q. Finally, the joke in the last column: "What does f-e-e-t spell?" And the ending: "Johnnie's answer was as surprising as it was unexpected." 919

What is the basis for your opinion there? A. The point of that joke seems wholly different in character than the others and the attention of the reader and the boys and girls would certainly understand this is directed to the discomfiture of the teacher in having a word ordinarily applied to animals applied to her. The implication, of course, is that the answer will be teats, instead of feet, but the substitution does come from mentioning the unmentionable. Teats are mentioned in all conversations about cows. The humor consists in the unexpectedness, in applying to a human being the word that is only associated with other animals. 920

Q. Now, will you turn to the November issue? The Varga girl is at page 46 in that issue. A. Yes, that is the girl that I had reference to. Shall I speak about it?

Q. Yes. A. The reason that I thought that Varga girl was not as wise to have in a magazine easily accessible to young people was related to what I had said previously about the attempt of educators to free boys and girls from an undue feeling of shame in connection with the body itself.

I am not talking about the body as displayed in suggestive or unpleasant circumstances, and both the verse and the picture itself suggest that the girl is surprised presumably until the end of the verse. 921

I am referring specifically to the use of "Wolf" and that implies some man who would be predatory in his approach. It is only at the end that you are told that her alarm was due to the mouse.

Well, the implication that there is anything indecent about how the girl will react, it seems to me is exactly

922 parallel with that of the other pictures. I don't think, however, that this is indecent or obscene, but the thing I spoke about in the other pictures as having a greater prophylactic value does not apply to this, because specifically the girl is ashamed in being in the condition that she is, at least you think she is until the very end of the verse.

Q. Now, will you turn to page 66, the cartoon and subtitle: "It's no use, Sarge—we're outnumbered—Yippee." What is the basis for your opinion with respect to that material? A. That seems to be entirely innocent, but the point of the joke is that here are some soldier boys that 923 would not resist being taken prisoner by a lot of attractive girls; a fine thing to look forward to.

Q. On the next page, the one entitled: "At the U. S. O. in New York they just gave us cigarettes", a picture of a soldier smoking a water-pipe in the presence of a harem girl.

What is the basis of your opinion with respect to that? A. Well, I think most boys and girls would draw the inference that I did when I looked at it, and that was that the inference was that between the water pipe and the cigarette and not just letting them smoke and possibly entertaining them with the services of an Oriental slave and sex relations after, and I am by no means sure that any boy or 924 girl would draw that inference, but I am sure that that is what was cited and that inference was expected.

Q. Now, on page 73, the color photograph "Golden Mould", what is the basis of your opinion with respect to that? A. Again, it is the attempt to use the camera and color photography for the kind of beautiful pictorial effect that has obviously been possible only with oils heretofore. It seems to me the picture is entirely free from any objectionable construction unless any picture of a pretty girl is

objectionable. I find no suggestion, no exaggeration of the sex characteristics. 925

Q. Now, will you go back to page 52, which is another Sultan cartoon entitled "Such a neighbor—always borrowing" and tell us the basis for your opinion with respect to that picture? A. Well, that seems to me very closely similar to the auction picture. That is, you import into the Oriental situation the custom of neighborly borrowing, which is one of the most innocent and natural customs among us Westerners, and by putting it into the Oriental environment, where it is the matter of borrowing wives or concubines, you produce the effect here of comic incongruity, but it seems to me that is not an obscene or indecent thing to show; merely shows the incompatibility, the incongruity, of the two different standards of behavior. 926

Q. Now, on page 60 there is another color photograph from a night club, the Folies Bergere. What is the basis of your opinion with respect to it? A. Well, that again is a piece of photographic reporting. I don't think of night clubs as places that boys and girls should habitually go to. I wouldn't think of a magazine filled with that sort of illustration as very acceptable and suitable for boys and girls, but I wouldn't think that an occasional picture of this kind appearing in a magazine of general circulation will be obscene or will tend to lower their moral standards. 927

Q. Now, turning to page 77, which is this monthly theatrical critical column, written by George Jean Nathan, and I believe it appears in every one of these issues, objection has been made to paragraph one, in which he mentions a St. Louis sporting house in connection with his objection to a scenic set on a stage which features a large and elaborate staircase.

What have you to say with respect to the basis of

928 opinion as to that photograph? A. Well, if the sporting house had been reported as made attractive to young people, I would say it is obscene, but it is not. It is merely illustrative of the bad taste of the kind of interior set that Mr. Nathan is talking about, and the mere mention of a sporting house or bawdy house is something, as I have said before, that does not seem to me to tend to lower the standard even of high school boys and girls.

Q. Will you answer the same question with respect to paragraph number 10, to which objection has been taken? A. Yes. It seems to me again that Nathan is objecting to precisely what I would object to. That is, to the stupidity 929 and bad taste of introducing two actresses dressed to look like prostitutes.

Q. That has reference to "young floozy characters"? A. The "young floozy characters wearing short skirts", and so forth.

Q. You agree with Nathan? A. I agree with Nathan. That, of course applies to all of this.

Nathan is condemning things that are coarse and in bad taste.

Now, may I add that if Nathan were making a pretense of condemning them for the purpose of describing them elaborately, the Ciceronian trick of saying, "I will not describe them to you" and then going ahead and doing so, 930 that in my opinion would be an entirely different matter. It is perfectly plain that he is giving us illustrations of the kind of things to which he objects and the article is very strongly on the moral side rather than on the immoral side.

Q. Is that true of paragraph 15? A. Yes.

Q. In which he says: "Any more plots about someone who mistakes an innocent institution for a bawdy house, or vice versa". A. That is very true, also.

Q. And is true of paragraph 21 in which he quotes what one of the boys from Dead End says with respect to "den don't gimme any a dat crap"? A. Yes. This applies there also and the very fact that it appeared in Dead End and it was seen all over the country makes it completely impossible that the quotation itself should produce the effect that he is deprecating. 931

Q. Now, on page 83, we have a cartoon of the two girls conversing, with the sub-title: "My date's at the awkward age—all hands and no dough".

What is the basis of your opinion with respect to that cartoon? A. Well, again the drawing is not a pleasant drawing but the advice is excellent: Keep your hands off girls, don't paw them. If you want to take them out and show them a good time, spend money on treating them, but don't pet. 932

Q. Now, look at page 89, and answer the same question with respect to the circus picture of the clown and the two girls. A. Well, that is again a matter of reporting, and if you have a magazine with dramatic criticism and undertake to review the plays, it seems to me impossible to allow the play on the stage and to refuse to allow a photographic report in a magazine. The kind of play that I don't think is particularly good for young people, but its attractiveness is not enhanced in any way. 933

Q. The text shows clearly that that is a photograph of two performers and a clown from the Ringling Brothers circus? A. Yes.

Q. At the entrance to the Big Top? A. Yes.

Q. Now, will you turn to page 94, which is again a two page spread, "Goldbricking with Esquire", and to which a great many objections are made. I know four is the first one. That is the joke about the corporal who was going

934 home on a furlough and finds two girls in his berth and says: "I am sorry, one of you girls will have to leave".

What is the basis of your opinion with respect to that joke? A. Well, the main point of the joke seems to me to come from understatement. He says: "One of you girls will have to leave." It seems to me impossible that any boy or girl old enough to read that would think that is implied that the other should stay. That the expectation of the reader is clear, of course, both girls will get out, but he says: One of you girls will have to leave. The humor of the understatement is perfectly familiar in English literature since early days.

935 Q. I ask you the same statement with respect to item 15, which says: "Don't fool yourself. He doesn't suspect a thing." A. Well, the only point that I see in it here that I think high school boys and girls would see in it is that the phrase "knows everything" implies that he knows discredible things about the wife.

It is again a matter of filling in the blanks to suit yourself, with no indication whatever that an obscene meaning is meant.

Q. And item 24 again is a joke about the soldier home on furlough and says to his girl: "Slimmer, aren't you?" And then at the end: "Where do I start?"

936 What is the basis of your opinion with respect to that? A. Again he is calling attention to the fact that she said something which she didn't mean.

Q. Do you see anything obscene in it? A. I do not.

Q. At the bottom of that column is the joke about the Army hostess who went in swimming and she was confronted by a soldier looking at her and the soldier's remark: "You're thinking that pan's got a bottom in it".

What is the basis of your opinion with respect to that one? A. Again, I think the point of the joke, and the point to which the attention is directed, is the ironical contrast between the whole story and position that the woman is assuming when she thinks she is entirely covered, and the very vulnerable position that the soldier calls to her attention that she is in when she thinks she is partly covered. 937

Q. Now, here is an Army joke that is very close to your experience: "Have a good time at the party, daughter dear, and be a good girl."

"Make up your mind, mother."

What have you got to say about that? A. Well, I heard that joke in one form or another for at least thirty years and it doesn't seem to me to be even a joke by this time. 938

Q. You understand this magazine is only reprinting this. A. I am not criticizing your editorial policy in that respect.

Q. Now, the second from the bottom of the third column, the one about the private who says to the girl: "I'm afraid we can't have much fun tonight. All I have left of my pay is some small change." And the girl answers: "Well, how much do you think it takes to send my kid brother to the movies—a five dollar bill?"

What have you to say about that? A. That seems to me absurd to read an obscene meaning into the desire of the young man and a young woman to get rid of a younger brother or sister. I am speaking now not as a principal of a school, but as a father of four children. 939

Q. And the one under it ending up: "It ain't against regulations to undress, lady."

What have you to say about that? What about that one? A. Again, there is no implication whatever, that the lady doesn't have a bathing suit on. If you wish to imply that he is talking to her when she is indecently exposed,

940 that is a matter of the obscenity of your construction of it and not a matter that is in print.

Q. I don't construe it that way, Mr. Smith. A. I am just warning you against it.

Q. Now, will you give me your opinion with regard to the joke: "You're sure there are no soldiers around here" underneath the picture of the girls in the water. A. Well, I don't think it is much of a joke.

Q. What? A. I don't think it is much of a joke and the girls are entirely covered. I don't see anything in the picture where there is any indecent exposure.

941 Q. And, finally, the joke of the woman who went swimming and heard one and spoke up and the answer: "79, darn it".

What is the basis of your opinion with respect to that? A. Well, that is again in the 30 year old class.

Q. Now, I find I skipped unintentionally one article in the October issue at page 104 entitled "The Sporting Scene", which is about the war worker girl who took a vacation and every time she tried to perform some athletic sport she had some man come around and kibitz her, and she got mad and went home, and then she got married and had 21 children, and then told her husband that now she

942 doesn't have to take any more advice.

What is the basis of your opinion with respect to that story? A. It seems to me that the lady was entirely right. That was one point on which advice could not be given by the amateur.

Q. Having examined all the cited and specified material in all of the issues, in your opinion is the cumulative effect of the cited and the specified material in those issues such as to render all or any part of it obscene, lascivious, lewd, filthy or indecent? A. I would like to answer that very

fully and frankly, and if the rules of procedure make my answer such as it would be stricken from the record, I haven't the slightest doubt that the chairman will strike it out from the record. 943

Mr. Cargill: You may feel perfectly free to say whatever you want to and talk as long as you want to.

The Witness: Thank you, very much.

I would like to give an answer to that question.

I think that the effect of the magazine to be considered in view of a complete context, that is, context of the magazine itself and the circumstances under which the boys and girls that come in contact with it are likely to see it under the present rules of the Post Office Department circulated like any other magazine. They are likely to encounter it in the home, in the dentist's office, in the beauty parlor, if the girls go to get permanent waves. 944

It is a perfectly open and obviously easily accessible publication.

It would seem to me that even if you put the worst possible construction on all the material that is in there that you would increase any possible harm that might be done if you made it less freely available and still did not stop its publication. 945

I am talking now from the point of view, as I say, of the boys and girls with whom I deal.

I think these younger people feel differently than we older ones, primarily, about the standard of what is accepted and what is not, and I think with reference to the boys and girls that it would be a damaging thing to have a public ruling to the effect that

946 the girls presented in that way were in and of themselves obscene. That is the very ruling itself that would bar this from circulation in exactly the same way as the other magazines were circulated, and that would tend to make mischievous what previously was entirely innocent or at the most only slightly objectionable.

Now, I hope I haven't gone beyond the point of the question. You were asking me the cumulative effect of the magazine when it was mailed out.

Chairman Myers: You say that if we try to take it away from them, then they will get it anyway?

947 The Witness: Yes. While I was at Harvard there was a time, for instance, when there was no doubt that the student editors of Lampoon tried to get the college to suppress a number because it would greatly enhance the value of the number, and my colleagues never suppressed the number.

In other words, if this were entirely stopped from publication, it would simply have the effect, which would be worse than it would be otherwise, of interfering with its present free circulation.

948 *By Mr. Bromley:*

Q. One final question. You don't think it ought to be stopped from circulation? A. No, I certainly do not. I see no reason.

Chairman Myers: In your experience in the field of English literature, is it your view that that kind of cartoon or satire is at the bottom of most humor?

The Witness: It is very much my view, yes. This

juxtaposition of two images that are not ordinarily associated with each other. 949

Mr. Bromley: That is all.

Cross Examination by Mr. Hassell:

Q. Professor, with respect to the last volunteered statement you made. A. Yes.

Q. Isn't it a fact that a magazine such as this, by reason of the subsidy it enjoys from the Government and the approval of its publication or circulation by a department of the Government charged with that duty, if such a situation occurs and that subsidy makes up the difference between profit and loss, would you have any different view from that you just expressed about it? A. No, I don't see that I should. 950

Q. Professor Smith, the school with which you are associated is a private school, is it not? A. That is correct. The current word is independent rather than private. Private has fallen out of use.

Q. Well, the pupils who attend that school pay a fee for attending it? A. Some do and some don't. That is, we have a fairly liberal and extensive policy of scholarships, as colleges do to those who are in need of it.

Q. Is your school largely patronized by children of wealthy people who don't want to send their children to public schools? A. Predominantly, but not by any means exclusively. 951

Q. Predominantly? A. Yes.

Q. Are the public schools in Chicago so inferior that wealthy or substantially wealthy people don't want to send their children there? A. This is hearsay evidence. I haven't investigated the public schools of Chicago, but as I talked

with parents and asked them why they are interested in hav-
952 ing their children in my school that is the reason they give us.

Q. How many pupils do you have in the school you are the head of? A. About 375.

Q. That number matriculates each year? A. No, not all. In the school all together there are about 375 boys and girls.

Q. That is the total enrollment? A. The total enrollment. That varies from year to year, of course.

Q. Now, in your position as head or headmaster of this school, do you find that the boys and girls of all ages come to you and confess their sexual peccadilloes and their secret
953 vices and so forth and what influences them in committing them? A. It varies very much with individuals, of course. Some do not confide at all and some confide very intimately.

Q. Would you say that most of the pupils going to your school voluntarily confide their secret vices to you and what influences them to those secret vices? A. I can say certainly not.

Q. So, as a matter of fact, Professor, you do not know whether these pupils, largely or a majority of them, or a substantial portion of them, are influenced towards secret vices by what they see in this magazine, do you? A. I cannot give you any evidence but merely my opinion.

954 Q. I am trying to get at what your opinion is and on what it is based. A. My opinion is based on the statements of those whom I do know best, but I have no reason to assume either the existence of secret vices or the fact that they are or aren't stimulated by any outside agency.

Q. You know, as a matter of fact, that ninety or more per cent. it has been stated that 99 per cent of men, and the 100th per cent as a liar, has at times masturbated? You know that? A. I have heard it stated.

Mr. Bromley: You are pushing it up, Mr. Hassell.

Mr. Hassell: Well, I am not relying on the preceding witness' conclusion. 955

By Mr. Hassell:

Q. Do you know anything about that, whether there is any truth in that? A. I would have no knowledge of the proportion.

Q. However, these people who have confessed to you actually confessed their secret vices and told you in detail about them and what led them to do those things? A. Again, some have and some have not. 956

Q. Let us be a little more frank as to that. Just what proportion of your student body ordinarily does that? A. Well, it is not the usual relation. I am trying to answer you just as fairly as I can. It is not the usual relation of school child and principal or teacher that the child habitually confesses vices to. I mean, the relation differs entirely from that of the priest and the person who comes to confession so that you are quite right in implying that it is not the large majority who come forth for the purpose, as you put it, of confessing their vices.

Q. Now, Professor Smith, coming to your own children with you as their father, have you received confessions of their secret vices and what impelled them to commit them? A. Yes, I think so. 957

Q. You think so? A. I will tell you why I use the words "I think so": I wouldn't describe those talks such as you use your word "confession", nor would I of my own choice use the words "secret vices", but they certainly have confessed about actions that I think—they have made statements about actions that I think you would characterize as

958 confession and you also used the words "secret vices" and then implied a sort of habitual indulgence that I would not include in my statement. That is why I could not answer your question categorically yes or no.

Q. But out of your enrollment in this school, how many children voluntarily seek you out and confess to you their secret vices and what impelled them to carry on those secret vices? A. If you will substitute the word "misdoing", because I am not sure about the word "secret vices".

Q. Well, let us be plain, masturbation. A. No.

959 Q. How many of your pupils come to you and tell you that they masturbate? A. No appreciable number of the children in the school come to me and tell me that.

Q. You say no appreciable number. How many does that mean? A. Not any more than about one or two in several years; a very small number.

Q. A very small number? A. Yes.

Mr. Hassell: At this point I move that the statement of this witness be stricken. It is obviously of no value whatsoever.

Chairman Myers: The motion is overruled.

960 Mr. Hassell: I would like to reserve with respect to this witness and all similar witnesses, that the fact that I am undertaking to cross examine him does not imply that I have waived my objection.

By Mr. Hassell:

Q. Professor Smith, how long have you been at this Francis W. Potter? A. Francis W. Parker, P-a-r-k-e-r.

Q. Parker, I beg your pardon. A. I am afraid as a New

Englander I don't have any proper way of pronouncing "r". My father, who is like you, a Carolinian, told me about that. I am just entering my sixth year. 961

Q. Prior to your employment there, Professor, where were you? A. I was the head of the Fieldston School in New York City.

Q. How long were you the head of that school? A. I was associated with it either as head of the school or head of the so-called ethical high school. The school merely changed its name when it moved to the suburbs. I was head of the English department for twenty years.

Q. Now, the Fieldston School was similar in character to the Parker School? A. Except that my own responsibility did not extend below the seventh grade. When I was with that school, the only other exception in the nature of the school, the Fieldston School, was really that the school was run by a religious sect much as the parochial school is by the Catholic Church. In other words, it was not an entirely independent organization as the Francis W. Parker School. 962

Q. Now, you have referred, Professor, in your direct examination to matter appearing in the January issue under the editorial "Pep Talks to the Tune of 'Easy does It'."

The material on that page headed "Shor Nuff."

Are you sufficiently familiar with the magazine, Esquire, to be able to tell us whether the description or the characterizations in the first paragraph to the effect that "Esquire, the four-bit magazine which is always busy as a little beaver sandwiching good advice between its spicy cartoons" is a correct description of the magazine? A. No, because the word "always" would prevent me from saying whether that was fair or not. I have seen very little of Esquire, except, as I say, in such places as the dentist's office. I have not been a subscriber to or a regular reader of the 963

964 magazine, so I haven't any idea as to whether that is a correct statement of what the magazine has always been.

Q. Now, with respect to those issues of the magazine which you have seen, would you say that that is a correct characterization of it? A. Yes.

Q. And the spicy cartoons referred to are such cartoons similar to those and perhaps those cartoons about which you have testified to here on direct? A. They certainly would include those cartoons.

Q. In your testimony with respect to those cartoons you did not refer to them as spicy. Would you call them spicy now? A. So far as I know, I have never referred to
965 any cartoon as spicy.

Q. You would not use that word? A. I would not use that word.

Q. You know what the word means or the implication of the word? A. The implication of the word is that they are sexually provocative, but may I make my answer full enough to be sure that I make my meaning clear?

Q. Yes. A. When I say "sexually provocative", I don't mean that they are provocative and imply impure sexual conditions.

Q. Now, in the fourth paragraph, first column, down towards the bottom of this article, we have this statement:
966 "The test is divided into nine sections. Companionship comes first, with 105 points, followed by intelligence, 90 units, and disposition with 80. Comes it then breeding (no, not that) which scores 50."

Do you have any idea what the implication is there with respect to breeding, "no, not that"? A. Well, I am sure that the implication there is for an adult, and I would include in that probably every person in this room, and that probably means the idea of reproduction, but I don't

believe that it would mean that to the boys and girls I associate with. I think they would think the parenthesis was a meaningless one. 967

Q. They would miss the point? A. I think they would miss the point. May I add to that that I think that if they did not miss the point it would not be a very serious matter anyway.

Q. Now, at the top of the next column in this article it is stated: "The pay-off on what kind of a guy this Woodhead is comes quick. He figures a gal's dancing ability is worth 20 points. Sex he gives 10".

"The pay-off". Would you say that there is an implication there that he meant that he rated this fellow Woodhead as a dead one because he doesn't rate sex very high? 968
A. That seems to me a fair inference to draw from it, yes.

Q. Now, at the bottom, number 7 in the tabulation, juking:

"a. That's right. Just what you're thinking about. 400".

What would you say that reference is to? A. I think that the reference is to the fact that juking is not a word in general circulation. I never saw it outside of this particular passage, but it is obviously one that has been defined in the parenthesis, bottom of the column:

"This is something Woodhead thought of which puts sex, dancing, manners, drinking, and risque behavior in one package." 969

Q. So, sex is involved? A. Sex is clearly involved. May I add that I don't think there is any implication that sex conduct is involved.

Q. You wouldn't think any sex misconduct was involved if this article applied to the appraisal of association after marriage, would you? A. Well, it does. It clearly says that the whole purpose of this is to decide whether you want to marry the girl.

970 Q. So you would have to be able to appraise that— A. Exactly.

Q. (Continuing): —ability? A. Yes.

Q. Before you married her? A. Yes.

Q. That wouldn't be any improper— A. No.

Q. (Continuing): —sex implication? A. No.

Mr. Bromley: Are you suggesting that that means they must live together before they get married, Mr. Hassell? I don't think the witness' answer construed it that way.

971 Mr. Hassell: I think he answered it.

The Witness: I did not construe it in that sense.

By Mr. Hassell:

Q. Does the school maintain a library? A. Yes.

Q. In which current magazines are displayed? A. Yes.

Q. Or available to the pupils? A. Yes.

Q. You don't have Esquire there? A. No.

Q. Referring, Professor, to the article by Gilbert Seldes on page 83, "Those Star and Garter Blues", in the center of the second column there is this statement:

"A stripper", do you see that down five lines from the 972 bottom of that paragraph? A. Yes.

Q. "A stripper who does an orgiastic dance verges on the erotic". Do you think that the 18, 19, 20 year old boy, or 17 year old boy who saw this and read that advertisement or this show would not be induced to go and see it? A. Will you read the question?

(Record read.)

By Mr. Hassell:

973

Q. The statement here: "A stripper who does an orgiastic dance verges on the erotic." A. Does that constitute an advertisement?

Q. Well, it might be called such. If you don't like the word advertisement, I would say review. A. Oh. It seems to me that that is to be construed in the light of its place in the article, and the article, as I see it, is condemning the whole business of erotic and near erotic exhibitionism.

Q. Professor, have you seen the show "Star and Garter"? A. I have not.

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Q. Have you ever been to a burlesque show? A. Not for years.

Q. For how many years? A. I can't answer exactly, if you are going to look at my ticket stubs, but I should say it has been twenty years since I have been to a burlesque show.

Q. That would put you how old? A. Well, old enough so I would be allowed out. I am now 52. I don't think I have been since I was thirty something.

Q. You read this article and construed it to be a criticism or a belittling of this show, the Star and Garter Blues; to discourage people from going to see it? A. I need to look at it a little more closely.

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Q. All right. Look at the sub-title, Professor. A. Yes. It seems to me that you are right in directing my attention to that fact, that the sub-title implies that the show as a whole is condemned; that there is only one bright spot in the show.

Q. Do you know anything about the sell-out performance that show has had for some years? A. I don't.

Q. Now, the poem on page 15 entitled "Benedicts, Awake", and a benedict is what, Professor? A. A married man.

Q. A recently married man is usually referred to as a
976 benedict? A. Not necessarily in popular speech.

Q. You think this is a very good poem and should be recommended to your pupils, do you? A. That isn't what I said. I said I thought that is a very good poem.

Q. You don't think that the picture conjured up by the words in the first part of the first verse and the first lines of the last verse is a lascivious, lewd, indecent picture? A. I would like to answer that more fully than with a mere No, because I think that it is not a lewd or lascivious picture, but I think the picture is of the beauty of marriage relations and is one that is invaluable for boys and girls
977 to have. I will go a little further than that, in my own experience, about the time when I was thirty, I very well remember back in the old Boston Latin school days one Henry Pennypacker, who was reading a Greek poem and he came to word "mestus" which is used for hill, a particular kind of hill, a hill rounded, a configuration, and he stopped at that point. He was a man whom we emotionally admired, and he stopped and said: "There is no curve in the world more beautiful than the curve of a woman's breast."

That, to me, was almost the first that I ever heard that implied that sex could ever be associated with anything else than filth or obscenity, so I think if boys and girls encounter
978 this poem, and I think if they had met with this reference it may very well have a similar value to them.

Q. You don't think the picture brought to mind:

"Men sleeping beside your wives, awake!
Awake to gaze longingly, lastingly,
Upon soft skinned thigh and softer breast
Revealed by careless gown"

that that is lascivious or has any lascivious implications? A. No, I would not. I would like to state a little more fully what I think of that and speak a little more fully of the matter of context. The context of the whole poem is very different from the context when you read it aloud, stopping after each word and separating that from the rest of the poem. Now, if you are asked to read it aloud and emphasize it that way in an English class with boys and girls, in my judgment I should say no. I should say for some of them in that fashion it might have some connotation such as you are trying to bring out; that that might mean to them obscenity and lasciviousness, but I wouldn't allow you to read it that way and in that fashion. It is the context of the whole thing, the essence of the whole thing. 979 980

Now, the context here is a very moving context. This deplores the fact of married men having to be separated from their wives and going through all the hardships and dangers and possibly death in war. I think it is perfectly inevitable that the context is a fine and uplifting one, and in the reverse, when you turn to the passage to which you called my attention, in the last stanza: "Men sleeping beside your wives, awake!

"Awake and seek the sweet caress of lip and arm." If that whole point of what marriage means, as it is known to people, is not to be treated as I think it should be, reverently, in a magazine for general circulation and to which young people have access, I think the possibility of happily married relations is very small. 981

I wouldn't like to read a line or a few words from something out of "Romeo and Juliet" and in that fashion distort the meaning of the whole thing. It is the context of the whole that matters not just fragments.

Q. But, Professor, this magazine advertises itself on the

982 front cover as a magazine for men. You know that, don't you? A. Yes, and fine literature was written for men.

Q. You know the reputation of Esquire as being somewhat risque? A. Yes, I think I mentioned myself that I thought the covers were unfortunate because they did somewhat bias the reader, but I don't think it is possible except to an evil-minded person to get anything like a lewd construction out of this poem. You understand I am not being personal in any way.

Q. Yes. A. I was talking generally.

Q. Referring to the reputation of the magazine, you say
983 you understand that they have the reputation of being somewhat risque? A. That is right.

Q. You in your direct examination, referring to these poems, referring to scenes I understand from Hamlet, is it your position that the language in literature and apparently accepted in polite society with respect to sex or respecting sex matters is as frank today as it was in the Elizabethan period?

Is that your contention as you state it now, or do you think otherwise? A. I think it is more nearly as frank today than it was 20 or 30 years ago. I think we are now approximately as frank as they were in the Elizabethan times.

984 It is very hard, indeed, to make a statement in exactly the form in which your question comes, but we are exactly as frank. There are certain differences.

I think in some respects we are franker, and in other respects we are not.

Q. You refer to Shakespeare and hold him up as a model of virtue in your testimony. A. I beg your pardon. I do not hold Shakespeare up as a model of virtue.

Q. And reference is made to the Bible and words in the Bible. A. Not by me.

Q. By counsel. Do you recommend to your adolescent and post-adolescent pupils the reading of Shakespeare's "Venus and Adonis"? A. We do not. May I make perfectly plain the connection in which I mentioned Hamlet? 985

I mentioned Hamlet and the editions of Hamlet prepared for circulation in schools as more or less supporting my position that rather outspoken treatment of marital relations was not only customary but practically prescriptive in the literature boys and girls read before they go to college.

Certainly I don't think that the Queen's conduct in Hamlet is a model for them to emulate.

Q. Now, on page 123, Professor, you referred on direct examination to the article under "Ad Libbing with Esquire," and this is the "Dear Doctor Diddle." A. I have it. 986

Q. You defined that word as meaning to act trivially, I believe. A. Or the equivalent. I don't recall the exact phrase.

Q. You were not by any chance referring to the word "fiddle", were you, fiddling around? A. No.

Q. You would say the word "diddle" around meant acting trivially? A. Yes.

Q. Have you ever heard the expression "fiddling" around? A. Yes.

Q. And that means the same? A. Yes. 987

Q. Have you ever heard the word "diddle" applied to the performance of the sexual act? A. No. I have heard it applied as pertaining to cheat, a person was diddled out of something, but not by young people.

Q. Now, turn to page 137, the cartoon showing the bug-eyed air raid warden with fingers in mouth and high-raised eyebrows, gazing through the skylight, and the legend underneath "And to think I gave up drawing."

988 I believe you said that that brought to your mind that this poor fellow was out in the cold and looking with longing eyes into a warm studio, is that right? A. I think I used the words "possibly out in the cold."

Q. Is there anything there, heavy clothing, icicles, or anything to indicate cold? A. Both men have overcoats on.

Q. But they have no gloves? A. And they have no earmuffs, either.

Q. But they are not rubbing their hands indicating cold? A. Well, it is not a moving picture.

Q. In a cartoon of this sort you could very well represent persons being cold by rubbing their hands, couldn't you?

989 A. I don't want to obstruct the proceedings; I will concede that. I didn't think the point was that they were out in the cold.

I thought the point was that they were envious of what was going on inside.

Q. And would you judge from the expression on the one person's face and the legend underneath the cartoon that he is seeing something that is giving him great satisfaction? A. No, I should say he was seeing something that he wished he could be much nearer to. The whole point of it is that he is not.

990 Q. Let's turn to page 65. A. Did you say 65?

Q. That is what I have here. Counsel jumped back and forth so as to get me mixed on my numbers.

Mr. Bromley: I can't throw you off that way, Mr. Hassell. I wish I could. It was by stupidity and not by design.

By Mr. Hassell:

991 Q. It is the cartoon referred to by counsel as the Sultan cartoon, "What am I bid for this one hundred pounds of sugar." A. It is not in this number from my indexing outside. It is in February.

Q. I beg your pardon. Do you think a cartoon for circulation in the United States, referring to the practice of selling women as so much sugar, or as a commodity, is an elevating and uplifting sort of thing? A. No, but I don't think it is the opposite, either.

Q. Do you think that the readers of Esquire might get 992 any indecent implications from that idea, that you could buy a woman like you would buy a hundred pounds of sugar? A. I doubt if that would be a novelty to them.

Q. Do you mean that they— A. I am saying it is a perfectly familiar conception of anyone who has read the Arabian Nights, which children read. It is common knowledge that in a good many Oriental countries polygamy is practiced and women are sold.

Q. You say you didn't think the matter of buying a woman would be a novel matter to the readers of Esquire? A. Nor to anyone else.

Q. Page 77, the cartoon and article "Home Sweet Ruby 993 Street." Did you read this article in its entirety? A. Yes, I read it.

Q. Do you think it is a humorous article? A. I think it is intended to be. I don't think it is very humorous. It is a rotten joke in the sense of a poor one, not in the sense of an indecent one.

Q. You don't think this article would be of sufficient interest to be read by any of your pupils? A. I do not.

Q. But that if they should happen to read it there would

994 be nothing wrong in a cartoon purporting to depict two unmarried young people in bed together, or getting up and dressing in front of a stranger or casual visitor, and in front of their parents? A. Of course, the point of the story, as far as it had any, was that this was a social worker who was investigating sordid social conditions, and doing it very badly, so it is not quite fair to describe it as a casual visitor.

I don't think much of the story, but the point is that the amateur social worker is a futile and ineffectual person.

It seems to me entirely devoid of harm to young people to let them know that a social worker, professional or amateur, would find sordid conditions in the overcrowded and badly
995 kept up negro quarters.

Q. This article indicates that a social worker, such as you may call Mrs. Finn, derives some enjoyment from looking over the manly figure of the young man who was dressing before her, does it not? A. I didn't interpret it so. I did interpret it that she thought it was getting hot and that was after—I think I had better find the passage. Can you locate the passage for me that you have in mind?

Q. The center of the middle column on page 77:

"It was not the response Mrs. Finn had hoped for, and left her at rather loose ends. Thinking it better to begin
996 afresh, she fastened her good eye severely on her notebook and presently flung at Mrs. Vermillion a new leaf, the writing on which seemed slightly furry as her wandering eye, cast presumably in the direction of the ceiling, caught Edna and Radiant gingerly dressing. Radiant, only half clad and suspecting the vagrant eye to be focused on him, winked slowly at Mrs. Finn."

Do you think that is an entirely decent sort of thing to put in an article? A. No. I said that I thought this story—I

think it is a story—it is labeled fiction—was a sordid story.

997 I don't think, however, there is anything like the sordidness or violence of language, or connotation of obscenity that there is in such a play as Tobacco Road.

Q. Tobacco Road does not enjoy the second-class privileges does it? A. No.

Q. Page 95, the portion of the article or story "The unsinkable sailor."

Do you say there is nothing obscene, lewd, lascivious, indecent, or filthy in the word "sonovabitch" as used in this article? A. I don't know whether you phrased your question negatively or positively. Do you mind repeating it?

998 Q. Do you say that there is nothing obscene, lewd, lascivious, indecent, or filthy in the word "sonovabitch" as set forth below the center of the first column? A. I say the inclusion of the word "sonovabitch" does not make it lewd, lascivious, and so forth.

Q. Is that word commonly used and commonly accepted among the pupils of your school, Professor? A. No.

Q. And commonly used and accepted in polite society? A. No. I said I had seen it in the Chicago Tribune.

Q. I believe you stated on direct that you had seen or heard this word used in talking pictures on the screen? A. I don't think I said that.

999 Q. You don't think you said it? A. I didn't intend to say it.

Mr. Bromley: You said it.

The Witness: I shouldn't have said it.

Mr. Bromley: If Will Hays ever hears that about you he will get after you.

The Witness: I do not recall it. I have seen it in print.

By Mr. Hassell:

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Q. You withdraw that? A. Yes.

Q. Now, the incident in the fourth column of this article on page 95 as described to counsel by you, what the sailor says to the girl, "How's chances to lower the boom on your sister?", you say there is an ambiguity there, a proper inference and an improper inference that might be drawn from that. Is that correct? A. That is correct.

Q. Why do you think that was included in this article; for the purpose of the reader first drawing the improper inference? A. No.

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Q. You don't think so? A. No. I think it was included for the purpose of reflecting the girl, as drawing an inference of terror which would include the improper inference, but I do not think it is intended that the reader himself should misconstrue the phrase.

Q. Now, having regard to ordinary, plain everyday English construction, if the writer of that article intended that the improper inference should not first be drawn, why didn't he put the 82 in to start with? Why didn't he make that explanation before he wrote the other? A. Because that would destroy all point as far as the girl is concerned.

1002

Q. As a matter of fact, Professor, if you leave these questionable matters out of this article, do you see any excuse for it at all in a man's magazine? A. Yes. I should say that in a man's magazine it was legitimate enough to reflect the conduct and language that was coarse. I wouldn't say it was legitimate to reflect conduct and language that was obscene. But I do think that it was perfectly permissible to imply that there exist attitudes towards sex and other things that are not the attitudes you wish to encourage.

Q. Aside from these questionable matters and the rather sordid, if not filthy, reference in this article to the sailor inducing the proprietor of the establishment to lock up a jar of urine, do you see any reason for the article at all? A. That is in a way an editorial question, and I don't have much reaction to it one way or the other. I do not feel, as I did about the voluntary social worker, that it ought not to be included at all. 1003

In other words, I have no strong opinion one way or the other about it.

Q. Now, coming to the March issue. First we had the advertisement of the Thorne Smith three wittiest, most ribald novels, America's one and only Rabelaisian humorist. I believe you indicated that from your knowledge of Thorne Smith, which consists of having read the novel called "Topper," and possibly the other two novels—or the three novels held forth by this advertisement—are improperly represented. 1004

That's the reaction you get from this? A. Yes, one of the three would seem to be misrepresented.

Q. But did ~~you~~ get the impression from reading the advertisement, that the advertisement was intended to convey that something very risque and Rabelaisian and ribald and so forth would be procured by the purchaser of these books? A. Yes, it states expressly that the three wittiest and most ribald novels were there. Ribald and Rabelaisian mean substantially the same thing. 1005

Q. At page 49 we have another one of the cartoons which counsel describes as a "Sultan cartoon," two soldiers and the slave girl with a "happy birthday" tag attached to her ankle, and in transparent and diaphanous bloomers and brief brassiere, and with the wording underneath, "I wonder how the Sultan knew this was my birthday."

1006 I believe you said that the point of this joke was similar to that of the other Sultan cartoon, that counsel had previously referred to, to show amazement that anyone should send a birthday present such as this to a soldier. A. That was not quite it.

It was a juxtaposition of two codes that don't ordinarily come into contact with each other at all, and the assumption that an American or a French soldier would be given a slave girl as a birthday present is an absurdity and, accordingly, it was the close juxtaposition of these two things.

1007 The Oriental custom is that one Sultan might send to another Sultan a slave girl, and the customs of Western people are different. That was the source of the joke.

Q. You didn't get the implication that the soldier with the smile on his face and the large eyes was delighted at having this birthday present sent him? A. Yes, I did. I got the idea that he was using exactly the formula that he would use at home, how did so-and-so know that it was my birthday, and he was reacting in the same way, which was incongruous, because after thinking how nice it was to have the Sultan send the slave girl, he still has the question of what to do with her.

I don't think his expression is lascivious.

1008 If you want to say his eyes are bulging, they are bulging as he looks at the other soldier. There is no indication who is speaking—it might be the one who looks worried.

Q. It might be the one with his mouth open and the grin on his face? A. I think that is probable.

Q. If a soldier in such a situation got such a birthday present, he would probably use her only briefly, wouldn't he? A. I doubt if the Army barracks would make it possible for him to use her at all.

Q. We don't see any barracks in this picture. There is a mosque— A. I took the Oriental decor in the background as being the place where the girl had come from, not the place the soldiers inhabited. 1009

Q. They are apparently on the desert. A. Yes.

Q. Page 68— A. May I be sure, before we leave the Sultan cartoon, that I have made myself clear? Of course, the sex content in that, the whole point in the thing, is that the sending of the slave girl, which is in accordance with the Oriental customs, is not in accordance with ours, and I don't for a moment deny that the girl is sent for what we would consider immoral purposes.

Q. On page 68 we have the "Fall of the Flattering Word," and I believe you stated you found nothing in there likely to arouse improper ideas? A. That is correct. 1010

Q. Do you agree, Professor, with the philosophy stated in the center of the third column? A. I didn't know there was a philosophy.

Q. "That these clothes will reveal and conceal so craftily that men will be driven mad with desire." A. I think that is greatly exaggerated. But I do agree with the fundamental assumption that clothes enhance sex appeal rather than taking it away.

Q. And revealing and concealing have an allure? A. Yes. 1011

Q. Would you apply that to the Varga girl pictures? A. No. It seems to me that the Varga girl pictures are rather curiously free from that. The clothes are used, as far as I can see, to keep the Varga girl within the conventions, but not for the purpose of accentuating the appeal.

Q. But in all instances the Varga girl clothing is very transparent and diaphanous? A. In some instances it is, and in some it is not, but no use is made of the fact that it

1012 is diaphanous to suggest what is covered. I think any of us who have traveled on subways or elevateds have seen billboard advertisements with the figure in a one-piece bathing suit, where people have come along with a pencil and accented the pubic hair and the nipples.

That is only used in a medical examination with us.

But the Varga girls conspicuously do not do that.

Q. Don't you think, Professor, that to a great many people such bald-faced exposures would be disgusting? A. In the first place, I don't think they are bald-faced exposures.

1018 Q. I am not talking about the Varga girls. I am talking about the additions to the bathing girls you have seen on the subway. A. Of course they are disgusting, and I would allow you to put on all the rest of the adjectives in the criminal act.

Q. Well, a thing that is disgusting ordinarily isn't enticing, is it? A. No.

Q. You say the hill-billy cartoon at page 107 is in bad taste but it will not affect the morals of your pupils, or it would not affect the morals of your pupils should they see it? A. Or of young people of that age. I wouldn't confine it just to our pupils.

1014 Q. Do you say it is a common sight to see? A. No. I didn't say that, at least I didn't intend to. I intended to say it is certainly not an unknown sight.

I don't think it is a common sight with boys and girls that I know. I think it is a sight that all of them are likely to see.

Q. On page 60— A. Aren't you in the wrong number?

Q. I beg your pardon. That is the next number. A. This is April that we are moving to now?

Q. Yes, sir. I believe you first commented on the front

cover here, that you don't like the front covers of Esquire—you think they are cheap? A. That is correct. 1015

Q. You think they are vulgar? A. That is correct.

Q. Professor, do you know enough about magazines to know that the front cover is usually the thing that sells the magazine at newsstands? A. I don't. In fact, the magazines that I have bought, I have never bought for the covers, so far as I know.

Q. You haven't had very much experience with spicy magazines, have you? A. There are two words in there that you have to define. I don't know what you mean by "much experience," or "spicy magazines." 1016

I certainly have read Life and Time and a good many other magazines.

Q. Take magazines like the Police Gazette. A. The Police Gazette is not on my reading list. It has been called to my attention, however, from time to time, by college students when I was in college.

Q. Magazines that go in for leg art and so-called cheesecake, if you know what that means. A. Oh, yes, there was an article in Life on cheesecake, with illustrations.

Q. Ordinarily you haven't had much experience in that type of magazine? A. Except as it occurs in everybody's reading, but, of course, my point is that it does occur in everybody's reading. 1017

Q. And you think the bug-eyes of Esky on the cover pages, and the cartoons in Esquire, imply that Esky is looking for everything he can see. I believe that was the expression? A. Yes.

Q. Everything spicy that he can see. Do you mean that? A. Primarily, yes.

Q. Now, coming to page 60, this is the article or story dealing with "The Court of Lost Ladies." It says "Despite

1018 Her Honor's years of earnest striving the ranks of the sisterhood have never diminished, never changed." A. I don't locate the passage.

Q. That is the sub-title. A. Yes, sir.

Q. You say that you were surprised to find this sort of a story or article in Esquire. Why were you surprised? A. Because I have not been a reader of Esquire, because it seemed to me the seriousness of this story was in contrast with the rather futile figure of Esky on the cover.

Esky is represented as a rather futile and trivial person. This thing is done with complete seriousness and it seems

1019 to me with great effectiveness.

Q. Do you think it would be effective in having the male pupils of your school refrain from having contact with such women? A. Yes.

Q. Were you surprised because you had in mind the reputation of Esquire for being risque? Were you surprised by reason of the fact that this article appears to discourage the visiting of sporting women? A. No, I was not surprised at all because this appears to discourage the visits to sporting women, and I was surprised because I thought of Esquire as a thing that was done in a lighter vein. This is done in complete seriousness.

1020 I have not been a reader of Esquire and I have found a number of pretty serious factual articles in Esquire which I had not known about at all.

Q. Your impression is that this article is done in complete seriousness? A. Yes.

Q. Now, coming to the May issue, pages 86 and 87, the strip "Exploits of Esky."

Professor, do you say there are no indecent, obscene, lewd and lascivious implications to be derived from these cartoons picturing, first, Esky peeking over the bushes? A.

I said nothing of the sort. A person can derive indecent, obscene, lewd, and lascivious suggestions from almost anything. I never would say that no lewd or lascivious suggestions could be derived from—you can fill in your own line. 1021

Q. What do you think of a man peeking over the bushes at a nude woman in bathing? A. The nude woman is covered above the waist.

Q. At that point where the cartoon is drawn, but did you read the language under it? She gets out of the water and she dresses as she proceeds with Esky as they walk. A. Are you looking at No. 29?

Q. Let's start at 29. "Time when women can become pregnant"— A. "Starting at the beginning of the sentence at 28. "The lady dislikes men"— 1022

Q. —Yes. "The lady dislikes men but wants a baby, so I sold her a ticket for the time when women can become pregnant by taking an electric shock. 'What do you want?' 'I want to see the redheaded dancer.' 'You won't need a ticket for that, just go upstairs and down the path.' Down the path was a brook and Esky saw the redheaded dancer in swimming. 'Hurray,' he shouted, 'at last a pretty girl to look at.' 'Esky—you darling, won't you join me?' But before he could a Western Postal girl tapped him on the shoulder: 'Follow me. You are to be judge of beauty in Finneagan's Dell.' Esky followed and so did the redhead, dressing as she walked. The Western Postal girl started to sing singing telegrams: 'Happy Birthday, Aunty Bess, every day I like you less.' 1023

"But Esky wasn't listening—to one side of the path Esky saw the most perfect creatures disporting themselves in a carrot-like clearing"— A. I am sorry, it is Corot—it is French.

Q. I beg your pardon. Continuing:

"The redhead explained: 'That is the abode of the Libidos
1024 where they gather when they are not on men's minds.'

"Esky watched them play gracefully or loll indolently by a tinkling fountain. The sound of their mellow voices lured Esky toward them like a magnet, but the redhead grabbed and held him. The Libidos joined in a ballet while leaves rustled an accompaniment. 'Why do so many look like movie stars?' asked Esky. 'Oh, they belong to men who are too lazy to imagine their own perfect woman, so they adopt the likeness of a star and if you look close, you'll see one old hag, the Libido of a man who just don't
1025 give a damn.'

"Esky saw a Miss drift by. 'Come,' said the redhead. 'if you don't get to Finneagan's Dell in time, I'll be attending Esky's wake.'

"And the three of them hurried to the amphitheater. The Western-Postal girl explained: 'This contest is the result of an argument between Hollywood big-shots as to which studio has the star with the best shape.'"

Do you say that there are no obscene, lewd, lascivious or indecent implications in the language and the accompanying pictures or cartoons? A. No, you are putting in the word indecent. Of course, the idea of a man conceiving of
1026 naked female figures is generally regarded as indecent. On the other hand, the story of Acteon coming on Diane bathing, a story from the Greek classics which is given to children when quite little, calls attention to the same point.

I take it this is a satire on comic strips, and does not challenge comparison with reality any more than the story of Greek goddesses would.

It doesn't seem to me as being lewd or lascivious, but the story lacks point unless the matter of indecency is involved.

I don't think by that very fact that it is lewd, lascivious, filthy, or obscene. I think that is a distinction one has to draw or what we are engaged in has no reason at all. 1027

Q. And Esky is pictured in these cartoons with the large bulging eyes you referred to before? A. Yes, but that is his stock characteristic, and he is never pictured any other way and his bug-eyes bulge as much in No. 25 where he is falling down and looking at the little male figure.

Q. And he is looking for everything he can see? A. Oh, yes.

Q. That is the language you used? A. Oh, yes.

Chairman Myers: Have you finished with that point, Mr. Hassell? 1028

Mr. Hassell: Yes.

Chairman Myers: We will adjourn until 9:30 tomorrow morning.

(Whereupon, at 5:30 o'clock, p. m., October 21, 1943, an adjournment was taken until 9:30 o'clock, a. m., Friday, October 22, 1943.)

1029

HEARING OF OCTOBER 22, 1943.

1030

PROCEEDINGS CONTINUED.

Chairman Myers: Mr. Hassell, will you proceed.
Mr. Hassell: Yes.

HERBERT W. SMITH, a witness called by and on behalf of the Respondent, having been previously duly sworn, resumed
1031 the stand and testified further as follows:

Cross Examination by Mr. Hassell (Continued):

Q. Mr. Smith, referring to the cartoon on page 48 of the May, 1943, issue of Esquire. A. This cartoon?

Q. Yes. A. There we have the airplane spotters on top of a building, one with a pair of binoculars, looking down towards the ground, and the legend underneath "She looks more like a B-17 than a P-40."

You will note that this cartoon shows buildings apparently all around or close by, and in the distance an open place, a
1032 direction different from the way in which the man with the binoculars is looking.

I understood you to say on direct that this type of picture leaves a blank and is susceptible of other interpretations or several interpretations. A. That is right.

Q. Now, what other interpretation would you give to this? The worst you refer to as a man looking at a nude woman. A. It seemed to me that the assumption that the woman is nude is entirely gratuitous. There is nothing in the cartoon to indicate that at all. The phrase implied

that they are looking at a woman and that she looks more like a Flying Fortress than a pursuit plane but that does not, in my mind, suggest the fact of nakedness. You can fill it in any way you want to. 1033

Q. It is apparently night? A. Yes.

Q. You can see the lights in the windows of the adjacent building? A. Yes.

Q. Referring to page 93, "Broadway for the Boys." A. Yes.

Q. The text and the printed matter adjacent to the picture, I believe you stated on direct that the reference here in this text to the fact that the soldiers have just come from a discussion of a hygiene lecture in which it was estimated that in the Army 20 percent do, 20 percent don't, and 60 percent might. You stated, I believe, that these fellows go home without having had any immoral relations with the girls in the picture. How did you arrive at that? A. I saw the play. 1034

Q. You saw the play? A. I saw the play.

Q. So you are going beyond what appears in the text here and in the picture? A. Oh, I see nothing here to imply that that is on the contrary from what happens in the play.

Q. You see nothing here about them going home without having relations. A. It seems to me it is quite explicit in stating that they do go home without having relations. 1035

May I read the paragraph?

Q. Yes, sir. A. The top of the second column of this little insert:

"One thing leads to another, and another leads straight back to barracks when Quizz decides he belongs to the first 20 percent."

That states explicitly that they went to the barracks
1036 without having had intercourse.

Q. The first 20 percent don't, the second 20 percent do, and the 60 percent might? A. That is right.

Q. You draw the conclusion from that, then, that there were no immoral relations? A. I think the conclusion is inevitable.

Q. I see. Does this text, coupled with this picture, indicate that immoral relations are contemplated here? A. It indicates that immoral relations are in the mind of one of the two boys.

Q. I see. Now, coming to the June issue, at page 34 is a
1037 picture of the Varga girl in a semi-recumbent repose, leaning back on one hand with her legs under her. What sort of a costume would you call this that is on this figure? A. The conventional costume of the ballet dancer practicing.

Q. The ballet dancer? A. Yes. That is made clear by the verse that goes with it. The first line says:

"Your life as a young ballerina
Is devoted entirely to art,"

And I should disagree with your description of the position as semi-recumbent.

1038 Q. How would you describe it? A. I would say it is a conventional pose from the ballet. Recumbent means to me lying down. And the girl is anything but lying down.

Q. Did you ever see a ballet dancer in such a costume as this? A. Yes.

Q. One-piece affair, so sheer that the folds and wrinkles in the body are shown? A. I should not say that was so sheer that the folds and wrinkles in the body were shown.

Q. Can you see a wrinkle or fold down the middle of the body leading to the umbilicus? A. Yes.

Q. I don't have to pronounce that "umbil-eye-cus" now? A. I agree with your pronunciation of that. Would you repeat the question, please? 1039

Q. I say, do you see a wrinkle or fold or a crevice coming down the center of the body to the umbilicus? A. No. As a matter of fact I see one coming in from the side, which will probably serve your purpose just as well.

Q. You don't see it coming from the breast? A. I see a lightening indicating the modeling of the body, but the only wrinkle I see is over the hip.

Q. I have reference to this (indicating). A. It is unquestionably a shadow indicating the modeling of the body.

Q. Maybe I described it ineptly. I will say a crevice, or whatever you want to call it. A. I am not picking at your phrase. But I want to imply that is not an indication of the sheerness at all; it is an indication of the fit or cut. The material in that costume does not seem to me translucent. 1040

Q. Notice the scantiness of the cut of the material. A. Yes, sir.

Q. As it passes between the legs of the model, a ballerina or dancer who actually had this on and danced in a costume of this sort would probably expose herself there, wouldn't she? A. I should say emphatically not. The costume is designed to prevent it.

Q. But this material is cut up above the area of the body where the torso joins the body, isn't it? A. It doesn't seem so to me. 1041

Q. Could you locate the points of the breasts of this model through this material? A. No more than in any advertisement for women's underwear.

Q. And do you usually see advertisements of women's underwear in colors, natural body colors? A. I have not looked at them closely enough to know.

1042 Q. Now, let us refer to page 134. There we have "Libel Suits Were as Wine to that Hell-Firin' Editor of the Old West, Dave Day."

I believe you said that this jingle about the epitaph

"Here lies the body of poor old Charlotte.
Born a virgin, died a harlot.
For eighteen years she kept her virginity.
An all time record in this vicinity."

I believe you said you saw nothing in that that would tend to corrupt the minds or the morals of your pupils? A. That
1043 is correct.

Q. I believe you referred to the antiquity of this ribald joke. A. I did.

Q. Do you think by reason of its antiquity and the fact that it is known that it would not be novel to pupils in your school? A. Yes.

Q. You said you read the Muldoon paragraph four times without realizing its vulgar connotation? A. I admit it.

Counsel called my attention to the fact but I did not get it when I read it originally.

Mr. Bromley: You are talking too much. Mr. Has-
1044 sell.

By Mr. Hassell:

Q. But you say, Professor, that although this is vulgar or has a vulgar connotation it is not likely to affect the conduct of right or wrong of your pupils? A. That is my opinion.

Q. Looking at that paragraph in the column I just read, would you permit your pupils to use the word "harlot" in your school? A. Not in my presence.

Q. If the word were used in your presence you would take disciplinary action, would you not? A. I should take action to discourage it; probably disciplinary action. 1045

Q. Why would you do that, Professor, if there is nothing about it, or nothing harmful about it? A. Because I should take similar action for any other breach of good manners. May I go a little further into that answer because I think that touches a great many of the questions that are phrased? That is a question of the criterion of obscenity from the point of view of the boys and girls of the age that I am concerned with. I should certainly not allow them to use the word "son-of-a-bitch" in my presence. I should object to it very much. Similarly, I would not allow a perfectly scientific medical book dealing in detail with the urinal-genital tract to be in the library. That is, there are a great many things that are inappropriate to school which do not seem at all obscene. 1046

Q. I don't believe you commented on the two other items you have discussed in this article, or whatever it may be called. That is the first one, "Social items on the first page include such as these:

"2. Weddings are on dit for next week. This weather kind of suggests two-in-a-bed spoon fashion."

Did you discuss that? A. I did not discuss that. 1047

Q. You don't think there is any obscene, lewd, lascivious or indecent connotation to be gathered from that? A. I have never seen anything obscene or indecent about two spoons lying together.

Q. This kind of suggests two in a bed spoon fashion, doesn't it? A. Well, lying beside each other.

Q. Well, what other way could you lie in bed spoon fashion? That would be about as close as you could get to

1048 gether, wouldn't it? A. Simply side by side. Spoons are ordinarily laid out in the silver drawer side by side, parallel.

Q. But they can be put on top of one another, and they cannot get any closer, can they? A. Yes. As a matter of fact, when I read it that was not the image when I read it. It seems to me that when you are implying one on top of another you are reading into it something that is not there or necessarily suggested from the first or previous one.

Q. Why does it use this method of expression two in a bed spoon fashion? A. Well, it is a way of saying two in a bed side by side.

1049 Q. That is what you get? A. That is what I got from it.

Q. Now the other item you did not comment on, and that was the one which reads:

"When Chipeta, Queen of the Utes went to Washington, Day pretended that she had been seduced there by an eminent gold-standard statesman. He followed the case for nine months, announced the birth of a boy, named by Day for the statesman, and chronicled the alleged boy's growth for years by that name."

Would you say that that item bears any indecent, lascivious or lewd connotation? A. No. It would seem to me that if was a description of an unwarranted and libelous attack,

1050 but it is merely a piece of reporting. I see nothing there that would stimulate lascivious images in the mind of a student or any other reader.

Q. The fact that Chipeta, the Queen of the Utes had been seduced and nine months thereafter brought forth a child as a result of the seduction; there would not be anything immoral or improper or indecent in that? A. Now it seems to me completely necessary that we assume that young people should be acquainted with the fact that sexual relations lead

to birth of children. That certainly is not an idea of obscenity in itself. It seems to me also that they are acquainted 1051
with the fact, the deplorable fact, that people from time to time are seduced. The presentation to young people of the idea that there are such things as sexual impurity is not an incentive to them to take part in sexual enjoyment.

Now it can be so presented but it does not seem to me to be so presented in this case.

Q. What would you think would be the reason for including items of this sort in a man's magazine? A. Well, items of this sort, and there are a great many items of this sort included, rather consistently, in order to give the local color of a rather wide cross section geographically and culturally 1052
of the United States.

Its particular appropriateness to a man's magazine is that it has rather rougher language, cruder language than would be appropriate to the Ladies' Home Journal.

Q. Isn't it a fact that, Mr. Smith, with this type of material plus the pictures in the magazine, that that accounts for its reputation for being risque? A. Quite possibly.

Q. Now, the July issue, page 76. I believe you stated with respect to this color photograph and the central figure therein, that this is a customary amount of exposure. A. I did.

Q. You wouldn't take any objection to that picture? A. 1053
As a piece of reporting on a musical comedy, I certainly should not.

Q. Even though it appeared in a risque magazine? A. Even though it appeared in a magazine which was considered risque.

Q. Now, turn to page 146, the central figure in the advertisement on that page. A. Yes.

Q. Is it your experience with pupils in your school that the picture of an entirely nude woman with a transparent

affair laying across her buttocks, would not be noticed by
1054 your children at all? A. It seems to me unlikely that any one in the school looking through the magazine would notice a picture of that size, even if the description that you gave it were an accurate one, in the middle of the advertisement.

Q. Do you think this model is clothed? A. When I read through the magazine I didn't notice it. I assumed it was a picture of a person sunbathing. I didn't even notice if it was a hat or a diaphanous bathing suit. I did notice that the picture was face down and none of the front of the body was exposed.

1055 Q. But this picture does show without any obstructing material whatsoever the nates of this person, doesn't it? A. You have used a word that is beyond my vocabulary.

Q. That is the contour of the rear portion of a woman's body. A. It is beyond my vocabulary. I didn't know it.

Mr. Bromley: He made it up.

The Witness: Will you read the question?

By Mr. Hassell:

Q. I said, that portion of the body is shown? A. A part of the buttocks of the woman are shown, yes. I hope you
1056 don't mind my cruder description.

Q. Extending on up to the waist and on up to the neck and head? A. Yes.

Q. This figure appears also to be in life-like color, doesn't it? A. Not particularly. I don't want to offend the art editor.

Q. It is a flesh colored figure; isn't it? A. I think it is meant to be, and, by the way, may I again say that I am not being flippant in answering the question at all. If you com-

pare the color there with the very life-like flesh tones in— 1057
what is the figure draped in gold cloth which is also in the cited material?

Mr. Bromley: Golden Mould.

The Witness: You will see a great deal of difference in the realism of the presentation. This seems to me to be rather a crude coloring in comparison with the other one.

By Mr. Hassell:

Q. Now, we come to the strip of Esky on page 87. A. 1058
Yes.

Q. You referred to the ambiguity here about money. A. If I used "ambiguity", I would like to use a somewhat different word, because "ambiguity" implies only two meanings. I intended to state that a multitude of meanings could be attached and the attention is not directed to one any more than another.

Q. Name some of the meanings that might be attached, will you, Professor? A. I don't see how mermaids are able to survive when they go under water because they have lungs and not gills.

Q. But the text under this says: 1059

"'You see—women are women the world over.'

"Esky turned to Verne: 'Say, there's something I have always wondered about mermaids—'".

Do you say that does not have a definite connotation? A. It doesn't seem so to me. He simply changes the subject and goes on with the next.

Q. Now, I understood you to testify, Professor, that if the worst connotation be applied to this, that, of course, would be obscene? A. Yes.

1102 cartoon or picture should have been included in the citation at all. A. Yes, sir.

Q. To you that has no point that is indecent or suggestive? A. That is right.

Q. No suggestive point at all? A. No.

Q. Let's come to the October issue, Professor. Refer to page 10, the third column, "The case of the classy chassis." A. Yes, sir.

Q. Do you think the characterization in this letter of the Varga girl pictures as the "Varga wenches" is an appropriate characterization? A. I think the term "wench" is one

1103 of the terms that I alluded to yesterday whose meaning has changed very much, and I think the connotation of the thing, like "gal" is a fairly cheap connotation, but I don't think it implies at all the same thing as prostitute, harlot, and so forth, loose sexual behavior, in this connection.

Q. He goes on to say, "We who appreciate shapely forms," and "a spot has been reserved on my wall to deposit such a dish."

Now, men don't eat women, do they? A. No. I hadn't thought of the implication of cannibalism, if that's what you mean.

Q. But referring to a shapely wench as a dish doesn't

1104 convey any sexual connotation, does it? A. Of course, it has a sexual connotation, but it is not the connotation of an indecent picture of a woman. The reason, of course, that they are pinned up is that they are pictures of girls.

Q. I see.

Let's go to page 37, the cartoon in the lower right-hand corner. A. Yes.

Q. I believe you stated that the sailor flexing his biceps on which is tatooed a hula dancer is manifestly simply to show the native girl a trick. A. It seems so to me, yes.

Q. And you think the readers of Esquire would get no other impression? A. It seems to me that is the impression obviously pointed out by the marks indicating that the biceps are being flexed, and the point of the cartoon would seem to me to be that he is showing a native girl the kind of dance that she can do. 1105

Q. I won't undertake to cover all of this in this magazine. The Portrait Above the Fireplace story, page 56 and 128. You recall the story? A. I recall the story, yes.

Q. The picture the man idealized as his mother, and he didn't know his mother, and the final revelation to him that it was a picture of the Madam of a bawdy house. A. Yes. 1106

Q. Would you say that the combining of those sentiments in such an article or story in such a magazine as this would have a filthy connotation or implication? A. No. It seems to me it is almost exactly identical with the point of Shaw's Mrs. Warren's Profession, which is included in the collections of Shaw's plays which are commonly available in school and college libraries.

Q. Referring to page 93, "Goldbricking with Esquire," and to the item 17 in the last column of page 93, second item, "What does f-e-e-t spell"? A. That is not your question, is it? 1107

Q. No. I am referring to that. I believe you stated that the point of this joke was to bring out the discomfiture of the teacher? A. Yes.

Q. As a teacher, Professor, I guess that is the one that hit you first? A. That is the one that caught my eye.

Q. Now, coming to page 104 and 105: "The Sporting Scene". I don't recall that you commented on this. A. I did.

Q. Did you? A. Yes.

1108 Q. I beg your pardon. A. It is all right.

Q. You are familiar with the story? A. I am familiar with the story.

Q. You say this has no indecent or objectionable connotations from a sexual standpoint? A. It seems to me not to point to any. I am willing to repeat in substance what I said and that is that the point of the story is that she has been advised about everything else on earth except having children. That is something that she feels that she can do without any kibitzing.

Q. Now, to the November issue, Professor. Referring to
1109 the Varga girl picture, page 46. A. Yes, sir.

Q. You only took exception to the undue feeling of shame shown in the expression of the face and indicated by the verse? A. That is correct, yes.

Q. That picture is supposed to be flesh color, isn't it? A. Yes, except for the torso, which, of course, is intended to be a garment of some sort.

Q. Page 52, the page having another Sultan cartoon, "Such a neighbor—always borrowing".

You say there is no indecent sexual connotation to be applied to that picture? A. Well, again, I have to discriminate rather carefully as to what I do say. It is the
1110 juxtaposition of the common homely phrase about such an unusual neighbor, always borrowing, with the very exotic and foreign situation of men having female slaves, and it is in the juxtaposition of those two incongruous pictures that the cartoon gets its point.

Now, if the idea of having women slaves were not completely incompatible with our whole cultural picture, there would be no incongruity at all. To us, the idea of having female slaves is, of course, an immoral idea, so it is the juxtaposition of these two very familiar homely phrases with

the context that does not go with the point of the picture.

Q. Page 60, the color photograph: "Esquire Canteen" and the matter in the text: "Here are five perfectly good reasons why service men and mere civilians pause for laughter, libation and libido at the Folies Bergere."

What does the word libido mean? A. Well, the word libido in Latin, of course, means lust. The word libido as used by the psychiatrist I imagine has been defined more definitively by Dr. Tillotson than I could define it, but the connection in which the ordinary layman regards it is in projection of one's ideas and desires of the opposite sex. It is, however, certainly a point, sir, on which I would not pose as an expert. You had an expert on the stand before me.

Q. You didn't hear his testimony? A. I haven't any idea what his testimony was.

Q. Now, the cartoon on page 66: "We are outnumbered", judging from the costumes of the native girls there shown, the expressions on the faces of the two soldiers and the legend underneath this cartoon winding up with: "Yipppeee", would you say that there is no indecent sexual connotation to be attached to this cartoon? A. It seems to me as near as you could come to a cartoon of being almost a stock situation in musical comedy. The soldiers coming on, they are surrounded by a bevy of native girls, looking like the natives of no country on earth, and they surrender with alacrity. It is a thing that is so common.

Q. It implies sexual conduct? A. Well, it doesn't imply sexual intercourse, but it implies the pleasure of being surrounded with a lot of pretty girls.

Q. Have you ever heard or read about Kanaka women in the South Seas? A. Yes.

Q. And the way they receive white men and take care of

1114 them? A. Yes. I have read Margaret Mead's "Coming of Age in Samoa", which has a detailed description of that and that culture.

Q. Well, Herman Melville's "Typee". A. I haven't read "Typee", no.

Q. Now, referring to the cartoon on page 67. A. Yes.

Q. In your statement on direct you did not refer to the clothing or lack of clothing, that is, lack of concealing clothing on the female figure which is rendering the service nor to the size of the breasts and the hips in the picture. When your attention is called to those factors,
1115 would you say that coupled with the expression on the mouth of the soldier who is about to put the stem of the bubble pipe in his mouth, that this cartoon does not have any indecent connotations? A. I don't remember what I said, but I will be very glad to answer your question in just a moment. The expression on the mouth of the soldier seems to me not emotional at all, but he is merely talking to her, to convey to her the idea that he is saying that at the U. S. O. Club he got cigarettes. I think I did mention that the point of the joke at which attention was most immediately directed was the contrast between the free cigarettes in the U. S. O. and this rather formidable bubble
1116 pipe that they are furnished with there. It does not seem to me at all that the female figure is life-like. It is a cartoon, and it is burlesque, and it would not seem to me or to any human being to be sexually stimulating.

Q. Now, turning to page 73, the "Golden Mould" picture. Did you by viewing this color photograph get the impression that this model has no clothing underneath the sheer or web revealing piece of cloth thrown across her body? A. I got the impression that she has no clothing under the drapery.

Q. You can see the umbilicus here through it. A. No. You can see an indentation under which the umbilicus unquestionably is. You can't see the umbilicus. It seems to me rather similar, as a matter of fact, to the famous "Victory of Samothrace". 1117

Q. Now, down to the pubic region, is that unduly shaded? A. It didn't seem to me at all. The shadow is due to the folds of the cloth, not to any darkening because it is diaphanous.

Q. Page 77. A. That is "First Nights and Passing Judgments"?

Q. Yes. George Nathan's article. A. Yes. 1118

Q. Would you say that this article contains no filthy, indecent language? A. I want to look at it closely before I say anything.

Q. Well, the paragraphs, Professor— A. I am looking at paragraph 21. I am afraid I interrupted your question. You are asking me about another paragraph?

Q. Paragraphs 10, 21, 15 and 1 are the ones I had in mind. A. Well, let me state in reasonable fullness what I do think. I do not think that the mention of "sporting house" or "bawdy house" is itself indecent. And I do not think that it is sexually stimulating to modern readers.

Q. Is it filthy? A. The mention of it itself? 1119

Q. Yes. A. No. The mention of that would not mean to me a filthy act. For example, in Shakespeare's plays frequently the word "bawdy" comes up and I feel no shame at reading the play in the class nor do I think the boys and girls feel any shame.

The point that I made is that Nathan is objecting strongly, and he picks out objectionable things to draw attention to, so that the young floozy characters with their short skirts and knees showing are made up as disgusting,

with the deliberate intention of condemning. Now, the presentation of something that is disgusting in order to condemn it again does not seem to me in any way indecent or immoral or obscene. That would apply also to 10 and 21.

Q. Turning to page 83: "My date's at the awkward age—all hands and no dough".

Would you say that the reference to the all hands might convey the idea or connotation that her date is using his hands to explore her anatomy? A. I should take it that, from the context there, since she has a dancing frock that is cut very low, that he had been petting, pawing her back.

Q. Now, let us go to the next one, 89. That is the circus picture. A. Yes.

Q. Would the almost nude model in the lower left-hand corner—I believe you referred to this as a matter of reporting? A. Yes. Boys and girls go to the circus. It is a pictorial report of what they see.

Q. You think the fact that the thing is reported in a magazine of this sort licenses nudity? A. Why, I don't see any nude figure.

Q. Or near nude such as on this model in the lower left-hand corner. A. That comes to the question that we keep recurring to, and that is the effect of the exposure of any part of the body depends on the situation and the society that surrounds it, and if this figure is one that boys and girls see when their parents take them to the circus right along, it seems to me it is in no way more suggestive when it is represented by a picture in a magazine.

My position steadily is that you have to construe the whole content in which these things occur, and I see nothing indecent or filthy in having these children find in a magazine a picture of something they saw with their parents.

Q. Now, referring to pages 94 and 95: "Goldbricking

with Esquire", the first item, that is number four on column 1, about the corporal going home. A. Yes. 1123

Q. I believe that you stated that the point of this joke was unmistakable. A. So it seemed to me.

Q. That it was impossible for the other girl to stay? A. Yes.

Q. Is that your impression on looking at it? A. That is my impression. That is, if you can construe this as a little drama. What would happen, of course, is that both girls would leave. The joke is just like one I saw in Esquire. I can't give you the exact reference, but I noticed two soldiers under heavy shelling and one of them says to the other: "Jees' I'm afraid I got trench mouth", whereas 1124 what he has got is so much worse than trench mouth, that gives the thing its point.

Q. But the man says: "I'm sorry, one of you girls will have to leave". A. Exactly.

Q. Doesn't that necessarily imply that the other one should stay? A. It implies that he is stating the least ground on which he would be willing to have them remain, that at least one of them will have to go.

Q. If that did occur there would be no indecent or immoral or objectionable inference to be drawn? A. No. Now, let me tell you what would seem to me to be objectionable 1125 at that point. If he had been inducing the other to stay saying, "One of you go but I will give two bucks for the other to stay".

Q. Now, item 15. A. The same page?

Q. The same page, the fourth column on the bottom of the page: "He: 'I see your husband has been promoted to a master sergeant. I suppose he's brilliant and knows everything.'

1126 "She: 'Don't fool yourself. He doesn't suspect a thing.'"

Don't you say that that implies some extra-marital relation between the He and the She, who are talking? A. No. I think again that that is one of those that you can fill in to suit yourself, but not with the direction attracted towards any extra-marital relation between this particular He and She. I don't like to say He and She.

The point of that joke seems to me the very ancient one that husbands don't know everything about their wives and it does imply that there are things in her life that her husband does not suspect and she doesn't intend that he should.

1127 Q. But you don't take it to mean this He is having anything to do with this She? A. Not with the one She is talking to.

Q. Now, the item in column two on page 95: "Home on Furlough", where it is stated that she has lost so much weight that "you can count my ribs" and he asks "Where do I start?" A. That is right.

Q. Does that joke imply a close exploration of the girl's body by the soldier on furlough? A. If you mean that the joke implies that he is going to go on and do it, I should say No. If you mean that he is calling the attention of the girl to the fact that she is inviting it and she better change her phrase; yes.

1128 Q. You don't think there would be anything indecent in that? A. No. It seems to me to call the attention of a person to the fact that a phrase that he has used is much more sweet than he intended it, and as a courtesy I should appreciate it from you on cross examination also.

Q. That would be a perfectly proper joke for current circulation among your pupils? A. As a report of what went on in the Army it would seem to me so innocuous that I should have no objection to it whatsoever.

Q. Now, item 27, which refers to the absence of a bottom in the dishpan, with the naked woman picking up the dishpan as she came out of the water. Do you recall that? A. Yes. 1129

Q. Does that imply necessarily the inescapable conclusion that this soldier saw this person in the nude and a certain part of her anatomy? A. No, it seems to me, and I am answering that not hastily, it seems to me that the attention is directed to the fact that the woman assumes a superiority and invulnerable position so much so that the K. P. calls to her attention the fact of it. Now, it does imply that the woman is more exposed than she thinks she is. I don't think that it inescapably implies that he is looking at her private parts. 1130

Q. Now, take item 28, which is the one immediately below that. A. I said that was very old.

Q. That is very old? A. Yes.

Q. And by reason of its antiquity it would not have very much point at all? A. Not much. I have heard a mother say to her child on the way to a party, "Go to the party, dear, and be good and you will be happy and you will miss lots of fun."

Now, it is a perfectly acceptable piece of conversation.

Q. Skipping the next one and going to the one after that, item 30, buck private. A. Yes. 1131

Q. You say there is no improper sexual connotation to be obtained from that? A. The desire to get rid of a chaperone, no.

Q. 31: "Pardon me, Miss". I believe you stated that did not imply— A. That she is naked, correct.

Q. That she is naked? A. No.

Q. Now, 35, the cartoon in the last column. A. Yes.

Q. I believe you said it is not much of a joke because

1132 the two females in the water are covered up to their busts A. I don't know that I said it wasn't much of a joke. I said there wasn't much indecent exposure involved.

Q. But, do you think it implies that those camouflaged soldiers, camouflaged as trees, are expecting and hoping to see indecent exposure? A. Yes.

Q. And there would be nothing indecent in that? A. I have been saying every time you have asked me that there can be nothing indecent in things such as you have mentioned. There can be something indecent in everything, of course.

1133 Q. If that were the fact— A. I think I mentioned in that connection the fact that calling attention through story incident or a story where there is a situation involving indecent exposure is not by itself indecent, and I cited a story, if I am not mistaken, of Acteon coming on Diana and her maidens bathing, which is in most of the stories from Greek mythology, and there is no doubt that that story has its main point that Acteon sees naked female figures and still it is not regarded in any way as an indecent story.

Q. You think this cartoon is comparable to that? A. I think it is comparable to it.

1134 Q. From an artistic and literary standpoint? A. Not from an artistic and literary standpoint. From the point of view of any possible obscene content.

Q. Referring to the next article, item 36, a beautiful young lady. That is the old Willy who was 79 "Darn it" story. I believe you stated this joke was at least 30 years old and would have practically no point due to its antiquity. Is that right? A. It seems so to me.

Q. Now, Professor, do you claim to be an expert on obscenity, lewdness, lasciviousness, indecency and filth? A. God forbid!

Q. You are being paid a fee for appearing here? A. Not at all. 1135

Q. You are not being paid a fee? A. No.

Q. You are appearing here voluntarily? A. I am appearing here voluntarily.

Q. With not even your expenses being paid? A. My expenses are paid, yes.

Q. Just your expenses? A. I hope. I must correct that. I am under oath. I received an advance, a sum of money, from which my expenses will be deducted and from which I hope there will be a refund to Esquire, Incorporated.

Q. Are you in any way connected with the publication Esquire? A. No. 1136

Q. Are you a subscriber to the publication? A. No.

Q. How did you happen to come here? How did you become interested? A. I will explain that. Mrs Gingrich's children, all three, were in my school for a time.

Mr. Gingrich has been active among the parents and was at one time president of the Parent's Association, and even now that he is in the suburbs, the oldest of his three children is there.

He called to my attention this material and asked if it seemed to me to be obscene and grounds for barring a magazine from second-class mailing privileges, and I said "No", and he asked me if I would be willing to go on the witness stand and state that in public and, of course, there is only one answer to that question. 1137

It seemed to me it was a serious question that was involved, and it was an inescapable duty to do that.

Mr. Hassell: That's all.

1138 ***Redirect Examination by Mr. Bromley:***

Q. The word "prostitute" has indecent connotations, hasn't it? A. Yes.

Q. Yet the use of the word "prostitute" in a magazine is not indecent? A. No.

Q. Do I understand your position to be that people can draw indecent or obscene suggestions or implications about anything that relates to sex? A. Yes.

Q. The mere fact that such suggestions or implications can be drawn does not, in your opinion, render the matter itself obscene or indecent, does it? A. Correct.

1139 Q. In using the term "indecent" in your testimony, you have used it in a broader sense than "sexual indecency" in that you refer to considerations of propriety. Is that correct? A. That is correct.

Mr. Bromley: That is all.

Mr. Hassell: No further questions.

Mr. Cargill: The witness has been on the stand a long time, and I know it is tedious, but to clear up one or two points in my mind I would like to ask a few questions.

1140 In the early part of your testimony you mentioned something about this magazine furnishing a valuable function. Do you recall that part of your testimony?

The Witness: Do you refer to what I said about the drawings of the Varga girls?

Mr. Cargill: Perhaps that was it. What did you refer to as "valuable function"?

The Witness: It still means we understand each other, and that is the reference, I will repeat that.

It seems to me that the holding up to admiration of an idealized male or female body, as long as the body is draped enough to accord with the demands of decency—in other words, to present as near a naked body as convention allows and to hold that up to admiration, is a good thing. 1141

There has been a very definite effort to rid young people of the idea that the body is in and of itself an obscene thing, or that sex is in and of itself an obscene thing. There is a great danger in having young people brought up with no association with sex other than the gutter association, and accordingly it seems to me the Varga girls have value from that point of view. 1142

I made exception to the one where the body is obviously a source of shame and in which the wolf was looking on, that, I think, being the cause of that shame.

Mr. Cargill: Do you think that these Varga girls would be a valuable addition to your school in having them pasted up?

The Witness: No, I don't. What I meant by saying that I thought they had value is that I think that there is value in having the young people realize that that kind of a picture can be circulated without people thinking it was obscene. 1143

I wouldn't want that pasted up as there are pasted in some schools, models, usually nude silhouettes, of the age of boys and girls of the school, and standing in the bent posture. Those are frequently pasted in the athletic departments of schools.

The Varga girls are not models in that sense. And, I much prefer the word "idealized" to Mr. Ziegfeld's phrase "glorified".

1144 But it is a figure held up to admiration in a way for them to realize it is a perfectly acceptable thing.

Mr. Cargill: Do you use any models in your school at all, or any such drawings or pictures or paintings?

The Witness: Models, but not nude models in the school.

Mr. Cargill: What type of model do you use?

The Witness: Almost anything from still life—they get supplies for the lunch room in still life—and sometimes they pose for each other, ordinary portraits.

1145

Mr. Cargill: Do they pose in the nude?

The Witness: No.

Mr. Cargill: Or in light garments?

The Witness: Some schools that I know, although not in my school, there has been a deliberate attempt to pose in the tightest fitting bathing suits that were generally acceptable, for the explicit purpose of putting that in service with other pictures of sports.

For example, in one school I know there was a series of murals, and some of the figures were foot-

1146 ball and hockey players where the figure was hardly recognizable, and also the swimming team, including the girls' team, posed in rather tight-fitting suits. And that was done after a number of conferences as to the advisability. That is not done in the Francis Parker School. The answer is "No."

Mr. Cargill: You mentioned that you have a library in your school.

The Witness: Yes, we have a library.

Mr. Cargill: Do you have any magazines in your library?

The Witness: Yes. 1147

Mr. Cargill: What magazines?

The Witness: I can't be absolutely sure of all of them, but Harpers, Atlantic Monthly, Geographic, Time, and—possibly Theatre Ads. Esquire is not among them.

Mr. Cargill: I believe the question was asked if it was banned in your school.

The Witness: It was not banned. We had also a recreation room which the boys and girls furnished and brought magazines and books of their own. I think Esquire was among those magazines. 1148

Mr. Cargill: Are there any magazines banned at your school?

The Witness: We have not banned any magazines. We have banned—the library committee of the school, the student committee, recommended that we purchase "For Whom the Bell Tolls", when it first came out, and we refused to have that in the school library, not because I thought it an indecent book, but because I thought it a shocking book—I am thinking of the clubbing to death and so forth—and I thought to deliberately call that to the attention of young people was to expose them to violence, but 1149 so far as I recall, that is the only recent instance of a book being banned.

That does not mean it is a fully representative library. It is a school library and our funds are limited and we purchase the books we think will be most useful to children.

Mr. Cargill: That is the one book you banned?

The Witness: That I remember.

Mr. Cargill: What books do you use to educate your children on this subject of body?

1150 The Witness: We don't have any specific material for that purpose because the whole tendency—and our belief goes with it—since the conference that was held about twenty years ago at the initiative of the Y. M. C. A., a conference of religious leaders, psychiatrists, and educators, where we pooled our information and made it clear that we were unanimous in believing that sex should be taught in the normal context.

1151 In the school I headed in New York we had difficulty with some lawyers because a bequest was left us solely for the purpose of sex education, and we all believed that as soon as you segregated sex education it became undesirable, and the lawyers said: "When you combine it with anything else you are violating the terms of the trust."

Do I make that clear?

Mr. Cargill: You have answered the question.

Doctor, you have testified here for yourself and for the students or the children that come under your jurisdiction?

The Witness: Yes.

Mr. Cargill: What would your definition of "impure thoughts" be?

1152 The Witness: I think I can answer that with a very specific instance. I dismissed a boy from the school two years ago for a joke that was to my mind obscene and filthy, and I think that will answer your question.

Mr. Cargill: What was that joke?

The Witness: I was going to tell you.

At a dance he got possession of a girl's handbag. He put in it a rubber contraceptive. He then told

the other boys and girls to watch the face of the victim when she opened her purse, and I dismissed him from the school for it. 1153

In general, if you wish me to generalize, the jokes, the books, the material that seems obscene to boys and girls of high school age, is almost directly associated either with the sexual act or terms that in their minds connote the sexual act, or those other physiological processes that are not mentioned in society. They are generally not matters of innuendo.

Mr. Cargill: Then, by innuendo a thing could be obscene? 1154

The Witness: What I am saying is that such obscenity as there is in the schools that I know about, does not take the form of innuendo. It takes the form of rather brutal and direct, calling attention to the mechanics of procreation or elimination.

Mr. Cargill: Would that be your definition of "impure thoughts"?

The Witness: That is an impure action, and, of course, the impure thoughts are obviously evoked in the eyes of the boys and girls who were invited to watch the face of the girl who was going to be shamed. I should say those were impure thoughts, very distinctly. 1155

Mr. Cargill: What would be your definition of "sexual impurities"?

The Witness: Sexual impurities would be plural rather than single.

Obviously, pre-marital intercourse would be sexual impurity, but I wouldn't confine it to so narrow a range as that by any means. It would seem to me that the presentation of erotic images of extra-

1156 marital nature and in such a way as to make them attractive, in such a way as to make it appear to a boy or a girl that in order to be adult and sophisticated he had to indulge in that kind of conduct. It would seem to me that would be impure.

Mr. Cargill: Is that a complete answer?

The Witness: No, I think that is enough. It seems to me to illustrate it.

Mr. Cargill: That would constitute your definition of sexual impurity?

The Witness: That would be a part of it. It is
1157 an illustration rather than a complete definition.

There is something that would not constitute sexual impurity but would be undesirable to develop in young people. I think, for example, it would be highly undesirable to give to boys and girls even the clearest complete description of the sexual act. There are books, as you know, which are endorsed by doctors, which give full information about marital relations. It would seem to me to be unwise to put such complete descriptions before boys and girls, because it is unduly stimulating and, after all, in our society, marriage is not possible for a number of
1158 years beyond high school.

Mr. Cargill: Doctor, do you think pictures or literature have any effect or tendency to stimulate the sexual desire?

The Witness: That is a very difficult question to answer because I think that the growing boy's or girl's whole conception of society, including, of course, sexual relations, is very strongly influenced by what he or she reads.

I think, for instance, that having him read fiction in which fine family life is represented, is extremely good for him. I think that such a book as "The Bent Twig," by Dorothy Canfield Fisher is an excellent thing. It treats of sexual relations. It calls attention to the fact that certain types of marriage are higher than others, that the marriage relation can be a higher or a lower relation.

Mr. Cargill: Do you think that reading literature or looking at pictures would tend to increase the sexual desire to the extent of increasing the sexual impurity as it is in the world today? 1160

The Witness: I think it would be conceivable that might be done. I don't think it ordinarily does, no.

Mr. Cargill: Getting down to cases, would you think that the cartoons, as are presented in this book, this magazine, Esquire, most of them or, as a rule, have a double meaning?

The Witness: I am not thoroughly enough acquainted with Esquire to have much confidence in my own answer. I am not a steady reader of Esquire.

Mr. Cargill: Those cartoons and pictures that you have observed since you began your study of 1161
Esquire in order that you might testify here, would you say, as a rule, they have a double meaning?

The Witness: You mean in the sense of implying a sexual impurity? Do you mean that is one of the meanings?

Mr. Cargill: Yes, sir.

The Witness: I read through two complete numbers, from cover to cover, and while the point of most any joke is that it has two meanings, the propor-

1162 tion of jokes in which one of the meanings was sexually impure was fairly low.

Mr. Cargill: You say that some of them do have that?

The Witness: Some of them do have the possibility of that as one of the connotations, but the point I am making is that in none that I have seen is the attention primarily directed toward an obscene meaning.

Mr. Cargill: Would you say that the magazines that you have read, taken as a whole, primarily

1163 feature sex?

The Witness: I don't think that I can generalize about the magazines I have seen as a whole, because they are all the way from the Yale Review in which the element of sex is taken up only statistically, to "Pic" and "Look" which I usually don't pick up or look at, but which are always on the tables in the barber shops.

It seems to me they have no common denominator whatever.

Mr. Cargill: And the few magazines, then, that you have read, would you say that they primarily

1164 feature sex, or not?

The Witness: It seems to me some do and some do not. It seems to me to be specific in Life, which I habitually see.

Mr. Cargill: I am speaking of Esquire. Would you state that the copies of Esquire which you have read and observed feature primarily sex?

The Witness: They never omit sex. They have also articles on sports and on a dozen other different things, but they never omit a sex element.

Mr. Cargill: The magazines that you have seen, then, do primarily feature the sex feature? 1165

The Witness: Yes, there is always present the sex feature.

Mr. Cargill: In those magazines that you read, do you think that the articles and pictures and the cartoons and so forth, feature loose morals?

The Witness: No.

Mr. Cargill: Or unfaithfulness?

The Witness: No.

Mr. Cargill: In your opinion, do the pictures and cartoons and reading matter portray the customs of our day as practiced by normal average citizens? 1166

The Witness: I should say so, yes.

Mr. Cargill: You would say they do?

The Witness: Yes. You are referring, are you not —may I ask you one thing before you pass from that question?

Mr. Cargill: Yes.

The Witness: You are talking about the magazines as a whole, not just about the cited material. The cited material does not seem to me to present a cross section of the manners of the day.

The magazines, taking the two which I read from cover to cover, do seem to me to present a fair cross section of masculine interests. 1167

Mr. Cargill: I call your attention particularly to the August issue, page 89. Doctor, what is implied there by the words "Paste Your Face Here"?

The Witness: Cut your own face out of a photograph and actually, with glue or some other adhesive, put it on the spot vacated by the head of the sailor.

Mr. Cargill: Aren't you reading something there

1168 which is not there when you say "cut your photograph out"? It says, "Paste Your Face Here." Does it say, "paste your photograph here"?

The Witness: I think that is to be construed in the light of the others of the series.

Mr. Cargill: But the others in the series are not in that book, are they?

The Witness: No. I see the double meaning that you imply there. It would seem to me that the reason why that didn't occur to me before is the direction in which the sailor is facing. The sailor is backed

1169 to the girl, not faced to the girl.

Mr. Cargill: Do you think that is a fair representation of the practices and customs of the average citizen of today?

The Witness: No, I was hoping it would not be. I was, in fact, deploring both that and illustrations of similar behavior in Life, because it seemed to me to be going beyond the desirable or existing practices.

Mr. Cargill: Do you feel that the publication of that is a step beyond the pale of decency?

The Witness: No, I think it is a step beyond the

1170 pale of desirable conduct for young people. It does not seem to me that either the behavior itself or the representation of the behavior is indecent.

Mr. Cargill: You say that the behavior is not indecent?

The Witness: I say that the behavior is not indecent. I would say the behavior is very ill judged. I have seen the behavior on the beach and no one interfered to stop it and it is not regarded as indecent. I have actually seen—not a sailor—but a

young man carrying a young woman, pick-a-back, and it doesn't seem to me to be desirable, but I don't think it is obscene or indecent. 1171

Mr. Cargill: Would you say the implication there is indecent?

The Witness: No, I think the implication is that what I am calling undesirable and injudicious, and I think the obectionable part of the "Paste Your Face Here" from my point of view is that it does all the more identify the person who puts his face there with the conduct, and tends to make him think of himself as participating in that experience. 1172

Mr. Cargill: I call your attention, Doctor, to page 65 of the September issue.

The Witness: The milkman cartoon?

Mr. Cargill: Yes.

The Witness: Yes, sir.

Mr. Cargill: Would that indicate to you immorality or adultery?

The Witness: Immorality or what?

Mr. Cargill: Adultery.

The Witness: No.

Mr. Cargill: What does that indicate to you?

The Witness: That indicates that the two wish to be in each other's presence when the husband is not there and adultery is a possible, but not a primarily indicated, connotation out of it. 1173

Mr. Cargill: You are placing the very best construction on that, aren't you, Professor?

The Witness: Yes, that is the very best construction. I am not saying for a moment that that is not a coarse picture. I am saying that it is not an obscene picture.

Mr. Cargill: You don't think that that would in-
1174 dicate indecency?

The Witness: I don't think that that would be an excitement to indecent conduct.

Mr. Cargill: Do you think that that cartoon represents current modes and practices of our times as practiced by the average married man and married woman?

The Witness: No, I do not.

Mr. Cargill: It does not depict the customs of the average man or woman?

1175 The Witness: It does not depict the customs of the average man or woman.

Mr. Cargill: Do you think that the publication of these two pictures that I call to your attention there come within the definition of decency?

The Witness: Yes.

Mr. Cargill: That is all.

Chairman Myers: Mr. Smith, is it not a fact that all great literature is built upon sex?

The Witness: No, I should not think that it were, although I have heard the statement made.

Chairman Myers: Are you familiar with Homer's
1176 Illiad?

The Witness: Yes.

Chairman Myers: What about Achilles sulking in his tent?

The Witness: That was caused by jealousy.

Chairman Myers: Of a woman?

The Witness: Agamemnon.

Chairman Myers: A concubine?

The Witness: Yes, about half composed of desire for the concubine.

Chairman Myers: And Dido in Virgil's Illiad? 1177

The Witness: Yes.

Chairman Myers: Is that built upon sex?

The Witness: Yes.

Chairman Myers: How about Dante's Inferno or all of Dante's work in relation to it?

The Witness: Yes.

Chairman Myers: How about Shakespeare's plays?

The Witness: From none of them is sex absent.

Chairman Myers: Is there a single play in which sex does not appear?

The Witness: That is a large order. I would have to reflect on that. May I say what I had in mind when I said "no," to your initial question? I think a poem such as "I have a rendezvous with death"— 1178

Chairman Myers: And now, let me ask, do you teach classic Greek and Latin?

The Witness: Latin, I wish we taught Greek, but we do not.

Chairman Myers: Are you familiar with the statue of the discus thrower?

The Witness: Yes.

Chairman Myers: Does that appear in children's schools and colleges? 1179

The Witness: Very commonly.

Chairman Myers: Is it a statue of a man absolutely naked?

The Witness: Yes, absolutely naked.

Chairman Myers: Without a stitch on?

The Witness: I might add that putting a stitch on him would make him obscene if put on in the proper way.

Chairman Myers: Are you familiar with the story
1180 of Suzanne and the Elders and Suzanne in the Bath?

The Witness: Yes, and the painting of it.

Chairman Myers: A little peeping went on there, didn't it?

The Witness: Yes.

Chairman Myers: Where did that story appear?

The Witness: In the Bible.

Chairman Myers: That's all.

Mr. Bromley: That is all.

Mr. Hassell: I want to ask one other question
1181 that I intended to ask the Professor on cross and overlooked.

Recross Examination by Mr. Hassell:

Q. Professor, have you discussed Esquire with any other teacher dealing with pupils of the ages in your school? A. Yes.

Q. Did they have the same views that you have, Professor? A. Well, I didn't take a full day and express my views as they were, but so far as I know our views coincide.

Q. Would you undertake to say what you know of other teachers' attitude? That your attitude with respect to Es-
1182 quire is one generally accepted among the teachers? A. I don't think the teachers would agree universally on anything, but I think that you would find a very considerable number of other teachers who would agree with me about it, yes.

Q. You would be surprised if the Post-Office Department had, since the mention of this in the press, received letters from teachers commending the action it took? A. No, I wouldn't be surprised at all.

Mr. Hassell: That is all.

1183

Mr. Bromley: That is all. Thank you, very much.

(Witness excused.)

Chairman Myers: We will adjourn until 1:15.

(Whereupon, at 11:53 o'clock a. m., the hearing was adjourned until 1:15 o'clock p. m.)

AFTERNOON SESSION.

1184

(The hearing was resumed, pursuant to the adjournment, at 1:15 o'clock p. m.)

Chairman Myers: Are you ready with another witness?

Mr. Bromley: Yes.

Mr. Hassell: At this point I would like to enter a further objection to the testimony of the witness who just preceded, Mr. Smith, and move that his testimony be stricken as irrelevant and immaterial to this inquiry.

1185

Chairman Myers: The same ruling as heretofore.

LOUIS J. CROTEAU, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Bromley:

Q. What is your name, sir? A. Louis J. Croteau.

Q. You live where? A. Burlington, Massachusetts.

1186 Q. You are engaged in what business, Mr. Croteau? A. I am the executive officer and secretary of the New England Watch and Ward Society.

Q. What is the New England Watch and Ward Society? A. The New England Watch and Ward Society is a social service agency engaged in the private and independent enforcement of the law throughout the six New England States.

Q. Engaged in the enforcement of what kind of law? A. Of all criminal violations tending to be commercialized.

Q. Does that include a watch on current magazines and
1187 current books? A. Yes, sir; that is one of the phases of our work.

Q. Would it be correct to say that your organization is perhaps the outstanding censorship organization existing in this country today? A. It has been referred to as being the outstanding censorship organization in this country as well as in other countries.

Q. Now, just what kind of organization is it? Who are its directors and officers, and tell us something about its composition? A. The organization was founded 65 years ago by Phillips Brooks and John P. Allen. Its board of directors is composed of representative laymen, ministers,
1188 and professional men. Its membership is composed of a fairly accurate cross section of New England community life.

Q. And it keeps a watch generally over what part of human activities of that community? A. It has often been dubbed the watch dog of New England morals. It is engaged in enforcing the laws against gambling, narcotics, prostitution, indecency in theatrical productions, magazines, books, pictorial periodicals, child delinquency, and with anything having to do with the uplift of the morals of our community life.

Q. Could you name representative members of your board of directors? A. Yes, sir. Godfrey Lowell Cabot, honorary president, and Charles H. Fleming is our president. I might say Dr. Cabot is a doctor of science and Mr. Fleming is an executive of the New York Life Insurance Company. And Stiles F. Keddy, our treasurer, is a civil engineer. And our doctors of divinity, ministers, laymen, and just ordinary every day average men who are engaged in several types of work. 1189

Q. Do you have investigators? A. Yes, sir, we do.

Q. And do those investigators by field work, actively keep themselves informed, and your directors and yourself informed, by reports of what is going on in theatrical productions and the magazine field and other fields you have mentioned? A. Yes, sir. 1190

Q. The investigators— A. The investigators are assigned to field work and are directly responsible to the executive officer who, in turn, is responsible to the board of directors.

The board of directors lay out the policies to be adopted, and the executive officer sets them in motion.

Q. For how long a time have you been executive officer of the society? A. Since April 1941.

Q. For how long a time have you been connected with the society? A. Since 1928. I started as an agent. 1191

Q. As an investigator in the field? A. That is right, sir.

Q. Are you here with the knowledge and permission of your board of directors? A. Yes, sir, I am.

Q. Does your organization examine each month, or each week, or some other period, current magazines? A. Yes, sir. Approximately we examine throughout the year about 125 different types of publications, that is, the different titles amount to about 125. Roughly, some 800 to 900 different issues of magazines are examined.

Q. Now, do you do all or a part of that work in the maga-
1192 zine field yourself? A. I make what we term the prelimin-
ary examination of the magazines or books in question. They
are then turned over to a literary committee comprised of
three men, who are, four times per year, named by the chair-
man to serve on the literary committee.

Ordinarily that committee is made up of a counsel, a law-
yer, who is a member of the board, a minister and one of the
laymen. Three of the directors of the society have refused
from time to time to serve on the literary committee because
they openly admit that they are prejudiced and have closed
minds and could not fairly pass upon the examination of any
1193 periodical submitted to them.

Q. Now, what do you do when you examine a magazine
which is finally determined by your committee to be obscene?
Do you have any power to do anything about it? What do
you do? A. Ordinarily the procedure is to notify the distrib-
utors. I might say at this time that there is a standing ar-
rangement between New England distributors and the So-
ciety to the effect that the distributing agency submit any-
thing which in their minds is questionable to the Society
for an informal opinion. That process has been in existence
now since 1934, at which time there was a radical change in
the attitude of the Society and a new policy was adopted.
1194 namely, that called a reasonable policy of control.

Q. Do you enjoy your Society I mean, enjoy the coopera-
tion of the distributors of the magazine Esquire? A. Yes,
sir; they have always cooperated a hundred per cent.

Q. When a distributor has submitted a magazine to you
which you and your committee determine to be obscene,
what happens next? A. Well, since 1934 I am happy to re-
port that only one such decision was turned down by the
distributor. That particular distributor found himself with-

in the clutches of the law three days after he had gone adversely against our report. 1195

Q. You mean that you receive such cooperation from the magazine distributors in New England that if you declare that a publication is obscene, they discontinue its publication and sale altogether? A. Yes, sir; I mean that they rely on our judgment to that extent.

Q. And in only one instance that you can recall has it been necessary to go to law because in all the others the magazine hasn't been sold or distributed after you had condemned them. Is that right? A. That is correct, sir.

Q. Does your Society enjoy the cooperation of the Federal postal authorities? A. It does. To my knowledge, it always has. 1196

Q. I take it, then, that in the course of your regular duties and business before you ever heard of this procedure you must have examined every one of the eleven issues now under consideration. A. Well, I would say that it is safe to say that I examined at least eight or nine of them.

Q. I suppose it is true, isn't it, that the November issue and perhaps the October issue was not out? A. I believe those are the two that I didn't see.

Q. Did you or your committee or your Society condemn or declare to be obscene any part of any one of the issues now under examination or discussion? A. No, sir. 1197

Mr. Hassell: I object to this questioning of this witness. I submit it is irrelevant and immaterial to the issue here involved. What the New England Watch and Ward Society determines does not have any controlling effect or advisory effect upon this Board or Department. As a matter of fact, this Society is not running this Department. So far as I

know, it has no connection with it, none that I heard
1198 of, and I have been here 35 years.

Mr. Bromley: I am trying to establish this witness as one of a character for whom you called this morning, i. e., an expert in obscenity, and I think he is competent on that obscenity.

Mr. Hassell: But I would like to say in response to counsel's characterization that I did not call for any expert in obscenity because I don't believe there is any such thing. This Department and the Solicitor's Office and the Post Office Department does not know of such an animal if there is one, because there
1199 are some eight or ten thousand rulings to postmasters and postal officials throughout each year that are made on the mailability of material under this statute, but I don't know anybody who claims to be an expert on obscenity. If this gentleman claims to be one, why he certainly is a novelty to me. I haven't called for him, I don't want him. I don't think his testimony is pertinent, and I object to its inclusion in this record.

Chairman Myers: The motion is overruled.

By Mr. Bromley:

1200 Q. I want to ask you this: To your knowledge, has your Society ever received a bona fide complaint against Esquire at any time? A. It never has.

Mr. Hassell: I object. What bearing does that have on this issue here, that some organization of some sort received a complaint? Are they supposed to be the keepers of the morals and the enforcers of all Federal and local law? I think it is utterly absurd.

Chairman Myers: Well, it is admissible for such persuasive opinion as it may have. 1201

The motion is overruled.

By Mr. Bromley:

Q. Now, in your opinion, Mr. Croteau, is there a set standard whereby obscenity can be tested or judged? A. There is no set rule by which any individual or any body of men can test obscenity. There are a multiple number of reasons as to why no two sets of facts are alike. That is why some years ago, as I have told you, we changed the policy of a hard and fast rule on obscenity. 1202

The committee is changed, as I have told you, three times a year, for the purpose of getting a cross section of opinion.

The members who sit on the committee sit there with an open mind and try to decide among themselves in conference the pros and cons of the admissibility of the contents of any magazine or book.

Q. Now, you, yourself, do you have a broad and wide familiarity with the types of articles, pictures, cartoons, drawings and illustrations that appear currently in the magazines of this nation? A. Yes, I have.

Mr. Hassell: I object. This calls, obviously, for a conclusion from this witness. It is leading and it is objectionable for other reasons. 1203

Chairman Myers: What is your purpose, Mr. Bromley? Is it to qualify him as a witness?

Mr. Bromley: To try to show what his acquaintanceship is with all the magazines of the country, if he has that acquaintanceship.

Mr. Hassell: I submit, Mr. Chairman, this does not do anything of the sort. This witness has already

said he is qualified. That is what he is asking now,
1204 is he qualified to pass on obscenity.

By Mr. Bromley:

Q. Be a little more specific as to what kinds of magazines you have examined over the years, with particular reference to last year. Name some of them. A. Roughly, I examined anywhere from 60 to 75 publications a month. A good 40 percent of the publications are so-called pulp magazines, a good percentage of them being of the spicy type.

Then you have your True Confessions, True Detectives,
1205 Spicy Stories, the cartoon gags called Yoo Hoo and Humor, and any number of publications which I can't recall off-hand, that run in the type that border on the line of the twilight zone in so far as obscenity is concerned.

They are not in themselves, probably, obscene—some of them are. But the editors go just as far as they know how to be humorous and yet stay within the bounds of the law.

Q. Now, do you examine magazines like Esquire, Life, Red Book, Cosmopolitan, Saturday Evening Post, and magazines like that? A. I have examined every one of those, sir.

Q. Will you name some more, if any such occur to you?
1206 Have you examined Time? A. I have examined Time and the New Yorker, Spicy Detective, True Detective Tales, Actual Detective.

I find that the detective magazines are the worst of the lot, that with the cheap pulp fictional novels.

Q. Now, have you, at my request, reexamined and made a particular examination of the eleven issues here in question? A. I did, Mr. Bromley.

Q. Could you tell us what the opinion of the Watch and Ward Society is of Esquire as compared to similar publications? A. The Society's opinion of Esquire is favorable as compared to Time, the New Yorker, and other similar publications. 1207

Q. Do you believe that Esquire is in any way harmful to the New England community life or any of the members thereof? A. I certainly do not.

Mr. Hassell: I object to that statement. I don't think this witness has been qualified by anything he has said in my hearing, to pass upon anything affecting morals. 1208

Chairman Myers: He is only answering if he knows.

Mr. Bromley: You have answered then?

The Witness: Yes.

By Mr. Bromley:

Q. That is the purpose of your Society, to safeguard the morals of your community, isn't it? A. Yes, sir, that is the fundamental purpose.

Mr. Hassell: Many things, Mr. Chairman, have many purposes. Purpose does not mean anything. All of us probably have every day failed in some purpose. If this Society failed, that would be the thing to be expected. 1209

Chairman Myers: Hasn't this proceeding a purpose? The objection is overruled.

1210 *By Mr. Bromley:*

Q. You, yourself, regularly inspect burlesque shows in your community, don't you? A. Five or six every week.

Q. And other types of theatrical productions? A. Yes, sir, all the new shows that come to town.

Q. Indeed, the script or manuscript of plays that open in your community are regularly and invariably submitted to your office in advance for reading, aren't they? A. Yes, sir, and for informal opinion.

Q. And your work also covers all published books, does it not? A. Yes, sir, it does. There is a standing agreement
1211 among book publishers just the same as there is with the magazine distributors.

Any book which, in the opinion of the Boston Book Committee, is doubtful is submitted to the office for informal opinion.

Q. And if your opinion is adverse it is not sold by the distributor, is that correct? A. That is correct, sir.

Q. Or by the book stores? A. That is correct, sir. They send out a notice to that effect to all their members, that the book has been deemed objectionable by the New England Watch and Ward Society, and anyone who sells it does so at his own peril.

1212 Q. And if he sells it, there invariably follows a criminal prosecution under your Massachusetts and other state obscenity statutes? A. That is right, sir.

Q. At my request have you made a particular study of all the Varga girl drawings in all of the eleven issues of 1943 Esquire? A. Yes, sir, I have.

Q. Now, will you state to the Board your opinion as to whether there is contained in any of these drawings or verses which accompany them, anything which, in your opinion, is

obscene, lascivious, lewd, indecent, filthy? A. After profound consideration of the subjects, I did not find anything that bordered on obscenity, lasciviousness, lewdness or vulgarity, or was in any way filthy. 1213

Q. Will you include, or will you not, the word "indecent"? Did you find them indecent? A. I certainly did not.

Q. Now, have you read the stories such as "The Portrait Over The Fireplace," and "The Sporting Scene" and the other stories of fiction which have been complained of specifically? A. Yes, sir, I have.

Q. What is your opinion with respect to them, as to whether they are indecent and so forth? A. I fail to see that they contain in any part or in their entirety any obscenity, indecency, or lewdness. 1214

Q. Did you read Mr. George Jean Nathan's theatrical column in which he made a reference to a bawdy house and sporting house and quoted from the dialogue of one of the Dead End Kids in Dead End? A. Yes, sir, I did.

Q. What can you say as to whether or not those terms there implied transgress the standard of current morality as you have found it in other contemporary magazines?

Mr. Hassell: I object—

Chairman Myers: That is a pretty broad statement. 1215

Mr. Bromley: I withdraw it.

By Mr. Bromley:

Q. Now, sir, have you read those textual articles such as Mr. Seldes review of Star and Garter and the story about the Unsinkable Sailor? All the textual articles, whether fiction or factual, have you read them and studied them? A. Yes, sir, I have, each one.

1216 Q. Can you tell us whether, in your opinion, there is anything contained in them which is obscene, lascivious, lewd, filthy, or indecent? A. In my opinion, there is not.

Q. Can you tell us whether or not the same type of material is found in other magazines, reputable magazines?

Mr. Hassell: I object to this question. I think it is ridiculous to have this man sitting up here and say the same type of material is in other magazines. What does that mean? It would take us a month to explore the comparison. He has to compare in his mind one instance here and explain it for the enlightenment of
1217 the Board. I think it is utterly absurd.

Mr. Bromley: I submit it is an opinion and perhaps we had better produce what we are talking about. I hate to take a month to do it.

Chairman Myers: Let him answer the question. Objection overruled.

The Witness: My examination of such magazines as Life, Cosmopolitan, Time, especially The New Yorker—I have read articles that in my opinion are far more objectionable and indelicate than anything I have ever witnessed in Esquire.

1218 *By Mr. Bromley:*

Q. Is the use of the term sporting house and bawdy house a commonplace one in current magazines today? A. Yes, it is very commonplace and is being used apparently quite readily by the authors.

Q. Now will you look at page 6 of the January issue, the boxed-in material "Shor Nuff", and particularly to the two references made to juking, and give us your opinion as to

whether or not those references are indecent and go beyond current standards of morality. A. There is nothing indecent or even suggestive about juking. It is a term that is used commonly in the amusement world and on the burlesque stages today. It refers to slapstick comedy and entertainment and it is just general hilarity. Juking itself is just a synonym of fun. 1219

Q. You are aware, are you not, that in that article where juking is listed it is followed by the phrase "that's right, just what you're thinking about." A. Yes, sir. I see that it is.

Q. Does that change your opinion with respect to its obscenity? A. Not my opinion. It might some people's opinion. 1220

Q. You see also that it is defined in the left-hand column "juking (this is something Woodhead thought up which puts sex, dancing, manners, drinking and risque behavior in one package)." A. That would be the opinion that he would have.

Q. Do you think Woodhead's definition of it is indecent? I mean as printed on that page? A. It is not in good taste and it is not an accurate expression of juking.

Q. But you still don't find it obscene or indecent? A. I do not. 1221

Q. Now what have you to say with reference to "Dear Doctor Diddle" on page 123? Is that an indecent, filthy expression as used there? A. I fail to see that there is anything indecent or obscene in that article. "Dear Doctor Diddle," diddle, if my memory serves me right is defined to borrow, to spend away, to fool time away. I think that is what it is meant in this particular issue.

Q. Can you tell me, Mr. Croteau, as an expert, whether there is any filthy meaning in this joke:

"Dear Doctor Diddle: I am a beautiful brunet but I have
1222 a serious problem. Everytime I take a bath I blush. What shall I do?

"Dear Twenty: Before you undress put on a blindfold."

Is there any hidden reference in there? A. Not unless the subject who is reading it wants to infer a hidden application to that particular thing. A good deal of this depends a good deal upon the state of mind of the individual who is reading it. Pre-adolescents may have one idea and adolescents may have another, and full-grown, mature persons who are right down to earth and not sex perverts or degenerates
1223 can read that and enjoy some clean slapstick comedy out of it.

Q. Is there any hidden dirty meaning that I don't see because I don't see it? I mean, based on your experience? A. Perhaps I am pretty naive, but I fail to see that there is any inference of obscenity or indecency in it.

Q. What about this air warden cartoon, the two men looking through the skylight. Does that transgress current standards of morality?

Mr. Hassell: What page is that?

Mr. Bromley: 137.

1224 The Witness: I don't believe that it does. I mean there is nothing in the connotation that tends to break down the subject at hand. It is not amplified by anything that appears in the cartoon, and there are several inferences which may be drawn from his remark.

By Mr. Bromley:

Q. Now, does that make it obscene or indecent because there are several inferences which could be drawn, in your

opinion? A. Hardly so. In my opinion, the worst that could be said about it, and probably coming down to the inference that could be the worst that would be drawn from it, would be that it would be indelicate. I think what it is, and I think I have reason to believe that is what he is thinking about, is that probably through the skylight he sees an artist's model and there is nothing indecent or obscene about seeing an artist's model in an artist's studio. 1225

Q. Is it commonplace today for magazines to print cartoons showing artist's models, or studios in which models are posing and make a joke about it? A. Yes, sir. As a matter of fact, I believe in some of the magazines I reviewed in the last few days there were three or four such references. 1226

Q. Then you think it is common to have that happen? A. Very common.

Q. I show you The New Yorker for March 6, 1943, the cartoon on page 19. Isn't that one to which you refer? A. Yes, sir, it is.

Mr. Hassell: Now, I want to object to the introduction of other magazines here. This Board is not charged by the order of the Postmaster General to inquire into the merits or lack of merits or what not respecting other magazines, and I think this is incompetent, irrelevant, and immaterial and should not be admitted. 1227

Mr. Bromley: It seems to me to be matter to demonstrate what current standards are in other magazines.

Mr. Hassell: I submit you cannot possibly demonstrate that, Mr. Chairman, unless you put in everything and we would be here a hundred years at least.

1228 Chairman Myers: Have you any authority on that, Mr. Bromley?

Mr. Bromley: No, not specifically that I can recall. However, it seems to me to be implicit in the decisions that the only way you can judge what the current standard of morality is is to demonstrate in some fashion that it has become commonly accepted for reputable publications to use a word like "son-of-a-bitch", or for newspapers to do it. Now, the only way you can do it is to produce the papers. If it is commonplace and you find it in other magazines, that kind

1229 of material, namely, similar in content, and you find references in reputable magazines which presumably pass public inspection without condemnation, at least without barring, it seems to me it would tend to help you to determine just how far we have gone in the critical conflict between candor and shame.

Chairman Myers: The reason I asked that question was in a recent trial a decision was cited from the Court of Appeals of New York, I think from the Court of Appeals, on that very subject, holding that it was admissible.

Mr. Hassell: I submit, Mr. Chairman—

1230 Mr. Bromley: You see how I am hampered by my assistants. They didn't find it.

Mr. Hassell: The opinion that the Chairman has in mind is undoubtedly one from the Second Circuit Court of Appeals in which the Court referred to the classification of works of literature, books. The decision dealt with books and it was to determine whether or not the book was a literary classic. We don't have that here.

Chairman Myers: No, that was not the question I had in mind. It was the question of comparative merit. I don't recall the case. I thought Mr. Bromley did. 1231

Read the question, Mr. Reporter.

(Record read.)

Chairman Myers: You are limiting it to a particular cartoon in The New Yorker?

Mr. Bromley: Yes, sir, that is all.

Mr. Cargill: Are you now introducing The New Yorker magazine, or are you introducing the one cartoon, just that? 1232

Mr. Bromley: Just the cartoon.

Chairman Myers: It may be admitted. The motion is overruled.

Mr. Hassell: Mr. Chairman, by my remaining silent I, of course, am not depriving myself of the customary exception.

Chairman Myers: Of course, you are entitled to it.

Mr. Hassell: The record will show it.

Chairman Myers: You will have it.

Mr. Hassell: That I stand on the objection?

Chairman Myers: You will have your exception whether you take it or not, and we will announce that that will be the rule to be followed. Counsel sometimes get too busy and sometimes they forget to take an exception, but if some judge should raise the question on that point, we will announce here that if an exception is not taken to a ruling of the Board that we will consider it as having been taken. 1233

(The document referred to was marked Respondent's Exhibit No. 1, and received in evidence.)

Mr. Hassell: May I ask the witness a question?

1234 Chairman Myers: Would you like to see it first?

Mr. Hassell: No, not now, thank you. With respect to the authenticity of this document.

Chairman Myers: I don't believe perhaps you can. It is received.

Mr. Hassell: Just a question.

Chairman Myers: Go ahead.

By Mr. Hassell:

Q. Mr. Witness, you know you are under oath? A. Yes,

1235 sir.

Q. You understand you are now? A. Yes, sir.

Q. You know that this is the copy of the New Yorker of this issue that was actually circulated throughout the United States? A. I do not, sir.

Q. You can't so testify? A. No, sir, I cannot.

Mr. Hassell: I object to it.

Chairman Myers: On that ground it probably would go out.

Mr. Bromley: Well, let the Board accept it subject to verification. I will call somebody from the New

1236 Yorker.

Chairman Myers: Yes. Suppose we just accept it subject to the verification so we may proceed.

By Mr. Bromley:

Q. On the same subject I show you what purports to be the issue of the New Yorker for August 7, 1943, page 14, the cartoon at the bottom of the page. A. Yes, sir.

Q. Is that one of those cartoons to which you had reference in your answer?

Mr. Hassell: The same objection.

1237

The Witness: Yes, sir, it is.

Mr. Bromley: I offer it in evidence.

Mr. Chairman: It will be received subject to verification at a later time.

(The document referred to was marked Respondent's Exhibit No. 2, and received in evidence.)

By Mr. Bromley:

Q. Now, I show you what purports to be a copy of Colliers for February 6, 1943, and direct your attention to page 30, the only cartoon appearing on that page, and ask if that is one of the cartoons you had reference to in your answer?

1238

Mr. Hassell: Objection.

Mr. Bromley: I offer it in evidence.

Chairman Myers: The same ruling. It is admitted subject to verification later on.

(The document above referred to was thereupon marked Respondent's Exhibit No. 3 and was received in evidence.)

1239

Chairman Myers: You had better keep those all together, Mr. Bromley, for purposes of verification.

By Mr. Bromley:

Q. Do you remember the poem "Benedicts, Awake!" in the January issue at page 45? A. Yes, sir, I do, quite well.

Q. Do you find anything indecent or obscene in that poem? A. If anything, it is laudable.

1240 **Q. In the February issue we have the first example of a Sultan cartoon, of which there are several, and I direct your attention to that one on page 65. Will you tell us whether or not in your opinion that is anything obscene, lascivious, lewd, filthy or indecent? A. In my opinion, there is not an obscene, lewd, indecent or filthy thing about the character of the cartoon or its subject.**

Mr. Hassell: I didn't get the answer to the question.

Chairman Myers: Let the reporter read the question, please.

1241

(Question read.)

By Mr. Bromley:

Q. In connection with this matter I show you what purports to be a copy of the New Yorker for September 11, 1943 and the cartoon in the right-hand lower part of page 27. A. Yes, sir.

Q. Is that an example of contemporary cartoons?

Mr. Hassell: I object. Is this one of the issues

1242 **that has already been marked?**

Mr. Bromley: No, it is another one.

Mr. Hassell: I object.

Mr. Bromley: I offer it in evidence.

Chairman Myers: Same ruling. It is admitted, subject to verification later on.

(The document above referred to was thereupon marked Respondent's Exhibit No. 4 and was received in evidence.)

By Mr. Bromley:

1243

Q. In connection with "The Unsinkable Sailor", the story in the February issue, and the reference on page 95 in the first column, near the middle, the term "sonovabitch" occurring in the sentence: "The first sonovabitch that moves I'll cut his head off! They left the room—but I went to the hospital." I show you the New Yorker for April 3, 1943, and direct your attention to the middle of page 56, which is a part of the story appearing in that magazine entitled "A reporter at large", beginning on page 44, and ask you whether or not that is an illustration of the current use of the word mentioned in that magazine?

1244

Mr. Hassell: I object.

Chairman Myers: Same ruling. You will have that marked for identification, will you, Mr. Bromley?

Mr. Bromley: Yes.

The Witness: In my opinion it runs along the trend of the modern standards that are accepted today in all such periodicals as this.

Mr. Bromley: I offer in evidence what I have marked in pencil on page 56.

Chairman Myers: Subject to verification later on, Respondent's Exhibit No. 5, encircled with lead pencil on page 56, is admitted.

1245

(The document above referred to was thereupon marked Respondent's Exhibit No. 5 and was received in evidence.)

Mr. Hassell: Mr. Chairman, in view of the fact that the Board is going to admit these excerpts from

these magazines, I would make this request: That
1246 the entire magazine be admitted for consideration if you are going to admit any of it.

I think it is unfair to the magazine that is being dragged in here without its consent, to have some objectionable passage that probably it itself is ashamed of, put out in this way and, one swallow does not make a summer, one piece of dirt does not make a dirty magazine.

The issue we have here occurs over a period of eleven consecutive issues and not an isolated instance here and there. It is a cumulative building up of
1247 a mountain of dirt.

Chairman Myers: Is there any objection to Mr. Hassell's request that the entire magazine go in in each instance?

Mr. Bromley: No, sir.

Mr. Hassell: If that is agreed to I won't insist on the proving of these matters.

Mr. Cargill: Did I understand you to say you want the whole magazine in?

Mr. Hassell: I don't want any of it in, but in consideration of the Board's admitting any of it, I want it all.

1248

I am not withdrawing my objection as a whole or in part.

Chairman Myers: Mr. Hassell's objection will stand in the record as originally made, but the magazines will be admitted as a whole in each instance, and I understand the matter of verification is now waived also.

Mr. Hassell: Yes, sir.

By Mr. Bromley:

1249

Q. I direct your attention specifically to page 95 of "The Unsinkable Sailor" in February to the description of the sailor's conversation with the union hall secretary, including the phrase: "How's chances to lower the boom on you, sister?", and ask if that phrase goes beyond that accepted in reputable magazines of today by way of descriptive language? A. The sentence is not obscene in itself, because of the very fact that it is commonly used by merchant seamen today.

As I understand it, it is an expression that is a counterpart of "Let me put the arm on you," or "Let me give you a touch."

1250

In other words, he is trying to get a loan from her. In itself, it is not indecent and, beyond that, it is a very commonplace use of language of the modern times.

Q. Now, anybody who has any familiarity with the sea or sailors knows that the word "boom" as used in that sentence refers to a cargo boom on a merchantman, do they not? A. Yes, sir, they do.

Q. Now, did you read the article of Mr. Gilligan in the April issue, the "Court of Lost Ladies", the night court story? A. Yes, sir, I did.

1251

Q. What is your opinion of that article and the words and phrases used therein? A. I think Mr. Gilligan was very delicate in handling a very sordid piece of business. I am frank to admit that if I had to be touchy about such things I would have to throw out the window ninety per cent of my agents' reports.

Q. And I show you Cosmopolitan for February, 1943, and direct your attention to an article by Francis Wickware entitled: "Our Teen Age Crime Wave," and ask you whether

1252 or not that is an example of the same kind of reporting as Gilligan's article?

Mr. Hassell: I object, the same objection as heretofore.

Chairman Myers: Subject to Mr. Hassell's original objection, it may be marked for identification.

Mr. Bromley: I offer it in evidence, being the article on page 26. I am offering the whole magazine.

My purpose in offering it is to call the Board's attention to the article beginning on page 26 entitled "Our Teen Age Crime Wave."

1253 Chairman Myers: Subject to Mr. Hassell's original objection, it may be admitted.

(The document above referred to was thereupon marked Respondent's Exhibit No. 6 and was received in evidence.)

By Mr. Bromley:

Q. Still further in connection with the Gilligan article in the April issue, I show you Time of March 29, 1943, and call your particular attention to page 46, an article

1254 entitled: "Health."

Mr. Hassell: I object; the same objection as made heretofore.

Chairman Myers: If you desire, Mr. Hassell, we will have the reporter note the same objection to any one of these that are of like nature and effect, and let the record show that Mr. Hassell will have an objection to the introduction of such pieces of evidence, and an exception also is granted.

Mr. Hassell: Very well.

By Mr. Bromley: 1255

Q. Is that an example of the same kind of reporting that Gilligan did? A. Yes, sir, it is.

Mr. Bromley: Will you mark that magazine, please?

(The document referred to was thereupon marked Respondent's Exhibit No. 7 for identification.)

Mr. Bromley: I would like to call specific attention of the Board to parts of this article: 1256

"A House Naval Affairs Committee last week made plans to investigate an age-old problem."

And further:

"The agencies' first aim was to eliminate the red light district. This project annoyed many Army commanders, who argued that running prostitutes into the street would only increase the difficulty of venereal control. 'Nonsense', said Charlie Taft: 'A housed harlot could infect 20 to 75 soldiers a night, while the problems of a street walker limited the number of her prospective customers to five or six,' and "red light districts tend to advertise the product." 1257

And further on:

"Messrs. Taft and Parran and their committees had also persuaded most better class hotels to keep a sharper eye on their bellboys' habit of sneaking in 'call girls.'"

And farther down:

"Lieutenant Commander Michael Wishengrad, the Navy's New York venereal disease control officer, said that non-professional pick-ups between 15 and 19,

1258 accounted for three out of four infections. 1800 random cases reported to Washington indicated at least 64 per cent of infection came from 'amateurs'.

"Lieutenant Commander Clarence J. Buckley, Wishengrad's Philadelphia counterpart, put the figure higher: 'These kids outnumber the streetwalkers four to one.'

"From Mexican workers now occupying San Antonio's famous 'Spictown cribs', the rate of delinquency among young girls had increased 350 per cent in two years. One of every four girl 'car hops' at

1259 the city's drive-ins were found to be venereally infected. Said a social worker among the professional prostitutes: 'The girls are sore as all get out. They say the young chippies who work for a beer and sandwich are cramping their style.'"

Chairman Myers: Isn't that a little different thing from what we have here? Does that not relate to medical and scientific matters?

Mr. Bromley: It relates to what the House Naval Affairs Committee found in their investigation.

Chairman Myers: Esquire does not attempt to deal in scientific or medical articles, does it?

1260 Mr. Bromley: It has articles of general interest in every issue and many among them report in the same serious vein as Gilligan does. Gilligan takes a night court and reports what he sees in an evening in a night court, and the House Naval Affairs Committee reports what it finds in Army centers.

Chairman Myers: I had in mind the Parmelee case, which is a little different than what we have here.

Mr. Bromley: But I think the frankness of this language published in Time, which has a larger circulation than Esquire by several hundred thousand —I suppose Time's subscription list is as large as any magazine in the country—and it is exposed to children to read every day of their school lives. 1261

Mr. Hassell: I take it that counsel's statement will not be considered as evidence, Mr. Chairman.

Chairman Myers: Oh, no.

By Mr. Bromley:

Q. In the May issue, Paul Gallico's article: "The Savage Beast In Us." 1262

I take it, Mr. Croteau, you are pretty familiar with burlesque? A. I should be after all these years.

Q. Do you find anything indecent, lewd, lascivious, filthy about that description of burlesque as Gallico wrote? A. No, sir, it is not. It is a very fair and accurate description of burlesque as it exists today, even up to the point of the pictorial exhibits on the two pages.

If you like, I can define each of them.

Q. I wish you would. I think the Board might like to know what those pictures are. A. This first picture is ordinarily construed as the entrance of the strip tease artist. 1263

Q. She is fully dressed? A. She is fully dressed. The second picture shows her in the process of removing her clothes and strutting up and down the boards, as we say.

The third picture shows her in what we term a "grind".

Q. What is a grind? A. A grind is a muscular movement by the subject, of her torso.

The other picture depicts a "bump", which, again, is a combination of the grind with a very convulsive jerk at

1264 different musical bar intervals, usually aimed at some patron down in the first or fourth or fifth row.

It is not at all in good taste, probably in many instances it is considered indecent.

Nevertheless, it is the accepted standard of the stage today.

This particular girl apparently is a chorus girl doing the number called the can-can or, at least, the movement there implies she is doing the can-can.

This is what is called a "back line girl", usually used purely as a posing individual. In other words, used to dress

1265 up the scene.

Q. You refer to the top picture on page 33? A. That is right, sir.

Q. And the can-can is the one where her skirts are all fluffed up about her legs? A. That is right. I might add that there is—

Mr. Hassell: I object to any voluntary statement here.

By Mr. Bromley:

Q. So that it won't be voluntary, what were you going

1266 to add?

Mr. Hassell: I object to that question. I think it is an entirely improper question.

Chairman Myers: You had better ask him another question.

By Mr. Bromley: 1267

Q. Is there any other material in any of the other issues to which you desire to call our specific attention? A. None that I can recall right now.

Q. I can't worm that out of you, can I?

Is there any material in connection with the burlesque article you wanted to refer to? A. No, none at the present.

Mr. Cargill: At this point I would like to say, and I think this is the consensus of opinion, among the judges, that the witness should feel free to say what he pleases subject to objection and ruling. 1268

Mr. Bromley: Yes, sir.

The Witness: Well, to elaborate on the burlesque article, I was going to point out as a matter of contrast, being in this so-called dirty sort of business, I visited your local burlesque house night before last to compare burlesque productions in Washington with them as we see them in New England, and the strip of Jardinere, who appeared there was in great part such an exhibition as is shown in the picture and what appeared in this article.

Mr. Hassell: I object to that. It calls for a conclusion of this witness: That doesn't give any pic- 1269
ture to this Board as to what he is talking about.

Chairman Myers: He is speaking as an expert, he is an expert on burlesque in Washington.

By Mr. Bromley:

Q. I call your attention to the picture of the girls from "By Jupiter", in the July issue at page 76, and ask you

1270 whether you consider that to be obscene or indecent? A. It is not obscene or indecent.

Mr. Bromley: Now, I offer in evidence the copy of Life for September 6, 1943, and ask that it be marked.

Mr. Hassell: The same objection.

Chairman Myers: The ruling will be the same as the previous ruling.

(The document referred to was thereupon marked Respondent's Exhibit No. 8 and was received
1271 in evidence.)

Mr. Bromley: I would like to refer the Board specifically to pages 69, 70, 71 and 72, which is a review of the show "Good Night, Ladies" in its 73rd week. "This undraped farce set Chicago records."

Mr. Hassell: I have not heard as yet a question directed to this witness respecting this magazine.

Mr. Bromley: I will think one up.

By Mr. Bromley:

1272 Q. Does that represent current day standards in the magazine publishing field, so far as the reproduction of pictures of undraped females is concerned? A. It is a fair representation.

Mr. Hassell: I object to the characterization of "undraped females". There is no such thing in this magazine. There was no such thing in that play. I saw it.

Mr. Bromley: You went to it?

Mr. Hassell: Yes, sir, I saw that very show.

By Mr. Bromley: 1273

Q. Will you look at the pictures on the four pages and tell me whether or not you think those are pictures of undraped females? A. I can't say much about this on page 69. This on pages 70 and 71, that on page 70 is a fair representation of an undraped female. That on page 71 is what is known to the trade as shadow shots.

Q. The shadow shots are of a woman in a shower bath with no glass? A. Yes, they are.

Q. With a man peeking through the glass door at her? A. Two men, to be exact. 1274

Q. Two men? A. Yes.

Q. Now, on the next page. A. On page 72 are pictures numbered 5, 6, 7, 8, and 9, which would be fair representations of undraped females. The others are not, in my opinion.

Mr. Bromley: Now I offer in evidence Life for July 5, 1943, and ask that it be marked.

Mr. Hassell: Same objection. Are you offering the whole thing?

Mr. Bromley: I will specifically refer to pages 86, 89, and 90.

1275

By Mr. Bromley:

Q. Would you say that those pages which I show you represent current standards in the publication of pictures of women, in the field known as leg art? A. From my observation, yes. I might add that this is one magazine that I saw before coming to Washington. As a matter of fact, I examined it at about the time it was released.

1276 Q. Do you find anything more objectionable in the picture in the issue of August Esquire on page 127 entitled "Hew To The Line Bertha, Let The Skirts Fall Where They May." A. I do not.

Mr. Bromley: I would like to show the Board, if I may, the pictures I have reference to (handing).

Chairman Myers: It will be received.

(The picture referred to was marked Respondent's Exhibit No. 9, and received in evidence.)

1277 *By Mr. Bromley:*

Q. I direct your attention to page 66 of the September issue of Esquire which is the courting scene of the young people who work nights in the war plant and who are passionately embracing while on a couch while in the presence of the mother and the maid. Do you find anything filthy or obscene about that? A. I think it is a fair representation of probably what takes place in a good many homes in these times.

Q. Also do you recall a similar cartoon in which the sailor is kissing the girl, and the parents standing in the 1278 doorway, and the sub-title is that he tells her he is sailing each night, which appears on page 84 of the same issue? A. Yes, sir, I do recall it.

Q. Is your answer the same with respect to that cartoon? A. Yes, sir, it is.

Q. Do you find the same thing in probably almost the same detail in the New Yorker for March 20, 1943, at page 19? A. Perhaps with the exception that it is not in colorplate, yes.

Mr. Bromley: I offer the issue of March 20, 1943, of the New Yorker in evidence. 1279

Chairman Myers: It may be marked for identification by the Reporter, first.

(The document referred to was marked Respondent's Exhibit No. 10, for identification.)

Mr. Bromley: I call your attention specifically to page 19 of the cartoon appearing thereon. May that be received in evidence, if the Chairman please, rather than just marked for identification?

Chairman Myers: It may be received, subject to the conditions heretofore stated. 1280

(The document heretofore marked Respondent's Exhibit No. 10, for identification, was received in evidence.)

By Mr. Bromley:

Q. Still further in connection with burlesque, I show you an issue of Time for August 2, 1943, particularly the picture on page 44 of Ann Corio. Would you say that that was typical of those times in so far as the publication of pictures of burlesque performers? A. Yes, sir, it is. 1281

Q. Who is Ann Corio? A. Probably the outstanding burlesque queen in the country today. She has a particularly unique way of presenting the striptease.

Q. Are you able to tell us whether or not in that picture her umbilicus is prominently displayed? A. Yes, sir, it is.

Mr. Bromley: I offer the issue of August 2, 1943, in evidence.

1282 Chairman Myers: Mark it for identification, first.

(The document referred to was marked Respondent's Exhibit No. 11, for identification.)

Mr. Hassell: You almost have to use your imagination to tell that is a woman, Counsel.

Chairman Myers: It may be received in evidence, subject to the previous conditions.

(The document heretofore marked as Respondent's Exhibit No. 11, for identification, was
1283 received in evidence.)

Mr. Bromley: Will you mark for identification the issue of Yank of September 16, 1942?

(The document referred to was marked Respondent's Exhibit No. 12, for identification.)

Mr. Bromley: I offer in evidence the magazine Yank, issue of September 16, 1942, and I call particular attention to page 18, to the picture thereon.

Chairman Myers: Have you any questions to ask about this one, Mr. Bromley?

1284

By Mr. Bromley:

Q. I want to ask you if that is the picture of the well-known stripper Gypsy Rose Lee? A. Yes, sir, it is.

Q. She appears there by her married name, does she not? A. Yes, sir.

Q. Mrs. Alexander Kirkland? A. That is right.

Chairman Myers: Received in evidence. 1285

(The document heretofore marked Respondent's Exhibit No. 12, for identification, was received in evidence.)

Mr. Bromley: Mark for identification, please, the issue of Life of July 12, 1943.

(The document referred to was marked Respondent's Exhibit No. 13, for identification.)

By Mr. Bromley: 1286

Q. I call your attention to the upper left-hand picture in an article about San Francisico, sub-titled, "Fun In A Night Club."

Mr. Hassell: What page?

Mr. Bromley: 78.

By Mr. Bromley:

Q. I ask you whether or not that is a typical example of pictures which are published of stripteasers in reputable magazines? A. I would say that it is a very good example. 1287

Mr. Bromley: I offer that magazine in evidence.

Chairman Myers: What page are you referring to here?

Mr. Bromley: Just the one page, page 78, the upper left-hand corner. The picture of the stripteaser and the sub-title.

Chairman Myers: It may be received in evidence.

1288 (The document heretofore marked Respondent's Exhibit No. 13 for identification, was received in evidence.)

Mr. Bromley: Mark for identification, please, Time magazine for February 15, 1943.

(The document referred to was marked Respondent's Exhibit No. 14, for identification.)

By Mr. Bromley:

1289 Q. I show you page 40, and call your attention to the article entitled "Shall I Have This Baby?" with the picture of editor Malloy, under which is the sub-title "Goo Is Salable In War Time, Too."

Would you say that that was an example of text similar to what appears under Esquire's column about "Dear Doctor Diddle"? A. In substance, yes, sir, it is very similar.

Mr. Bromley: I offer in evidence the issue of Time, of February 15, 1943. I just want to call attention to this: This has reference to a column that appears in the Chicago Herald-American every day. Here is a

1290 sample of it:

"I am 19. I foolishly trusted a man whom I met at a picnic. We talked of marriage. Later I found he was married. I no longer care for him. But what am I to do about our child? Added to that problem I have met a sailor from Boston who has fallen in love with me. Shall I have this baby and say nothing to the sailor? He does not know.

"Have your baby. Do not mention your condition to the sailor."

"My husband was classified in 1-A and, of course, was called. All our friends are married and kept asking this one man to be my escort (at parties). I did not mind his company. Now I yearn for it. I am beside myself. We are both in love. What am I to do?" 1291

"Tell him if he is half the man your husband is he will not tempt you further."

"My daughter is in a pitiable condition. She is not yet 18 and about to give birth to an illegitimate child. The father is a married man who is in the service. He took my daughter to a tavern and gave her the first drink she ever had." 1292

"You can take action against this inn keeper."

Chairman Myers: Respondent's Exhibit 14 is received in evidence, subject to the previous conditions.

(The document heretofore marked Respondent's Exhibit No. 14, for identification, was received in evidence.)

By Mr. Bromley:

Q. Now, Mr. Croteau, you recall the recurring feature of Esquire, the double page spread entitled "Goldbricking With Esquire" containing the Army camp jokes from the different Army camp papers? A. Yes, sir, I do. 1293

Q. Have you read and studied each one of them? A. Yes, sir, I did.

Q. Do you find anything in any of them which is obscene, indecent, lewd, lascivious, or filthy? A. I do not.

Q. In the September issue, page 65, is a cartoon of the milkmaid and the husband at the backdoor, sub-titled "Come back later, Sweet, my wife hasn't left for the factory yet."

1294 Questions were asked this morning of the witness, Mr. Smith. What can you tell us as to what your opinion is as to the obscenity of that cartoon? A. Well, to begin with, it is as corny as the hills. The only new feature about it is that the subject has been reversed. The husband is playing the part of the wife and vice versa. It has not been considered obscene for probably a hundred years and I don't see how it can be.

Q. Is there an inference there which you, as a guardian of public morals, in your official capacity, feel that readers could make, and that is to say, when the milkmaid came back 1295 and when she got in the house that adultery might occur? A. If the reader is so inclined to imply that inference in what he sees, but I suppose nowadays other things could happen as well.

Q. Well, it is a fact that, in your opinion as an expert, if some reader, or some members could infer ultimate adultery from that cartoon would that render it indecent, obscene, lascivious, lewd, and filthy? A. Well, I might say that all sensible and reasonable men know that there are a certain amount of individuals who inhabit society who are essentially low in character and who view obscenity in everything that they see. I repeat again that it has a good deal to do 1296 with the subject. A test that is applied by the Society in a case of this kind is will it harm the most people? In this particular instance the average man can see that and probably react with a humorous guffaw, but other than that, if you want to infer obscenity or indecency, you can do it with almost anything.

Q. While I am on that subject will you look at page 89 of the August Esquire and give us your opinion with regard to the "Paste Your Face Here" picture appearing thereon? A. The subject is no different from that that anyone might

view at any beach resort that he may visit during the summer months. It is something that I have seen and I think 90 percent of the average men who have gone to beach resorts have seen. I fail to see that there is anything obscene or that there is any lewdness or anything like that in connection with that at all there. 1297

Q. Now I want to call your attention to this fact, read the words "Paste Your Face Here." A. Yes, sir.

Q. Doesn't that connote a nasty implication, paste your face down on the woman's stomach, and not looking out? A. Well, of course if one is possessed with a degenerate, moronic mind, I suppose so, but to the average individual who is normal, why, I can't conceive that that is the reaction to that particular subject. 1298

Q. Would it ever occur to you as a censor of the literary morals in New England that there was any danger that any reader of Esquire would draw that filthy inference from that picture or those words? A. I repeat that there are some who belong in a world by themselves and who are ultimately a danger to all society, who would infer that of any similar picture, but I do say that to the average person who views that sort of thing, it is not different from going into one of the small picture places in a beach resort and having your picture taken on the back of a donkey, or some such thing that they use in the studio. 1299

Q. Would it ever occur to you in your work to ban that picture because it might suggest something indecent? A. If it had occurred to me I would have it banned. As a matter of fact, I remember distinctly having seen that particular publication.

Mr. Bromley: There is no longer any question of identification, Mr. Hassell, of these magazines? They are all in evidence.

1300 Mr. Hassell: Subject to my general objection.

Mr. Bromley: That is with respect to their materiality. Let the library witness go.

By Mr. Bromley:

Q. Now do you find anything in the Sultan cartoons, in which the feature of the sale or borrowing or giving of concubines or slave girls is used in juxtaposition to some American custom or phrase, which, in your opinion, makes those cartoons obscene, indecent, lascivious, lewd, and filthy? A. I do not. I think that the Sultan picture series have run
1301 over a period of years. They always imply the humorous side that is to be taken from the particular subjects represented. There is nothing obscene about that in my opinion.

Chairman Myers: Mr. Bromley, is that a good place for you now to call a recess?

Mr. Bromley: Yes, Your Honor.

Chairman Myers: Or would you prefer to go ahead?

Mr. Bromley: No.

Chairman Myers: We will take a recess until three o'clock.

1302

(Whereupon, a short recess was had.)

Chairman Myers: Are you ready to proceed, Mr. Bromley?

Mr. Bromley: Yes. Will you mark for identification Time for January 18, 1943?

(The document referred to was marked Respondent's Exhibit No. 15, for identification.)

By Mr. Bromley:

1303

Q. Do you recall, Mr. Croteau, the two Esky comic strips which have been complained of in some of the Esquire magazines? A. Yes, sir, I do.

Q. Now I show you an article in Time, Respondent's Exhibit 15, for identification, and ask you whether that is a typical description of comic strips as they appear from time to time in the press.

Mr. Hassell: What page is that?

Mr. Bromley: Particularly at page 75.

1304

The Witness: Yes, sir, it is, and beyond that it is extremely prevalent today in your comic type of magazines of which there are over a hundred published.

By Mr. Bromley:

Q. Would you also say that was a typical example of a reproduction of the Army type of jokes? A. Yes, sir, it is a very fair reproduction.

Q. Is there anything obscene or indecent about that, in your opinion? A. There is not.

1305

Mr. Bromley: I would like to read this to the Board, if I may, under the heading of "Army's Terry."

"Milton Caniff is a youngish (34) comic strip artist whose 'Terry and the Pirates' is popular (twenty-three million subscribing readers in some 110 civilian papers) partly because it is filled with lusciously sculptured ladies who move sensuously against a background of Oriental intrigue.

"In the early autumn Artist Caniff started drawing in spare time a special once-a-week super-luscious

1306 'Terry' for Army newspapers. Said Artist Caniff 'I beamed it to the Army, in Army lingo. The boys like it sharp and lusty.'

"Unlike the civilian 'Terry', the Army's version has had no continuity; each week's strip has been built around a separate gag and decorated with damsels as breasty and near-nude as Caniff dared draw them. One strip had Caniff's famed shapely Burma entertaining Yanks at a dinner at which food was hauled in by slave girls apparently unclad from the waist up. As bulge-eyed soldiers stared entranced, Burma asked,

1307 'Why don't you guys eat? Is something too spicy?'

"In another soldiers staged a camp show, used cantaloupe to give feminine allure to their flat chests. In the last panel a tough Yank spotted well-built Burma and yells, 'Hey, you! Hurry it up. I gotta get all them melons back to the mess hall!' "

Further, in connection with the picture comic strip complained of, I ask that there be marked for identification the issue of Time for October 18, 1943.

(The document referred to was marked Respondent's Exhibit No. 16, for identification.)

1308 Q. Will you look at the comic strip at the top of page 31 of the issue of October 18 from Time, and tell me whether that fairly represents what is commonly reproduced in reputable magazines today? A. Yes, sir, it is a fair and accurate representation.

Q. I call your attention to page 38—

Chairman Myers: I don't believe Mr. Hassell saw the one prior to that.

Mr. Hassell: Counsel did not furnish me with his magnifying glass, but I saw it. 1309

Mr. Bromley: Here is a reproduced comic strip entitled "Lady Jane", which shows naked girls taking a bath, and some of the titles are:

"Come in, Jane! It's a real treat for me to escape from ceremony like this!"

And the other girl says:

"Yes—some of your old Cornucopian customs are rather embarrassing, Clotilde."

And the man is peeking around the screen at the girls in the bath and he says: 1310

"The Queen must be having a bath! Its my—ah duty to—ahem—officiate."

And he leans against the screen and it falls down and the girl says:

"Good Heavens, it's the Lord Chamberlain! He's fainted! ! !"

It explains what this is:

"The pin-up girl who warms the hearts of British soldiers from Italy to India is Gloucestershire Artist W. Norman Pett's pert, blonde, leggy Jane (see above). Jane is British but she is not staid. Like U. S. comic strip characters, she is constantly in and out of love, in and out of trouble. Unlike her American cousins, she is also often out of her clothes. 1311

"When Jane couldn't appear (because she'd lost her panties), admirers wrote complaining letters, sent real panties to London's "Daily Mirror" for her. Thousands of letters, telegrams, radiograms (from His Majesty's ships at sea) protested loudly last week at her recent threat to marry. Since British servicemen's morale purportedly rises and falls in direct ratio to

1312 the number of times she undresses, Sir Walter Scott might have dedicated his 'A weary lot is thine, fair maid' to Jane. Puzzled Creator Pett now asks, 'If Jane has to be naked to insure a minor victory, what shall I have to do with her when we approach Berlin?' "

Now, Mr. Croteau, is there anything in any of the issues which you see before—

Chairman Myers: Is it your intention to introduce those last two in evidence?

Mr. Bromley: I will offer in evidence both of the
1313 exhibits which have been marked for identification.

Chairman Myers: They are admitted in evidence subject to conditions previously stated.

(The documents above referred to were thereupon marked Respondent's Exhibits 15 and 16, respectively, and were received in evidence.)

By Mr. Bromley:

Q. I withdraw the last question and ask this: Is there anything in any of the complained of material in any of the eleven issues, which, in your opinion, is obscene, lascivious,
1314 lewd, filthy or indecent? A. In my opinion, there is not.

Mr. Bromley: That is all.

Cross Examination by Mr. Hassell:

Q. Mr. Croteau, is it one of the functions of the Society to appear as a defense witness in cases where concerns or individuals are charged with violating either local, state or federal obscenity statutes? A. It all depends on the

matter at hand. I mean, they have in the past appeared and then again have not. 1315

Q. They have appeared as defense witnesses? A. Yes, sir; they have.

Q. Have you so appeared? A. Yes, sir, I have.

Q. And you appeared at the direction of your governing body of the Society? A. That is correct, sir.

Q. In what cases have you appeared as defense witness where obscenity and lewdness and filth was involved, in behalf of the defense? A. I can't recall the exact cases. I do know there were several in Boston where there was some disagreement on the part of the prosecution and the respondent as to the matter under observation by the courts in which 1316
we are asked to appear and render an informal opinion. That is exactly what I am doing here. I am not pro nor con for this. I am calling it as I see it.

Q. You call these statements you have made here an informal opinion? A. Yes, sir, they are.

Q. Who called you in the local prosecutions to testify in behalf of the defense? A. In this particular case?

Q. No, I mean in the local prosecutions of violations of obscenity statutes. A. Counsel for the respondents.

Q. Counsel for the respondents? A. Yes, sir.

Q. And in how many of such cases have you appeared? 1317
A. I think three or four, if I remember correctly.

Q. Over what period of time? A. Probably since 1936, or thereabouts.

Q. Since 1936? A. I should say so.

Q. When did you appear in the last one? A. I think it was some time last April.

Q. April, 1943? A. I believe so.

Q. Do you recall the nature of that prosecution? A. Yes sir. It was a case where some magazines had been con-

1318 plained of in a drugstore, I believe on Essex Street in Boston. They were purchased by the police and the police brought a complaint against the seller of the magazines and they engaged the former district attorney of Suffolk County as counsel, and he asked me to come to his office and render an informal opinion.

I did that and did not agree with the report of the police and I so testified.

Q. You don't recall the name of the defendant? A. I do not.

Q. You don't recall whether or not he was convicted? A.

1319 He was not convicted, sir.

Q. Why do you recall that so definitely if you don't recall the name? A. The name of the drug store was Woodward's. I don't recall the name of the individual. I do recall he was merely the clerk who had sold the magazines.

Q. Does the local prosecuting attorney in Boston consult you before he brings a prosecution for violation of local obscenity statutes? A. I think he has in one or two instances. Ordinarily, he does not.

Q. He doesn't ordinarily do that? A. He does not.

Q. And the other instances in which you testified, did the defendant win? A. If I recall correctly, there were three

1320 or four cases and I do know that two defendants were let off and one was found guilty.

Q. One was found guilty in a case in which you testified in his behalf? A. Not necessarily in his behalf—with an open mind.

Q. You appeared as a defense witness, did you not, sir? A. I was summoned by the defense, yes.

Q. I see. Does the publication Esquire have any arrangement with your organization for the review of its issues of its publication? A. No, sir; it has not.

Q. Do you know whether there is any member of your organization that is in any way connected with Esquire? A. To my knowledge, no, sir. 1321

Q. Have you ever heard whether there was one? A. No, sir, I never did.

Q. You couldn't testify positively that there is not a member of your organization who is associated with Esquire? A. I say, to my knowledge I do not know of any.

Q. You don't know whether one of them might hold some stock in the organization? A. No, sir, I do not.

Q. How did you come to come down here and testify in this case? A. The Boston counsel of the respondent, Mr. Welch, called me on the telephone— 1322

Q. Mr. who— A. The Boston counsel for the respondent, Mr. Welch, called me on the phone—

Q. Who is Mr. Welch? A. I believe he is the representative in Boston for Esquire.

Q. Oh, I see. And he did what? A. He told me there was a hearing to be held in Washington on the mailability of the magazine Esquire, and requested that I come to Washington to offer testimony in behalf of Esquire.

I told him I was not at liberty to do so unless I had the approval of my Board of Directors, which met on October 14, I believe. 1323

I asked him first to submit his request in writing, which he did, and at the next directors' meeting I took the matter up with the members of the Board and they instructed me it would be all right, inasmuch as the Watch and Ward Society received such a black-eye for knocking everything down, that it would be an opportunity, possibly, for once to show we were not so narrow-minded as most people thought we were.

Q. Who is paying you? A. The Boston counsel has agreed to reimburse the Society for my expenses and time.

1324 Q. And that includes your salary? A. Yes.

Q. What is that, sir? A. My salary is $4,500 a year.

Q. How long have you been engaged on this case? A. On this case, sir?

Q. Yes. A. Since Tuesday.

Q. This last Tuesday? A. Yes, I came down Monday night on the train.

Q. You were not engaged on it prior to that time? A. No, sir.

Q. You had not examined these particular issues with this case in view? A. I had examined eight of the issues here in

1325 question, as a matter of office policy.

Q. I see. With this case in view? A. Not with this case in view, no, sir.

Q. Did you know what the charges were here? A. No, I did not, sir, not until Tuesday morning.

Q. Is it the policy of the organization to oppose other law enforcement organizations and agencies in their attempts to enforce either local, state or federal statutes against filth and obscenity? A. Ordinarily not, but there is always the exception to the rule.

Q. And this is the exception? A. I would say so, yes, sir.

1326 Q. Mr. Croteau, you testified, I believe, that your organization cooperates with the Federal postal officials? A. Yes, sir.

Q. Just who are they? A. In Boston I think it is Tennyson Jefferson who is now the inspector in charge of violations, and he is the man with whom I do business when I have any to do.

You must bear in mind that there are not only magazines, but also the sale of a lot of indecent books, which are solicited through the mails, but about which I don't

have to tell you, and time after time complainants will come to the office and show you a letter of solicitation for some particular book. 1327

There is one on the desk now.

Ordinarily we make a preliminary investigation to find if the complaint is justified, and then we pass it on to the authority in question, in cases of this type the Postal authorities in Boston.

Q. By "cooperating" you mean you make complaints from time to time against concerns and individuals alleged to have used the mails in connection with the transmission of obscenity? A. That, and also help the Department in obtaining tangible evidence that will stand up in a court of law. 1328

Q. You mean to say the Post Office inspectors delegate to you the authority of securing evidence? A. They do not. They merely seek my cooperation.

Q. Just how? A. Very often Mr. Tennyson will say: "Did you bring down the envelope in which the solicitation was received," or "Did you order a copy of the book complained of," or "Have you that book with you?"

Very often, if the thing is obviously wrong, we don't bother to even order the book. Sometimes he has requested "Will you get me a copy of the book to show it has been mailed to you or to an individual in your organization, and I will proceed from there." 1329

That is usually the routine.

Q. That is what you mean by assisting in the investigation? A. Not assisting, but cooperating.

Q. Cooperating? A. Yes, sir.

Q. That is the way most complainants, or a good many complainants cooperate with law enforcement agents, isn't it? A. Generally, yes, sir.

1330 Q. Has your organization written to the Postmaster General commending him for his action against the second-class privileges of publications on account of the obscenity contents? A. Yes, sir; I believe several months ago such a publication was sent to Mr. Walker.

Q. Such a publication? A. Such a letter of commendation.

Q. And you are here in this proceeding to withdraw that letter now? A. Not by a long shot, no, sir.

Mr. Hassell: May I have a couple of minutes, please, sir?

1331 Chairman Myers: We will recess for five minutes.

(Whereupon, a brief recess was taken.)

Chairman Myers: Proceed, gentlemen.

By Mr. Hassell:

Q. Mr. Croteau, I show you a letter on the letterhead of the New England Watch and Ward Society, dated May 24, 1943, purporting to be signed by Charles H. Fleming and Louis J. Croteau, Secretary.

Is that your signature? A. Yes, sir.

1332 Q. Did you send this letter? A. Yes.

Mr. Hassell: I offer this in evidence as the next Government exhibit.

Chairman Myers: If there is no objection, it may be received.

Mr. Bromley: No objection.

(The document above referred to was marked Department's Exhibit No. 25 and was received in evidence.)

Mr. Hassell: This letter of May 24, 1943, is addressed to Postmaster General, United States, Washington, D. C. It reads: 1333

"Dear Sir:

"We of the New England Watch and Ward Society wish to express to you our appreciation for the recent action that you have taken in further removing from the mails certain additional magazines and other printed matter which you deem unfit to go out to the public.

"We, as an organization, are endeavoring to prevent such pernicious literature from reaching the homes of our New England families." 1334

It is signed by Charles H. Fleming, president, and Louis J. Croteau, executive secretary.

Chairman Myers: You will probably want to submit a copy of that and keep the original in the file, Mr. Hassell, will you not?

Mr. Hassell: Possibly.

Chairman Myers: We had probably better understand each other. You may put a copy in instead of the original letter.

Mr. Bromley: I agree. 1335

Mr. Hassell: I don't know that it will be required because of the great mass of that kind of stuff in the files already.

Chairman Myers: All right, however you feel about it.

By Mr. Hassell:

Q. I show you another letter, Mr. Croteau, on the letterhead of the New England Watch and Ward Society, dated

October 5, 1942, purporting to be signed Charles H. Fleming, president.

Do you know Mr. Fleming's signature? A. Yes, sir. I do.

Q. Is that his signature? A. Yes, sir, it is.

Q. Do you know that that letter was actually sent? A. I know that a letter was sent at or about that time.

Mr. Hassell: All right. I offer this letter.

Chairman Myers: It may be received in evidence.

(The document above referred to was marked Department's Exhibit No. 26 and was received in evidence.)

Mr. Hassell: This letter reads:

"October 5, 1942.

"Postmaster General,
United States of America,
Washington, D. C.

Dear Sir:

In behalf of the New England Watch and Ward Society, I wish to extend grateful thanks to you for your activity in curtailing the circulation of obscene literature. This is a matter which has given us great concern and difficulty and we feel that your action has cleared it up for the benefit of those readers of current literature.

"Yours very respectfully,

"Charles H. Fleming,
"President."

By Mr. Hassell:

1339

Q. Do you know, Mr. Croteau, whether in passing upon the question of your testifying here, the board—is that what you call the governing body of your organization? A. Yes, sir.

Q. Had in mind these letters of commendation for the action the Postmaster General has taken? A. I am not in a position to know that, sir. As a member of the board of directors, I may say that there are two on the board who dissented about my coming to Washington. The others were in favor.

1340

Q. Two dissented? A. Yes, sir.

Q. Who dissented? A. Doctor Vandersall, who is a doctor of divinity, and a Mr. Woodfin.

Q. What is his position? A. He is an executive in the civilian defense set-up in the city of Boston.

Q. What is his position? Is he a lawyer? What is his business? A. No, sir; he is a layman. He is our most recent addition to the board of directors.

Q. Your organization is a private organization, is it not? A. Yes, it is, sir.

Q. How is it maintained? A. Over the 65 years of its existence it has accumulated in bequests that have been left to the Society a sum of money amounting to $215,000 which is invested in stocks and bonds, and the income from those bonds and stocks is used for the perpetuation of the work. Beyond that there are now nearly 400 active members in the Society, who give anywhere from one dollar to five thousand dollars. That is money that is being used to defray expenses.

1341

Q. Do the by-laws of your organization restrict its activities in that the organization is to discourage the dis-

1342 semination of obscene literature? A. No, sir; the object as stated in the by-laws is to promote good public morals and to eradicate corrupt agencies. That is as stated in the by-laws.

Q. How does your testimony here further that object? A. Well, I believe that my testimony here is in the sense of fair play. I am frank to admit that I was a little bit at a loss as to why I am here, and I openly state that I have personally as an officer of the organization and as a director been a little bit curious as to the motive behind this entire proceeding.

1343 Q. You mean the motive of the officials of the Post Office Department? A. Yes, sir. It seemed a little bit out of the ordinary in view of the fact that Esquire had not been complained of to the Society at any time.

I might say at this time that in Boston where our office is and throughout New England the organization is considered as a sort of watch dog, and if there is anything radically wrong in the field of criminal violations, ordinarily there is some rumble along the line. We get some complaints, and in the police department, for instance, if it is brought out that in several precincts there are some commanding officers who are so-called businessmen, we will

1344 know about it, and I was a little bit at a loss to understand why it was that the Postal authorities proceeded to institute proceedings against this magazine when we apparently were in the dark about the whole situation.

I don't mean that we set ourselves up to interfere with Government agencies or to find out every action that the Government takes on any case, but there was something about this that was not quite clear in the minds of some of the directors and in my own mind.

Q. Do you have any question in your mind about the action taken in other cases of this sort? The right of the publications to enjoy a subsidy and to go out under the stamp of approval of the Post Office Department, being such publications designed for the dissemination of information of a public character, devoted to the sciences, the arts, and some special industry? A. Well, there are many other publications, Mr. Hassell, which are far more offensive, that is in my opinion, than Esquire, that it seemed a little bit of an off tackle play to touch upon this publication and not tackle other publications which were far worse. 1345

Q. Do you know the names of the publications whose second-class privileges have been revoked by the Department? A. I don't know if they have second-class privileges. I do know there was a large batch that we were informed were banned, but by name I wouldn't know them. No one supplied me with a list of them. 1346

Q. You don't know the names of those publications, yet you are comparing the action taken in those cases with the action in this case? A. No, I am not comparing the action taken in those cases. I am comparing the action which could be taken in many cases which as yet has not come about.

Q. Do you realize in your contact with law-enforcement officers that you can't proceed against every one at one and the same time? A. I respectfully concede that, Mr. Hassell. 1347

Q. But still you say that you question the motives of the officials of the Post Office Department who called upon this publication to show cause why a second-class privilege should not be revoked, and you are not familiar with the action taken against other publications? A. No, sir, I am not familiar with them.

1348 Q. In other words, you are here in the capacity of attempting to rescue a high-class, decent publication which you think ought not to be imposed upon by the unscrupulous Federal authorities. Is that your position? A. No, that is not my position. I am here for the purpose of listening to the pros and cons of this argument and appearing here with an open mind. I have for a long time felt that Esquire was probably one of the representative periodicals of our American way of life. I have never at any time seen anything wrong with it; that is, that could be construed as obscene, indecent, lascivious, or lewd, call it what you will.

1349 I say that it is on a good many family tables, on many tables throughout New England and perhaps elsewhere in the country, and why this action was taken, I don't know. I am in the dark about it and that is what I had hoped to be able to find out.

Q. Well, when you took the witness stand, you were here for the first time, were you not? A. No, Mr. Hassell, I was here for about five minutes, I think, when you made your opening remarks, up to the point where you asked that the witnesses be excused.

Q. Would you agree with statements of other witnesses if such statements had been made or are hereafter made that
1350 Esquire has the reputation for being risque and hush-hush? A. I will grant you the first part of your question, but not the last part of it because I don't know what you mean by "hush".

Q. That is something that the ordinary decent citizen does not like to have found on his living room table. A. Well, I don't quite concur in that because I think it enjoys a very large circulation and is representative of the average American home.

Q. You think it is representative of the average American home? A. I believe so. It is in our communities, at least. I can't speak for the rest of the country. 1351

Q. You want all your testimony respecting Esquire considered and weighed in the light of that statement, do you?

Mr. Bromley: I submit that that is not a fair question. I object to it as incompetent.

Chairman Myers: Well, I think it is a sort of test question on the part of the cross examiner and one that he has a right to ask.

Objection overruled. 1352

The Witness: I respectfully concede, Mr. Hassell, that there have been instances in Esquire that have been racy, a little border-line, probably, and to use your word, risque. I do say that it is done in the spirit of good, clean slap-stick humor, and I do believe we could all use a little more of it right now. God knows, there is enough gloom going on throughout the world that if anybody can't be creative enough to give us more relief, such as the soldier and the sailor and the factory worker, relief that will take us away from the hub-hub of every day life.

By Mr. Hassell: 1353

Q. Is it your position, in fact, Mr. Croteau, that Government, federal, local and state law enforcement officials with regard to obscene, lewd, indecent and filthy material should turn over their functions to your organization? A. Not by a long shot. I do say to you that there are some instances where there is a complete break-down in law enforcement; particularly in small communities, sometimes due to graft

1354 and corruption and sometimes due to political inefficiency and sometimes due to things like that. That is the reason I say that the Watch and Ward Society exists, not to usurp the authority of any constituted local or state or federal agency.

Q. Burlesques similar to those you saw are conducted in theaters in Boston? A. Yes, sir, at three theaters in Boston.

Q. Are those burlesque shows banned in some cities? A. Yes, there are some, Worcester and Springfield that I know of.

Q. At the behest of your society? A. No, sir; at the

1355 behest of the local authorities.

Q. Are they banned in New York City? A. I don't believe so. They have been at times.

Q. The burlesque houses on 42nd Street have opened up again, have they? A. So I understand.

Q. Which one—since when was that? A. I believe since last spring.

Q. I believe you testified that as part of your official duties you read the script of plays to be produced in theaters in Boston. A. Not all of them. Those about which there was some question are submitted to the office by the city censor.

1356 Q. Have you read books and magazines in any number? A. Oh, yes.

Q. About how many books and magazines would you say you have read? A. Roughly, I think about seven or eight hundred a year. We cover about 120 or 125 different publications, but there are several copies, of course, the issues that come to my attention.

Q. 125 different issues? A. Yes, sir.

Q. In a month? A. Not a month, over the year.

Q. Over the year? A. Yes, sir.

Q. How many books over the year? A. Books, probably don't amount to over 80 or 100. 1357

Q. How many books do you read a week? A. Well, about two.

Q. About two full-length novels? A. No, I don't read them in their full content. The way in which a book is examined is that it is presented to the office and through the entire context of the book are marked the marginal lines opposite the part of that which should be brought to my attention. If there is any question at all, no matter how negligible it may seem to the assistant, the marginal line is made, and the result is that when I pick up the book, then I know what to read. There is a notation that is made on the jacket of the book as to the pages on which the marked lines appear, and I go back and read the part which has been brought to my attention. 1358

Q. You only read the excerpts? A. Yes.

Q. You follow that same procedure with respect to the magazines? A. I do, Mr. Hassell, yes.

Q. Do you read anything else outside of books and magazines? A. No, I don't. Pictorial issues. There are several pictorial issues that come out and on which the picture or jacket has in the same way been marked as to the literary material or the picture. The Police Gazette is one that invariably receives first and special attention. 1359

Q. Who makes the preliminary examination under you? A. The office assistants make the preliminary examination and mark the book. I am the one that renders the opinion on the preliminary examination.

Q. Who is the office assistant, just what person? A. Just one.

Q. Male or female? A. Female.

Q. How old? A. She is about 30 years of age, a married woman.

Q. How old are you, sir? A. I am 48, sir.

1360 Q. By reason of these duties that you have described, do you think that you are an expert on what is obscene, lewd, lascivious, indecent and filthy? A. What I think doesn't matter very much. It is the respect that I enjoy from local court authorities and law enforcement officers. In their opinion, I am considered an expert. I am very humble to say that sometimes I am a little bit doubtful as to my ability.

Q. The fact that you are dealing with obscenity and filth all the time does not have a tendency to have you grow
1361 calloused to it and pass up things that certain persons who are not so engaged would possibly not pass up? A. There have been times when that particular thing did bother me and when it does happen I usually check with a committee. If there is anything doubtful in my own mind, I usually point it out to someone else and try to get a cross section of opinion. I don't say that I am the only fellow that knows it, and I contend that I am not a censor as was stated in your opening remarks. There is no such animal as a censor. In the final analysis the censorship lies with a body that finds and convicts.

Q. But in answer to counsel's question on direct you said
1362 that this organization is the outstanding censorship organization in this country or perhaps in the world. A. It is so recognized, Mr. Hassell, not on my say-so, but on the say-so of many public authorities.

Q. But the organization is a censorship organization; it has that standing, hasn't it? A. It has had that standing for many years, a number of years.

Q. But you are not a censor? A. I contend that there is no living human being who can tell any mature person what he should or should not read. I think that you can

and should create a censor in so far as pre-adolescents are concerned, and probably adolescents, and sometimes in these modern days I wonder if that should not be stricken out, but I always contend that there isn't a human being that should tell anyone, any mature person, what he should or should not read. What is objectionable and offensive to you may be entirely all right with me, and vice versa. 1363

Q. So you agree with the statement that I have made that obscenity is a function of many variables? A. Yes. It is a multiple number of facts all taken together and by which a committee, or a number of men, or a governing board apply a certain amount of common reason and sense to the policy as to arriving at what is and what is not obscene. Perhaps you know better than I do that years ago we had a Watch and Ward Society which had a set and fast rule. A thing was either bad or it was good. There was no halfway medium. There was no elasticity to it and, as a result, our Massachusetts' statute on literature was changed by the book dealers themselves, and the ultimate result was, as you told us some time here this afternoon, that the book or the magazine or the periodical in question must be taken as a whole and not an abstract or a sentence or paragraph. 1364

In years past the Watch and Ward Society could walk into a complaint justice and say, "Now here is a paragraph that says so and so. In our opinion it is obscene. We want a complaint placed against the book or magazine." Now, as a result of that, that does not apply today in any New England court. The statute was changed and the book was considered as a whole. I might say that I tried to bring a complaint against four books in the last year which, in my opinion, were obscene, and the courts themselves deemed that they could not be considered obscene because the book as a whole was not obscene. 1365

Q. Are you finished? A. Yes.

1366

Mr. Hassell: Now, Mr. Reporter, will you read my question?

(Question read.)

By Mr. Hassell:

Q. Now, Mr. Croteau, would you also agree that in a determination of whether or not a particular thing is obscene, lewd, lasciyious, or indecent, or filthy, is in and

1367 of itself a small piece of legislation? A. I will concede that, Mr. Hassell, yes, sir.

Q. So, if that is the fact, will you also concede the testimony of a so-called expert on the question of what is or what is not obscenity, lewdness, lasciviousness, indecency, or filth is of no value? A. Not having heard the testimony, I can't say.

Q. I am saying any testimony by such an alleged expert. A. Well, I'm afraid that I don't agree with you on that, Mr. Hassell.

Q. You agree that the determination is somewhat similar to a legislative act? A. Yes, sir, I do.

1368 Q. Now, your volunteer statement there, you got into this hard and fast rule which you mention. What was the hard and fast rule by which a thing was taken to be obscene or indecent? A. The hard and fast rule was that if a periodical contained a slight amount of obscenity or a large amount, it made no difference, just so long as it contained obscenity. Whether or not the entire book was obscene, or whether or not it contained only a single paragraph of obscenity, was the hard and fast rule that was applied.

Q. Now a book or a magazine may contain bits of obscenity or filth and your organization does not regard it as objectionable? A. The organization has tried to keep itself attuned to the modern times and the present day standards and mores as applied to life. 1369

Mr. Hassell: Will you read my question, please?

(Question read.)

By Mr. Hassell:

Q. Now, will you answer that question? A. That is correct. 1370

Q. Does your organization regard as obscene or objectionable nudist books with front views of male and female figures shown in the front picture? A. It does regard nudity in any periodical as obscene.

Q. There you might have one such picture in a book and the whole book, the balance of the book is entirely unobjectionable and would be an argument for nudism, stating why it is of benefit to society for various reasons. No objection at all. You have one nude picture there and the book would be objectionable, is that right? A. Yes, sir, it would.

Q. Well, how does that jibe with your statement of this hard and fast rule that you changed in 1930— A. 1934. 1371

Q. 1934? A. There I would say that a certain amount of reason and common sense must be used. I don't think that you can take, for instance, the Bible and slap a pornographic picture on the front page of it and say "Now, here, this is all right." I think you are going to extremes now.

Q. You think that is extreme in view of your prior testimony? A. No, I don't, but in view of your remark that

1372 a book could contain entirely unobjectionable material and yet have a front jacket, or picture, in it that was obscene.

Q. No, I didn't say obscene. I said a nude picture of a nudist book. A. If it has the two subjects, it is obscene.

Q. If it has the nude picture? A. Of the male and female together, it is considered obscene.

Q. You differentiate between those having male and female pictures in one pose and those having the sexes separated in poses? A. Yes, sir.

Q. If you have the female sex on one page in one picture and the male sex on the other page in another picture then
1373 that is all right, is it? A. No, it is not, because it is in the contents of the book.

Q. It is in the what? A. The context of the book.

Q. What portion of your day, the working day, day in and day out, week in and week out, year in and year out, do you spend reading questionable magazines, books, theatricals, scripts, and so forth? A. I usually get into my office at 8:30 in the morning, and I usually devote the first half hour to my correspondence and mail. From there on I devote my time to reading magazines, books, theatrical strips, and so on, up to two o'clock in the afternoon. I thereupon enjoy a little lunch, and I work until six or six-thirty in the evening. That goes on for six days a week,
1374 and I stay home Sunday.

Q. So you live pretty much the whole day every day in the year with this sort of filth and indecent and obscene material? A. That is right, sir.

Q. As part of your duties, do you read the Saturday Evening Post? A. The agents are out in the field and invariably throughout their contacts and on their investigations they pick up various parts of magazines. That comes along in the particular place they are at. I don't have to

tell you that if a bookie room is operating in the back of a newsstand he doesn't walk in there and deliberately walk into the back room. He usually spends some time and reads a magazine. There are some that are earmarked and some are not. If he brings back a Saturday Evening Post it was not because it was earmarked, but because it was present. Those are placed on the office assistant's desk and she looks them over, and if there is anything in them she marks it for my attention. If she finds nothing in them she throws them in the wastebasket. 1375

Q. So you read all magazines whether they are questionable or not, is that right? A. No, I don't read all the magazines. As a matter of fact, I don't think there is any living human being that could and exist very long. 1376

Q. In how many instances have you found objectionable material or obscenity, I mean, in the Saturday Evening Post? A. No obscenity. I have found material that was racy, risque, probably humorous to the nth degree.

Q. Have you found any words or material such as has been adverted to here and as appears in Esquire? A. I don't believe in the Saturday Evening Post, no, sir. Perhaps, if there was, I don't recall it now.

Q. Why did you make a reexamination of the eleven issues of Esquire involved in this case after you came here? A. I was requested to, sir. 1377

Q. You were requested to by counsel? A. Yes, sir, I was.

Q. Well, what was his request to you? A. I believe his opening question was "Have you examined these eleven issues?" and if my memory serves me correctly my reply was to the effect that I had probably examined 80 percent of them. I believe the conversation went on something like this: "Do you want to refresh your memory and look over those that you did not?" And I agreed to do so.

1378 Q. Did counsel call your attention to the fact that there were features that ran through this magazine like the Sultan cartoons and the Esquire comic strip and so forth? A. No, sir, but counsel did not—I infer from what you say that I got coaching on this thing. I was not coached in any way. I was left to break this thing down in my own way.

Q. I wouldn't intimate that counsel would coach you.

Mr. Bromley: Thank you. Thank you.

By Mr. Hassell:

1379 Q. Now, Mr. Croteau, will you take the January issue of Esquire and refer to page 6, the material boxed in that page under "Shor Nuff." A. Yes, sir.

Q. Will you agree that the writer there in the first paragraph of Esquire says this, and do you agree with him: "Esquire, the four-bit magazine which is always busy as a little beaver sandwiching good advice between its spicy cartoons." Do you agree with that? A. Yes, sir, I do.

Q. As a description of Esquire? A. Yes, sir, it is spicy.

Q. Spicy in that it deals with sex? A. Not necessarily. It is humorous.

Q. Do you recall any humor aside from the sex in these
1380 things? A. Well, I think that humor depends a good deal entirely upon the individual himself, the people, as I told you some time ago, that the individual who reads a magazine can imply what he wants to what he is reading. No one has any control over his mind and if he wants to feel dirty-minded about it, why, that is his own business.

Q. Now, look down the last paragraph of the first column. A. Yes, sir.

Q. In the third sentence which reads: "Comes it then breeding (no, not that) which scores 50."

Q. What do you take that reference to refer to? A. I don't find that, Mr. Hassell. 1381

Q. In the first column of the "Shor Nuff" article, the last paragraph, third sentence in that paragraph: "Comes it then breeding (no, not that) which scores 50." A. Yes, sir.

Q. What do you take that to refer to? What does that convey to your mind, what activity does that convey to your mind? A. Well, it could mean a number of things. It could infer a generalization on the entire article; it could infer probably the thoughts of the one man.

Q. The what? A. It could infer a generalization on the entire article. 1382

Q. I heard that. What was the last statement? A. "Comes it then breeding (no, not that) which scores 50."

Q. "No, not that," is the way it reads, isn't it? A. That is correct, sir.

Q. What is the purpose of putting that in there? A. I think the intent is to be humorous.

Q. On what subject? A. The entire subject at hand. If the individual wants to infer anything sexy about it, he is at liberty to do so.

Q. Would you say that that parenthetical phrase is put in there to refer to the reproduction of the species? A. I should not say so, no, Mr. Hassell. 1383

Q. Now, look at the first complete paragraph on the second column at the top. "The pay-off on what kind of a guy this Woodhead is comes quick. He figures a gal's dancing ability is worth 20 points. Sex he gives 10. So he'd rather dance—". A. Yes, sir.

Q. What do you gather the meaning of that to be? A. The meaning is very obvious. The girl is by far, by 10 percent, a better dancer than she is a sexy person. That is.

she is a far better person to bring about the desire to dance
1384 than she is to bring about the impulse of sex.

Q. You don't think it refers to the completely dead status of Woodhead, do you, in so far as sex is concerned and women are concerned? A. Well, that is difficult to say, Mr. Hasseli. There again you would have a multiple number of facts upon which you must apply a various number of reasons for what you are thinking.

Q. But you would get no such idea from this part I have read here? A. No, sir, I would not.

Q. What education have you had, sir? A. I am an
1385 academic graduate of a preparatory school.

Q. What school is that? A. St. Regis Academy in Berlin, New Hampshire.

Q. That is equal to a high school diploma? A. Plus two years, yes, sir.

Q. Now, at the bottom of this article, the second column, is:

"7. Juking—a. That's right. Just what you're thinking about . . . 400 points." A. Yes, sir.

Q. What do you think that statement is desired to conjure up in the minds of the readers? A. Juking is a form of entertainment, dancing, kidding around, playing—it has
1386 been applied to many such things. I don't think the inference of sex is there.

Q. If so, why the comment or whatever you want to call it following the word "juking"? It says, "a". That's right. "Just what you're thinking about." A. I don't see that, sir.

Q. That follows the word "juking." A. There again, what is the individual thinking? There are any number of things that you could apply to it. It depends on the individual reading it.

Q. I say, why do the words appear there? Are they mean-

ingless to you? A. They are for the individual interpretation. They could mean almost nothing or anything to the individual reading them. 1387

Q. But they don't mean anything to you? A. They don't mean sex, if that's what you mean.

Q. I see.

Now, refer to page 45, the first four lines of the first verse of the printing appearing on that page under the title "Benedicts Awake!" It reads:

"Men sleeping beside your wives, Awake!
Awake to gaze longingly, lastingly
Upon soft skinned thigh and softer breast
Revealed by careless gown," 1388

and the first two lines in the last paragraph:

"Men sleeping beside your wives, Awake!
Awake and seek the sweet caress of lip and arm."

A. Yes, sir.

Q. Do you say that that language does not contain or convey to your mind any thought of indecency? A. Not by a long shot.

Q. Any thought of indelicacy in referring to a subject that is not ordinarily discussed about the way a man may view the charms of his wife while in bed with her? A. I don't see anything indelicate about any man admiring his wife's charms. I am married and I see nothing indelicate about my admiring my wife, particularly in this instance. 1389

It is obvious here that the lines that were intended to make the most damage in your question were read, but if you read the entire article I think it is laudable.

1390 I personally am going to go in the service in a few weeks and when I first read this I was much impressed with it, and I think any man who will read it seriously will admire it, but if you are going to linger over it and try to find filth and dirt in every word you read through an implication of enunciation, you are bound to find it.

Q. Would you be influenced in your views when you consider the type of magazine in which this matter appears? A. The only thing that would change my mind about the type of magazine, is that the magazine was distributed among adolescents. I am afraid then I would probably object to it.

1391 On the other hand, I am frank to admit this particular magazine was on my living room table for a long time, and I have a boy 18 and a girl 16 and a girl 13, and I know they all read it and I raised no objection to it.

Q. But you think it might be objectionable among adolescents generally? A. Yes, if brought into the school room and displayed generally under the peek-a-boo type of desk. It would cause harm, probably.

Q. I see. Now, let's go to page 83, "Those Star and Garter Blues" article by Gilbert Seldes. Did you see the play or show "Star and Garter Blues"? A. I did in New York, sir.

1392 Q. It doesn't play in Boston? A. No, sir, it does not.

Q. You went down to New York to see it or happened to see it while you were there? A. I happened to go there while I was there on other business.

Q. And you went there for entertainment? A. I didn't go there for entertainment.

Q. To see the show? A. I went for the purpose of seeing what "Star and Garter" was like. It is part of my business.

Q. You were not taking a bus man's holiday, so-called, when you went to see "Star and Garter Blues?" A. No.

I did know at the time that "Star and Garter" was not going to be permitted to play in Boston and for my own satisfaction I wanted to know why and I went to see the show. 1393

Q. Who decided that? A. The city censor.

Q. Do you have such an office in Boston? A. Yes, sir, it is part of the mayor's office.

Q. Is that his official title? A. He is considered the Boston city censor, in charge of the Boston licensing division. He is the fellow who gives out the licenses and suspends or revokes them if they do not live up to the rules of the city ordinances.

Q. After you saw this show, did you agree it should not be shown in Boston? A. I did not. 1394

Q. You thought it was perfectly all right that it should be shown there? A. I did not. There were some parts that were racy, and those parts were called to the attention of the production manager and he was told if he would eliminate them he could show in Boston.

Q. Let's see. Those things that were thought to be racy —look at the center part of the complete paragraph in the center column of this page 83, which reads:

"In this particular show there is also a young slender dancer named Leticia, who does a wonderful trick ballet dance—a trick because it is actually erotic."

Do you recall that dance in the show? A. Yes, I do, Mr. Hassell. 1395

Q. And going ahead with the reading:

"Where so many of the hip grinds are not."

Do you agree with Gilbert Seldes in describing that trick ballet as actually erotic? A. Yes, sir; it is erotic.

Q. Now, going from where I left off reading:

"There is also a character from the night clubs who makes her breasts jiggle, and this is considered funny, but I didn't

1396 think so, even at the night clubs where her frankness was greater, her skill no more engaging."

Did you consider that erotic? A. It was not erotic; it was objectionable from my standpoint.

Q. And then going ahead:

"A stripper who does an orgiastic dance verges on the erotic."

Do you recall that? A. Yes, I believe I do.

Q. Do you recall a stripper in that show by the name of Georgia Sothern? A. I do.

Q. Who does a "bump" with practically nothing on? A.
1397 Yes, sir, a big heavy red head.

Q. And you believe that is who Seldes refers to in that line? A. Yes, I think so.

Q. Do you think that dance was erotic? A. As presented there, yes. As Georgia Sothern performed in Boston, no.

Q. So this article is, is it not, a statement, a review or an advertisement of an erotic show? A. I think it is the report on the show "Star and Garter," by a man who has handled a very indelicate situation in an extremely delicate manner.

I am frank to say if I viewed it and was asked to write a report on it, I don't think I could do as well, and many
1398 of my agents who reviewed the burlesque performances in Boston could get a good lesson by reading this, because if they were allowed to reproduce their reports in print, I think probably we might all go to jail.

Q. Do you think any reader of "Esquire" might be induced to go and spend his $4.40 to see this show by reason of having read this article by Gilbert Seldes here? A. I don't think so. I think a man attends a burlesque show because he has purely fundamental reasons for doing so. He may be seeking entertainment or trying to kill an idle

hour, but I don't think this article would entice him to go see something that is reported here. 1399

Q. Suppose you take a reader of "Esquire" who never heard of this show and he reads this article and finds that here is a show going on in the city of New York that has several erotic dances in it, so described in the magazine that he purchases or subscribes to. And later he is in New York.

Do you think he might, being interested in that sort of stuff, be induced to go there by reason of this? A. If the man is susceptible to that kind of entertainment, yes.

Q. Now, Mr. Croteau, don't you know that the average virile active man is susceptible to that sort of entertainment? 1400
A. I don't agree with you on that, Mr. Hassell.

Q. You don't agree with that? A. No, sir.

Q. You don't agree that the average uninhibited male is enticed by a thing of this sort? A. Out of curiosity, yes, I concede you that, but I don't think because he has any sexy motives behind it.

It is a common thing for all the Harvard students to want to go to The Old Howard but it is because they are curious and not because they have sex on their minds.

Q. Now, referring, Mr. Croteau, on page 98, to the so-called Varga girl calendar, note the way in which what purports or appears to be a magazine entitled "Dreamland" is part way draped over the hip and buttock of this figure. A. Yes, sir. 1401

Q. Noting also the scarcity of the covering and its apparent transparency. Would you say there is nothing indecent or objectionable about that picture? A. Considering the modern standards and mores of the times, I would say not.

To begin with, the Varga girl is not an actual reproduc-

1402 tion. It is a composite picture made up by the artist's mind and does not represent any individual.

Q. By the way, Mr. Croteau, was the moving picture "Du Barry was a Lady" shown in Boston? A. Yes, sir, it was.

Q. Did you see it? A. I saw it, I think, the first two reels of the picture. I was not able to see it all.

Q. Did you see the Varga girl alleged reproductions in that picture? A. No, sir; I did not.

Q. You would not be able to state that they were clothed for the arctic, as one might say, as compared with these?

1403 A. Not having seen it, I couldn't say; no, sir.

Q. Now, refer to the next picture on page 101, May. That picture in connection with the verse:

"May's a balmy sort of month
That makes me apprehensive,
A lot of fellows get the urge
To start their spring offensive!"

Look on this model's face, her extremely scanty attire, her seemingly recumbent pose, and would you say there is nothing indecent about that picture? A. No, sir, it is not indecent.

1404 Q. Take the June picture on page 102. All of the clothing on this model appears to be the flowers in her hair and a scanty grass or willow girdle around her middle. Do you say there is nothing indecent or sexy, sexually enticing in that picture and the pose? A. No, sir. It is a fair representation of the modern standards. You see it every day on your burlesque stages and probably in legitimate plays.

Q. You see every day on the burlesque stages a woman without anything about her breast and with such a garment as this woman has on? A. In this particular case the

breast is not exposed, it is covered by flowers and that is the same trick they employ at the burlesque houses. 1405

Q. The flowers are not attached to the body, are they? A. And they are not in the burlesque houses either. They are held in such manner as to cover the breast. They sometimes use pigeons to do the same thing.

Q. If this model's breasts were exposed, do you think that would be objectionable? A. If the breasts were exposed, yes. It would not be allowed on the burlesque stages in New England, at least.

Q. I am talking about a magazine in Boston. Would the society take objection to it? A. It would take exception to it, I don't know that it would take legal action, but it would take exception to it. 1406

Q. On page 103 the figure for July, and the verse:

"July's a patriotic month
And you will all agree
Whoever dreamed this suit up
Took a lot of liberty!"

Does that indicate or refer in your mind to the extremely scanty state of her attire? A. Not to my mind. It might in some individual's mind. I have seen worse on the beaches.

Q. Without a brassiere? A. Lying on the sand, face and breast down in the sand, just as she is here. 1407

Q. Now, the next one, page 104, August. This model is in a recumbent pose, isn't she? A. Depending upon from which angle you look at it. I can state she is in a recumbent position.

Q. Now, the costume, if it may be called such, which is painted on this model, reveals everything underneath it, doesn't it? A. Well, it reveals in substance the contour of her body—not in detail.

1408 Q. Doesn't it accentuate? A. It doesn't accentuate the umbilicus and it does not accentuate the nipples of the breasts.

Q. Doesn't it accentuate the nipples of her breasts? A. Not necessarily so. Again, I say it is not a true model. I think they have been created that way.

Q. Why do you think they would be created that way? A. Because it is the artist's idea of what the Varga girl should look like. I don't think there is any sexy intent behind it.

Q. Now, the verse on this says:

1409 "I find a cool, secluded beach,
A perfect August shelter,
But all the men who pass my way
Just look at me . . . and swelter."

A. It is a normal thing to swelter in the summer time, isn't it?

Q. But they look at her and swelter. A. There again you have the individual's inference. If you want to take that slant a person is at liberty to do so.

Q. What other slant can you take? Isn't that what it says? A. I think it is reasonable to say that nine out of
1410 ten men can read this, read just what it says and not stumble on the exclamations or the words, and not get any cockeyed ideas about it.

Q. You think nine out of ten men would read that verse and not get an idea that it was intended— A. To be smutty.

Q. —to indicate that the person looking at that would have an increasing rise of blood pressure by reason of the instilling of sexual desires? A. I do not, Mr. Hassell, no, sir.

Q. And you think the sweltering part only refers to the weather in August? A. That would be my natural reaction to it. I can only speak for myself. 1411

Q. Do they swelter on the beaches in Boston in August? A. In Massachusetts, yes.

Q. I thought the water was awfully cold up there. A. They are on the beach, not in the water.

Q. Look at the picture on page 15, September, and the verse. This model is in a recumbent pose with the right leg cocked up, isn't she? A. Yes, sir.

Q. The verse reads: 1412

"September brings us cooler days
But still I have to pose on,
Oh, Mr. Varga, hurry up
And let me put some clothes on!"

Do you think that verse is intended to imply that she has no clothes on to speak of? A. No, I don't agree with you, Mr. Hassell, I think it is the lament of what a model might say if she were actually a true living person. This is just a creation in the artist's mind.

Q. Would you say the costumes or one piece garment she has on is transparent or translucent? A. No, it is neither transparent nor translucent, nor diaphanous. 1413

Q. You can see at points the color of her flesh through this, cannot you? A. No, I don't agree with you, Mr. Hassell.

Q. How about in the middle of the figure? A. The contours are high-lighted. I wouldn't describe that as the umbilicus. It is a high-lighted indentation in the color plate.

Q. I am speaking of the dark shading in the pubic region. A. That is purely in the plate itself. I don't think that is

1414 intended to be obscene, whatsoever. I might add that I have seen worse in newspapers.

Q. You mean in life-like colors such as this? A. No, sir, in black and white.

Q. Now, wouldn't you agree, Mr. Croteau, there is quite a difference between running a picture in black and white and between life-like colors? A. If you are going to infer sex, I don't think it makes any difference. I think if a person is bent on finding sex in a picture, the color in which it appears makes no difference.

Q. Whether or not a person is bent on sex, don't you think
1415 the natural color is a more pleasing reproduction than one in black and white? A. I concede you that, sir, but this is not a natural reproduction.

Q. But it is an approach to the natural flesh color, isn't it? A. From the artist's standpoint, yes.

Q. It is an attempt to reach that. Now, refer to page 106, October. A. Yes, sir.

Q. The verse:

"October is a lovely month
Of yellows and of reds.
The leaves start turning golden
And I start turning heads!"

1416

What sort of a costume would you describe this model as having, Mr. Croteau? A. It is a diaphanous garment that covers the breast, torso, and part of the buttocks and the pubic region of the subject.

It is commonly used today in all theatrical productions and is referred to as a leotard.

Q. Do you notice the point of the right breast showing through the material? A. I don't think that is exaggerated

in any sense. I think I have seen that particular reaction of the female breast, even on actual persons. 1417

Q. But you notice that point, don't you? A. Yes, sir; I do.

Q. Would you say that is a bathing costume? A. No, I grant you it is not a bathing costume. I don't think it is intended to be a bathing costume, Mr. Hassell.

Q. You would not think that is a diving board she is lying on? A. I shouldn't think so, no, sir.

Q. Now, look at the November figure at page 107 and verse: 1418

"November's swell for hunting—
But this year it seems flat!
The only men worth hunting for
Are hunting for a rat!"

A. I think that is humorous.

Q. You think this picture is humorous when coupled with the verse? A. No, not the picture; I think the verse is humorous.

Q. Do you think the picture shows the model in a hunting costume? A. Well, if I am to base my observation on what again I see in burlesque houses—this must become pretty irksome—yes, it is. 1419

Q. It is a hunting costume? A. It is what is considered a theatrical costume.

Q. A theatrical costume? A. Yes, and used extensively throughout the country today by theatrical people.

Q. A costume that has nothing supporting it at the breasts and is cut clear down past the middle in the back? A. I have seen far less on Georgia Sothern and if you have seen her, you did.

1420 Q. You say there is nothing in any of these pictures that might be considered as indecent, lewd, lascivious? A. If there is I fail to find it, Mr. Hassell.

Q. Now, refer to page 123, "Ad Libbing with Esquire", up under the top of the fourth column of that page, "Dear Doctor Diddle". A. Yes, sir.

Q. I believe you defined the word "diddle". Where did you find that definition of it? A. If my memory serves me correctly, in a Webster's dictionary. I think the definition of it is "borrow, steal, or to fool away time."

Q. How recently have you looked that up? A. As late as yesterday. So—

1421 Q. I see. So you expected to be asked about the meaning of that and you came prepared for it? A. Not necessarily. I was a little bit puzzled about it and when speaking about it I gave my opinion of what "diddle" was, and I was told that what I was defining was "doodle".

You and I and everyone does it whenever we are in a telephone booth, make pictures on the wall. It is a common expression used every day in the theatrical profession—"Go flub your diddle". That is a common expression on the stage.

Q. Is this word "diddle", meaning frittering away your time, commonly used in New England? A. Yes. I repeat,

1422 it is commonly used on the boards of the theaters up there.

Q. But you had to refresh your recollection on its meaning by looking it up in Webster, did you? A. Yes, sir, that is correct.

Q. Now, page 137, the air raid wardens apparently on the roof of the building, seated by a skylight, one of them is rather wide-eyedly or bug-eyedly, looking into the skylight and he has his fingers in his mouth, and the legend underneath: "And to think I gave up drawing."

I would like, first, Respondent's Exhibit, the copy of the New Yorker of August 7, 1943, that was introduced in connection with this cartoon— 1423

Mr. Bromley: Here it is. (handing document to counsel.)

Mr. Hassell: This is Exhibit 2. Is there an Exhibit 1?

Mr. Bromley: Yes. (Document handed to counsel.)

By Mr. Hassell: 1424

Q. Mr. Croteau, I believe you testified in connection with this cartoon that this is on a par or similar to pictures or cartoons appearing in Respondent's Exhibits 1 and 2, one purporting to show men and women drawing from life in a life class studio, and number two showing a window washer on the outside of a window of the building, apparently looking in a studio window, and drawing the back of what appears to be a nude model on the side of the building.

Do you recall those two in New Yorker? A. Yes, sir.

Q. Do you say that these are similar to the cartoon in Esquire and have substantially the same import, or are they worse? A. What I did say, Mr. Hassell, and probably what the connotation inferred, if it should be so taken, was that apparently what this subject's mind was on, was what was being reproduced inside the studio. In this one there is a skylight and the models, and he is probably censuring himself for having given up drawing. 1425

It is a very plausible thing.

Q. Yes. You think the black and white sketched drawings in the New Yorker are more objectionable from a spicy

1426 standpoint than the cartoon using one color plus black and white, appearing at page 137 of Esquire? A. Well, I do say if you are comparing the two pictures, here are two men on a roof top, in a very innocent pose, sitting on a box with a telescope by their side, and here you have the original model and five easels representing the nude woman, one of the artists, purportedly a woman.

Q. Now, this cartoon in Esquire, January issue, page 137, does that indicate that those two men are peeking, or one is peeking and the other has been peeking through the skylight at a scene not intended for his or their eyes? A. 1427 I think the inference is that he has been peeking at just such a scene as this, or similar.

Q. Well, would the fact that they were peeking make the Esquire cartoon more risque than the ones in the New Yorker? A. I shouldn't think so, no.

Q. You think it is all right for men to peek at nude women whom they are not supposed to see? A. I don't think it is any worse for an individual to be sitting on a roof top and looking through a skylight, than it is for an artist to sit in a studio and paint a nude woman, a nude model. Substantially they are one and the same thing.

Q. You believe an artist sitting in a studio, following 1428 his business, vocation or avocation, painting from a nude model, as shown in those cartoons there, with a front view of the model being simply pen outlines of the figure, would be just as objectionable or more objectionable than this scene depicted in this cartoon on page 137 of January Esquire? A. I don't think the peeking thing in this particular scene is the highlight or the inference. Here is a man who stops to think, "I gave up drawing." Apparently he is lamenting with himself because he seems to be an artist or a draftsman or something like that. Of course, if you want to imply dirt in it, why, it is very possible.

Q. Appearing in a risque magazine such as Esquire, would it be natural to imply that inference? A. I can say that it is intended to be humorous. 1429

Q. In that way? A. In that way, yes, sir.

Q. I see, sir. A. But not offensive.

Chairman Myers: Is this a convenient place for us to adjourn?

Mr. Hassell: That winds up the January issue.

Chairman Myers: If that is so, we will adjourn until 9:30 tomorrow morning.

(Whereupon, at 5:00 o'clock, p. m., the hearing in the above-entitled matter was adjourned until 9:30 o'clock, a. m., Saturday, October 23, 1943.) 1430

1431

HEARING OF OCTOBER 23, 1943.

1432

PROCEEDINGS RESUMED.

Chairman Myers: Suppose we start, gentlemen.

LOUIS J. CROTEAU a witness called by and on behalf of the Respondent, having been previously duly sworn, resumed the stand and testified further as follows:

1433 *Cross Examination by Mr. Hassell* (Continued):

Q. Mr. Croteau, calling your attention to Respondent's Exhibit 3, Colliers for February 6, 1943, page 30, the cartoon outlining the two rather grotesque figures under which appears: "Do you suppose, Professor, it is just because I don't understand women?"

Do you take the position, sir, that that cartoon is objectionable from an indecent standpoint, and as objectionable as the skylight air-raid warden peepers you referred to yesterday afternoon? A. Well, I would say that it is a reasonable similarity.

1434 Q. Now, will you refer to the February issue of Esquire, page 65, the Sultan cartoon, showing what appears to be an auctioneer with the girl in a scanty costume beside him, under which appears: "What I am bid for this 100 pounds of sugar?" A. Yes, sir.

Q. What is your idea as to what is intended to be conveyed by this cartoon to readers of the publication Esquire? A. I believe that the idea that is to be conveyed is to be humorous. I mean, it is not at all unusual for Turkish customs to auction off concubines and bits of sweet females.

To refer to it as a sweet 100 pounds of sugar is simply trying to be humorous. 1435

Q. May I have the New Yorker of September 11, 1943, which is Respondent's Exhibit 4? I believe, Mr. Croteau, the Sultan cartoon that you refer to was mentioned by counsel in connection with this Respondent's Exhibit. A. Yes, sir.

Q. What is the similarity there between that cartoon and the one in Esquire, February issue, at page 65? A. I would say that the similarity is that both have services for sale. In the Sultan cartoon the auctioneer announces the sweetness of this presumed concubine where, in this instance, apparently a prostitute is selling or soliciting on her own 1436 in the doorway of an employment agency.

Q. Just read what appears in the body of the cartoon there. A. Right here, sir (indicating)?

Q. Yes; and what appears underneath. A. "Men wanted, experienced and inexperienced. Good pay". And then I can make out the words, I suppose it is, "While you earn".

Q. And there is a woman standing in the doorway? A. Yes, sir.

Q. And you read from that that instead of her selling her services, the men ought to be paid? That is your understanding or what you got from it? That is your understanding or did you get a different understanding of it? 1437 A. No, I didn't get that understanding from it, Mr. Hassell. I don't think the sign is intended. That this part "Men Wanted", I think is very significant. "Experienced and inexperienced" is significant principally the words "Good pay". They have some bearing on it. I don't think the rest of it has.

Q. Now, page 95 of the February issue. In connection with the language in "The Unsinkable Sailor" article or

1438 story in the February issue of Esquire, page 95, your attention was called on direct to matter appearing in, I believe, one or two sentences on page 56 of the April 6, 1943, issue of the New Yorker, Respondent's Exhibit No. 5, as part of an article starting on page 44 of that publication, entitled "A Reporter At Large" and following with the column on page 48, a column on page 51, a column on page 52, one on page 53, one on page 54, and one on page 55, and then you get down to the end of the article on page 56 and we have four or five sentences in a space of a little over an inch on that page.

1439 Do you think that that is as bad as the material in "The Unsinkable Sailor"? A. I think that the description in that paragraph, Mr. Hassell, is far more forceful than what appears in "The Unsinkable Sailor".

In "The Unsinkable Sailor", the word "sonovabitch" appears once, and here beyond the word "son-of-a-bitch" you have profanity and the words "God damn it, guts", which also imply vulgarity.

As a matter of fact, he repeats "God damn it" twice.

Q. Point out the matter in there that is comparable to the portion of this story or article appearing on page 95, fourth column, near the top: "How's chances to lower the boom on you, sister?" A. I fail to see that there is any-
1440 thing that compares with the sentence: "How's chances to lower the boom on you, sister?", but I repeat that yesterday I gave an explanation—

Q. You needn't repeat. Let's get along, sir.

Just one other question in connection with that "How's chances to lower the boom on you".

What portion of a man is comparable to a boom on a cargo vessel, in your mind? A. Well, comparing the meaning of the sentence: "Let's lower the boom on you, sister".

or "How's chances to lower the boom," I compare it with the remark: "How's chances of putting the arm on you," which is a commonplace remark meaning: "How's chances of making a loan". 1441

Q. But, in this instance the girl jumped up in terror and ran screaming from the room. "Oh, that man! That man!," she cried, "he wants to do something terrible to me".

Do you think that leaves any ambiguity of what is intended by that sentence: "How's chances of lowering the boom on you, sister?" A. It means that the girl was absolutely misconstruing what was said and absolutely misapplying the words. 1442

Q. I believe attention was also called on direct to Respondent's Exhibit No. 6, an article appearing in the February, 1943, issue of the Cosmopolitan, in connection with the article by Edmund Gilligan entitled "The Court of Lost Ladies", at page 60 of the April, 1943, issue of Esquire.

Isn't it a fact that the Cosmopolitan article has a subtitle entitled:

"How much do you know about the alarming rise in crime among our boys and girls between the ages of 12 and 16? Why have crimes of murder and sex become commonplace? Here are the facts. They are not pretty reading, but they are true. What are you going to do about it?" The article is entitled "Our Teen Age Crime Wave". 1443

Have you read this article, sir? A. No. I have not.

Q. You have not read it? A. No, sir; I have not.

Q. So you are not able to compare that with Gilligan's article? A. No, sir.

Q. Now, in that connection, have you read the matter appearing on page 16 of the March 29, 1943, issue of Time

1444 headed, "Health Among the Amateurs." Have you read that? A. Yes.

Q. You say that compares with the article of Gilligan's on the Court of Lost Ladies? A. I think the Court of Lost Ladies is a far more sincere article than that one, sir.

Q. But this article in Time is an article reporting matter developed at a House Naval Affairs Committee hearing. A. Yes, sir.

Q. Is it not? A. Yes, sir.

Q. In so far as you are aware, is the Gilligan article factual or fanciful? That is, is it factual report or is it
1445 a story? A. In so far as I have been able to ascertain, and from what I know of procedure of courts, this is a factual report.

Q. The article does not purport to be a factual report, does it? A. I did not find anything in it that said so, no, sir.

Q. So far as the reader might judge, this article was derived from the fancy of the writer based upon some experience possibly, but he does not name any dates, places, the name of the judge, and the names of the participants, does he? A. No, he does not, but I would not imply that the reader would imply that it was a fanciful article. I remember distinctly having read it at the time and, I did
1446 not think for one minute that it was fiction.

Q. It does not purport to be a factual report? A. No, it doesn't say so in so many words, no.

Q. Does the article point to the way in which prostitutes may escape punishment? A. I hardly think so. There is no question but what some prostitutes who come before a bar of justice know all the answers, but I don't think the article was intended to be a lesson or instruction in that vein.

Q. Well, I was not asking you what you thought the article was intended to show, but I asked you if on page 61, the third column, beginning with the third paragraph and extending over near the bottom of column four on that page, it does not recite how a blonde woman disposes of the charge against her and was allowed to go scot free? A. Yes, sir. 1447

Q. That is a fact? A. Yes, sir.

Q. Would you say that that was instructions to prostitutes as to how to comport themselves in escaping punishment? A. I doubt it very much. I doubt very much if there are many prostitutes who read Esquire. 1448

Q. What is the basis of that statement? How many prostitutes do you know, sir? A. Well, roughly, last year we arrested over 108 of them and convicted probably 26 to 27 of them.

Q. And you personally knew all of these and what they read? A. No, sir, I didn't know them personally.

Q. They didn't tell you all the things they read, did they? A. Well, I might say that in the number of places that we raided, it is customary to seize the material that is found in the establishment, and at no time ever during any of those raids did I ever see Esquire on the premises.

Q. Were you looking for Esquire at the time, Mr. Croteau? A. Not necessarily Esquire. I was looking for everything that might help us in the case. 1449

Q. Now do you recall definitely, so definitely that you are able to swear to it, that in none of those houses was there a single copy of Esquire? A. I couldn't take an oath on it, no, sir.

Q. Further than that you did not question these prostitutes on their reading habits, if any, did you? A. Knowing their general habits, I don't think they are intellectual enough, that is, the majority of them.

1450 Q. Answer the question, will you please? A. No, sir, I did not.

Q. Did you read, referring to the February issue of Esquire, pages 76 and 77? A. Yes, sir.

Q. Did you read the story "Home Sweet Ruby Street"? A. Yes, sir, I did.

Q. And in that story did you note the drawing at the bottom of page 77? A. Yes, sir, I did.

Q. And the accompanying text describing the incident of the visit of Mrs. Finn to this place? A. Yes, I did. Mr. Hassell.

1451 Q. That describes her call into a sleeping room, doesn't it? A. Yes, sir, it does.

Q. In which a male and female young couple are in bed together? A. Yes, sir.

Q. And apparently the parents or two old people are also present in the room? A. Yes, sir.

Q. And while this visitor, Mrs. Finn, is there, the two young people get up and put on their clothes, dress in her presence. You recall that? A. Yes, sir.

Q. And you also recall that this appears in the article:

"Thinking it better to begin afresh, she fastened her good eye severely on her notebook and presently flung at Mrs. Vermillion a new leaf, the writing on which became slightly
1452 furry as her wandering eye, cast presumably in the direction of the ceiling, caught Edna and Radiant gingerly dressing. Radiant, only half clad and suspecting the vagrant eye to be focused on him, winked slowly at Mrs. Finn."

Do you think that language, coupled with the drawing, conveys anything salacious? A. To me it conveys that there is no question but what the man and the girl were in the bed. It doesn't indicate anything beyond that. If the individual reading it wants to infer more than that I am afraid there is ample there from which he can do so.

Q. Do you think it is decent to picture by a drawing and by language, such as this, a scene of this kind? A. Well, in connection with the locale of the story, I don't think there is anything unusual about it. 1453

Q. Are you familiar with Harlem? A. Somewhat, yes, sir.

Q. And the habits of its inhabitants? A. Yes, sir.

Q. Are you familiar with scenes of this sort happening in the dwellings of the inhabitants in Harlem? A. I am not familiar with them personally, no, sir.

Q. You say it is nothing uncommon in the locale? A. It is generally conceded that the morals of certain groups of inhabitants in Harlem are low in their responsibility to society. 1454

Q. Do you think it is perfectly proper that this type of material be carried through the mails under the stamp of approval of the Post Office Department and at a substantial loss to the taxpayers? A. I do, sir.

Mr. Bromley: Mr. Chairman, may I ask Mr. Hassell whether he contends that there is an additional question here to obscenity, that is, whether we are entitled to have the stamp of approval on our publication, or entitled to a subsidy? Is that something different from obscenity? 1455

Mr. Hassell: Why, I submit the question involved here is really whether or not this publication is entitled to the second-class privilege.

Now, if it complies with all the conditions laid down by law, it is certainly entitled to the second class privilege.

The first of those conditions under section 331 of 39 U. S. Code is that it must be mailable matter

1456 I grant that. But if it is shown that this publication over a large number, or a series of issues, continuously and as a usual thing is putting out objectionable non-mailable matter, then it certainly is not entitled to the second-class privilege.

That question was disposed of by the Supreme Court in the Burleson-Milwaukee Leader case. The matter there, of course, was subversive.

There is a further matter in connection with this. I will cover it more fully in the argument. But we are not dealing with a criminal case here. This statute makes matter non-mailable and imposes a duty 1457 and an authority on the Postmaster General to exclude matter from the mail. His right and his duty under that portion of the statute has been accepted by the courts. This is not a criminal action.

We are not required here to establish such a degree of indecency as would convince a jury beyond a reasonable doubt.

Chairman Myers: Does that clear the matter up for you, Mr. Bromley?

Mr. Bromley: No, it only makes it more confusing. It seems to me that we are entitled to have him 1458 state whether or not it is not the fact that the only question is obscenity and not whether a magazine is entitled to a subsidy, or whether it is objectionable on some other ground. It seems to me that the only question here is whether this magazine is obscene under the criminal statute. Of course, this is not a criminal proceeding, but it seems to me the only question here is, is it obscene under the criminal statute, and if it is, then it should not be mailable. But

there is no question as to whether it is objectionable to the Board, or whether it is entitled to a subsidy or not. 1459

If it is obscene then it should not be mailable. If it is not obscene then it should be given the second class privilege.

Mr. Hassell: I don't see how the Board can escape considering the matter in this magazine in the light of the issue, and the sole issue involved here is as to whether this magazine is entitled to a subsidized postal rate and to the approval of the Post Office Department under the 4th condition of the second-class Act. Of course, we go back of the mailability on account of the matter that we are calling attention to here. 1460

Chairman Myers: There is no question pending. Mr. Bromley simply wanted to have cleared up in his mind the issue that was before the Board.

It strikes me that the issue here raised is whether or not this matter is obscene. It implies, of course, the question that Mr. Hassell has raised, whether or not to be obscene it must be sufficient to support criminal action. There has been a great deal of discussion about that, but it has always been a question in my mind as to whether the line was not drawn at the jail door. 1461

By Mr. Hassell:

Q. Now, referring to the material on page 9 of the March 1943 issue of Esquire. This is, you will note, an advertisement of Thorne Smith's books which is headed "Thorne Smith's Three Wittiest, Most Ribald Novels Now In This Big Brand New Volume."

1462 Now, under that is, "America's one and only Rabelaisian humorist!" A. Yes, sir.

Q. Have you read that advertisement and noted the illustrations therein? A. Yes, sir, I have.

Q. Would you say that that advertisement is so worded as to leave the reader to believe that if he purchased this book, or these books, he will get something obscene, lewd, indecent, or rotten? A. No, sir, I wouldn't.

Q. Now I refer you to matter appearing on page 10 of that issue under the "Sound And The Fury," and the reproduced letter signed "Somewhere, Indiana, D. S." and the
1463 heading of it is, "On putting Esky in a cap and gown." Have you read that? A. Yes, sir, I have.

Q. I call your attention to the parenthetical matter appearing in the first column of this reproduced letter. A. Yes, sir.

Q. I ask you to note that matter:

"You probably envision a bald-headed gentleman gazing at Varga vistas of forbidden fruit, but as a matter of fact, I'm quite young and that's not my dilemma." A. Yes, sir.

Q. That is in the first part of that. Do you have the same view as expressed here with reference to the Varga girl pictures? A. No, sir, I do not.

1464 Q. Why do you think Esquire would publish and advertise to its readers this view of the Varga girls as forbidden fruit? A. As I understand it, it is a letter that was received by the editor and is reproduced and it reproduces hundreds of letters which are received by the editor of Esquire.

Q. But why would that letter be reproduced? Why would they select this letter out of many hundreds and thousands of letters? A. I don't know that they selected it.

Q. Well, they certainly did if they published it here and did not publish a great many others that they received.

A. I don't know that they have any set method of selection. Probably they pick them out at random. 1465

Q. Now, further on down in the last paragraph, past the center of the last paragraph, it says:

"The only way in which this could be done, without disturbing small-town codes of conduct, would be to semi-camouflage that bulge-eyed masher on the front of each issue and make it appear like the front of, let us say, Harper's or the Atlantic."

Do you agree with the characterization of Esky on the front covers as "that bulge-eyed masher"? A. Well, he is a bulge-eyed creature. I don't know that you would refer to him as a masher. 1466

Q. What is a masher? A. A masher ordinarily is a man who is concerned with annoying women.

Q. He tries to pick up women for immoral purposes, is that it? A. I won't concede immoral purposes, but he does annoy them.

Q. Women who are strangers to him? A. Yes, sir.

Q. Now, referring to page 49 of this March issue. Another one of the so-called Sultan cartoons. Now this shows two soldiers and what appears to be a scantily clad slave girl to whose leg is attached a card reading "Happy Birthday." And underneath is the sub-title, "I wonder how the sultan knew this was my birthday." 1467

What do you think a soldier in this sort of setting could do with a slave girl sent to him as a birthday present? A. Well, he could do any number of things. She could be used for mild entertainment, she could be used for other types of entertainment, she could be construed as being sent there purely for the curiosity of it, or anything else.

Q. You don't think it is fair to infer from this cartoon in this issue of this man's magazine that anything indecent

1468 or indecent relations were implied? A. Not unless the individual wants to imply it himself.

Q. And you don't want to imply that? A. No. I fail to see that there is anything but humor in it, Mr. Hassell.

Q. Where is the humor? A. There are two soldiers apparently of the French Legion in the middle of the desert, who probably very seldom see women of any kind, and one, in an effort to be facetious, turns to the other and says "Look at what the sultan sent me for my birthday".

I don't think it implies anything beyond that.

Q. Now, on page 68 of the March, 1943, issue of Esquire. In the center column of this article: "The Fall of the Flattering Word", there is a statement:

1469 "Rarely on the justifiable ground that these clothes will reveal and conceal so craftily that men will be driven mad with desire." A. Yes, sir.

Q. Do you agree that women may wear clothes that will accomplish that? A. I believe so. I think that in the Gay '90s that is just exactly what did happen.

Q. You say in the Gay '90s the clothes revealed portions of the ladies' anatomy? A. I believe that the trend in that period was the abundance of clothes that a woman wore which created a desire on a man's part to investigate the anatomy.

1470

Q. So the less a woman wears, the less attractive she becomes. Is that your belief? A. Yes, sir. I believe that is so. It is proven in our nudist colonies.

Q. So if the Varga girl pictures had nothing resembling clothing on them, they would be less attractive than they are now? A. I believe so, yes, Mr. Hassell.

Q. That is, from a sexual standpoint. So the absolutely nude form would be less objectionable and less indecent than a woman clothed as in the Gay '90s? A. The true

test of that is your strip tease features, which receive less attention and less applause from the male audience than do your chorus girls, who wear considerably more clothing. 1471

Q. But it is a fact that burlesque shows are still making use of strip teasers, isn't it? A. I think the better production managers have come to the conclusion that they are just excess baggage, where three or four years ago there were four strip tease artists featured in any production, they were decreased to two, and sometimes to one.

Q. Referring to the $4.40 burlesque show, "Star and Garter". How many strip teasers do they have there? A. If I recall correctly, four. 1472

Q. Referring further to the article: "The Fall of the Flattering Word", on page 68:

"When we approach the young of the species, the innocents at college, we are a little franker. A 'show-off V-neck' or a 'skirt pleated for action' (on a bicycle, so be quiet) are at least 'functional' ".

What is the purport of the matter in parentheses in conjunction with the other matter in this portion I have read? A. I think the writer is trying to convey today that we are more frank about our expressions about our attire than we were probably a quarter of a century ago. 1473

Q. Referring to the words: "Skirt pleated for action (on a bicycle, so be quiet)", what do you think that conveys? A. I think the idea is to dismay anybody who may have any dirty thoughts about it, sir.

Q. But isn't the prospect of a dirty thought made inescapable by the parenthetical matter "on a bicycle, so be quiet"? A. There again, it depends upon the individual reading and the interpretation he places upon it.

1474 Q. You wouldn't place any such interpretation on it, would you? A. No, sir, I would not.

Q. Now, referring to page 107 of this issue. Here we have the hill-billy cartoon showing a woman nursing a baby and another one beside her chair on the floor bawling, apparently, and the statement underneath: "Seems like somebody's allers clamorin' to somebody to open up a second front, don't it?"

Is it common in Boston or in the area in which you operate, for women to nurse their children in public? A. In regard to that, I might say that sometime in the past
1475 six months I had occasion to make a visit to Lewiston, Maine, and coming back a woman was nursing a set of twins on a day coach. No one paid any attention to it. I think it is a normal function.

Q. Is that a common occurrence through New England? A. Not a common occurrence, Mr. Hassell, no.

Q. Referring to the April issue, Mr. Croteau, of Esquire. Would you say that the breasts of the female figures on this cover page, front cover, are over-emphasized? A. To begin with they are not females. They are caricatures modeled out of clay.

Q. They are not meant to represent females? A. Naturally, they represent females, but it is obvious to any-
1476 body with reasonable sense that it is not a female figure.

Q. But would you say the breasts of these figures are overly emphasized? A. I think both the—as a matter of fact, the head, the shoulders and the breasts are over-emphasized.

Q. Now, refer to the verse printed in connection with the Varga girl picture at page 38 of this issue. Have you read that verse headed: "Peace, It's Wonderful!"? A. Yes, sir, I have.

Q. The latter part of it:

1477

"And then leads her to the altar on the run—
She will let him slumber heavily
Where once he woke to reveille
And never bawl him out about his lapse;
But, unless my eyes deceive me,
He won't be so lax, believe me,
When the clock upon the mantle points to 'taps'!"

Do you say that is not an indecent connotation, Mr. Croteau? A. In my opinion, it is not.

1478

Q. What does that refer to? A. Well, it is a soldier boy who is coming back after slapping down the Axis, and it is clear he is apparently going to run his fiancee to the altar and get married, and it goes on to say that she will never bawl him out about his lapse if he oversleeps in the morning.

The only thing that it infers, and it is quite proper, is that he won't have any objections about going to bed at night. There is nothing objectionable about going to bed with your wife.

Q. "Unless my eyes deceive me," refers to this Varga girl picture in a brief, somewhat military, private first class Army uniform. A. Well, I think if you find any fault with the uniform at all it is just downright silly.

1479

Q. I see. You don't find any fault with the figure, either? A. No, sir. It is not a true figure, but from an artist's standpoint I think it is well done.

Q. The uniform or dress is cut down rather low in front, isn't it? A. Yes, sir, but I have seen a lot less on women.

Q. And it is so sheer that you can see the umbilicus, can't you? You can see where it is? A. That is the impression of where it is.

1480 Q. Just below the belt buckle? A. Yes, sir.

Q. At the line:

"But, unless my eyes deceive me,
He won't be so lax, believe me",

refers to the Varga girl picture and such use he is to make of her, doesn't it? A. No, I don't tie in the two at all. I mean I consider the verse as entirely separate from the picture. It has no connection with it.

Q. Now, referring to the May issue of Esquire. You are a sort of expert on burlesque, aren't you, Mr. Croteau? A. I
1481 have been told that I am, yes, sir.

Q. How many shows do you attend a week? A. Probably six or eight.

Q. Six or eight a week? A. Yes, sir. Beyond that, I think I take in probably at least two floor shows at night clubs every night of the week; that is, six nights a week.

Q. Don't you often find yourself going to sleep at some of these shows by reason of having seen the same sort of show over and over again? A. No, not actually going to sleep, but I find it irksome.

Q. You find it very tiring? A. Yes, sir.

Q. In other words, you are surfeited with burlesque, aren't
1482 you? A. Yes, sir, probably I am.

Q. So the article on page 32 of this May issue: "The Savage Beast In Us. Dispelling the hopes of burlesque entrepreneurs and fears of censors that the strip has sensory appeal", by Paul Gallico, is, to use the language of the street, "right up your alley", isn't it? A. Yes, sir; it is.

Q. Any sort of digs that any sort of writer could throw at burlesque would please you very much, wouldn't it? A. Not necessarily, no, sir.

Q. You are tired of it, you would like to see it stopped? A. No, sir. I do believe in a sense of fair play and I do believe the producers of burlesque have an investment and they are entitled to have it protected. 1483

Q. But, I believe you described the "grind" and the "bump" which you stated are well illustrated by the pictures on pages 32 and 33 of this article? A. Yes, sir.

Q. As being not at all in good taste? A. No feature of the strip tease is in good taste, Mr. Hassell.

Q. Well, will you answer my question? A. Yes, sir; I do.

Q. As being not at all in good taste? A. Yes, sir; I do.

Q. Now, you think, on the other hand, that these illustrations in connection with this article which you say correctly portrays those things not at all in good taste, is in good taste? A. No, I think that these caricatures here are not in good taste, but they are not obscene, and as I understand it, the charge here is obscenity. 1484

Q. In your opinion, pictures which are designed to show and which you say do show the grind and the bump and the strip tease are not indecent in a magazine of this sort? A. No, sir; I do not.

Q. Do you think the average reader of Esquire would get the same reaction from this article that you, an expert on burlesque, would get from it, Mr. Croteau? A. I think it is reasonable to assume that a good percentage of them would. 1485

Q. Do you know any other patron of burlesque who goes to see burlesque shows six or eight times a week? A. No, and if he does I don't think he is quite normal, if it is not part of his job.

Q. Now, referring to page 48. This is another one of the air raid watchers cartoons. You will notice the figure with the binoculars is looking down from the top of this building, which appears to be in a congested city area with buildings all around. A. Yes, sir.

Q. Do you gather from this picture that he is peeping
1486 through a window at night? A. I don't concede that he is peeping through a window. He may be peeping at something, not necessarily through a window.

Q. Well, you can see light coming through the buildings across the way, can't you? A. Yes, but not in the direction in which he is looking.

Q. You think probably he is trying to look in a window that has no light in it at all, or in a room that has no light? A. I don't think what I think matters at all. It was the intent here. The intent here is, I think, to be humorous and funny and I think a good deal is left to the imagination of
1487 the man that looks at the picture.

Q. Well, what does your imagination tell you that he is looking at? A. He probably is looking at exactly what the cartoon says, looking at a B-17 or a P-40; a large airship or probably a stream-lined one. Probably he is looking, and the inference might be drawn by somebody that he is looking at women.

Q. Now, let us see, your first instance there. He is probably looking at an airship. A. Yes, sir.

Q. A large airship? A. Yes, sir.

Q. Is it customary to find a large airship down on the ground in the midst of city buildings? A. I think you will
1488 notice in the same picture that the background indicates these lights that are illuminating the sky. It is an indication that the airfield is not far away.

Q. Let us grant that. That is the airfield, but he is not looking in the direction of the airfield at all, is he? A. That is right. But the airfield may be in this direction.

Q. Now, Mr. Croteau, from this picture you wouldn't think that that man is looking at an airfield, would you? A. No. My first inference was not that at all, Mr. Hassell.

Q. Pages 86 and 87 of this May issue. This deals with the Exploits of Esky strip, a strip of cartoons running across those two pages, beginning with 29 and running through 32. Did you consider the text in connection with those cartoons? A. Yes, sir; I did, Mr. Hassell. 1489

Q. Starting at the bottom of the cartoon, 28, it says: "The lady dislikes men, but wants a baby, so I sold her a ticket for the time when women can become pregnant by taking an electric shock", and so forth.

The first cartoon, 29, shows Esky peeping over some bushes at what appears to be a young nude woman in water up to her waist. A. Yes, sir. 1490

Q. Then the text brings her out of the pool and she dresses while she walks along with Esky and they go to Finneagan's Dell to view other totally naked females. A. Yes, sir.

Q. And the red head explains that that is the abode of the Libidos "where they gather when they are not on men's minds", and so forth.

You say that those cartoons and that text does not deal with anything indecent or imply any indecent thoughts? A. I respectfully submit, Mr. Hassell, that in my opinion, and after a good deal of consideration, this is probably the worst feature that I have found in Esquire so far, but I do not go so far as to concede that it is indecent. It is utterly in bad taste, I thought. I readily concede it is utterly in bad taste, both in text and in design. 1491

Q. Well, how is it so bad, sir? Tell us that. A. Well, it is bad in that it depicts a character who habitually is always being entranced or enticed to be in the company of women and who is quite fastidious in his manners. I have never at any time seen Esky in any compromising situation, but he is always on the border-line.

1492 Q. Now, what do you think about Esky peeping over the bushes looking at these women in the nude? A. Well, I think that probably he is doing the same thing that a lot of men would do under the same circumstances.

Q. You think that is perfectly decent, do you? A. I do not. I told you that I concede that it is utterly improper.

Q. You do think it is decent, though, for a man to take a peek over bushes at a woman nude, in bathing? A. Perhaps not in all circles it is considered as indecent. I do not consider it as indecent, but improper and in very bad taste.

Q. How is it improper? A. Well, it is not the thing that a gentleman would do.

1493 Q. Oh, I see, you have certain standards for gentlemen and certain standards of decency. Well, where do you draw the line? A. I think there again that lies with the individual. There are many gentlemen who are so-called gentlemen on the surface and have all the appearances of being so, but under the right circumstances may very easily give in to their inhibitions and do the indecent thing.

Q. Now, you notice Esky's goggle eyes are focused on this nude girl in the pool? A. Yes, I do.

Q. Do you think there is anything indecent about that? A. Not indecent, but improper.

1494 Q. You notice in the next strip his goggle eye, the one visible, is pointing towards the totally nude female around behind that bush? A. Yes, sir; I do.

Q. There is nothing indecent in that? A. No, sir. It is improper.

Q. But to your mind this is the worst feature that you found in any of those issues of Esquire? A. In my opinion, Mr. Hassell, it is.

Q. Now, referring to page 93, the text described in the picture on page 92 of this issue. The text or descriptive ma-

terial of "Broadway for the Boys", which has under it "The juke joint scene from the 'The Eve of St. Mark'", and the text reads: "These soldiers have just come from a discussion of a hygiene lecture in which it was estimated that in the Army 20 per cent don't, 20 per cent do, and 60 per cent might." A. Yes, sir. 1495

Q. And then it refers to the characters and says: "Lil tells how dull it was in town before the Army moved in, but hints there can be too much of a good thing.

"'This is practically inflation, what we've got now.', she complains. One thing leads to another and another leads straight back to barracks when Quizz decides he belongs to the first 20 per cent. 'I have a hell of a hankering,' says Marion. 1496

"'But you're the strong, solid man and you bear the purse. I bow to your judgment and follow.'"

You say there is no indecent implication to be derived from this textual material, referring to the picture on the preceding page showing the soldier seated with the girl in his lap with her arm around his neck, and they are both holding glasses indicating that they have had a part of a drink? A. I say that the text meaning is no worse than it is in the play itself. Insofar as the picture is concerned, I fail to see anything indecent about it. 1497

Q. It is perfectly decent for a young woman to sit on the lap of a young man with her arm around his neck and her dress showing up to her knees, and a little beyond, and apparently taking a drink with him? A. I might say to that, Mr. Hassell, that I see this very thing happen probably half a dozen times each night in my working week.

Q. And that makes it proper and not indecent? A. It doesn't make it proper, but it doesn't make it indecent, either.

Q. It doesn't make it indecent? A. No, sir; it does not.

1498 **Chairman Myers: We will take a recess for a short time.**

(Whereupon, a brief recess was taken.)

Chairman Myers: Proceed, gentlemen.

By Mr. Hassell:

Q. Mr. Croteau, referring to the June issue of Esquire, page 34—that is the Varga picture entitled "Something for the Boys".

1499 This shows the two-page spread in what purports to be natural colors, and the young woman leaning back on her haunches. One hand is shown. A. Yes, sir.

Q. Would you say that costume is cut rather high and rather sparsely at the crotch? A. No, Mr. Hassell. I have seen a very similar costume, probably one that was cut higher, on ballet artists.

Q. What do you imply from the title "Something for the Boys", in connection with this picture? A. It is something for the boys to look at it.

Q. What would they want to look at it for? A. Purely from the standpoint of beauty.

1500 Q. Do you think it is not intended to have any salacious or sex appeal for the boys? A. Not unless the individual wants to imply such.

Q. You notice the points of the breasts shown there, showing through the very sheer material with which this model purports to be clothed. A. I is high-lighted on the color page. I wouldn't necessarily know that it is the points of the breast.

Q. Do you think there is anything salacious, or indecent,

or lascivious about this pose, coupled with the title? A. I do not, Mr. Hassell. 1501

Q. At page 134: "Libel suits were as wine to that hell-firin' editor of the old West, Dave Day." A. Yes, sir.

Q. And it sets forth several items at the bottom of column 1 extending through the middle of column 2. A. Yes, sir.

Q. Have you read those items? A. Yes, sir; I have.

Q. Both purporting to be social items on the first page of the publication referred to. A. That is correct.

Q. The first one:

"Two weddings are on dit for next week. This weather kind of suggests two in a bed, spoon fashion." A. Yes, sir. 1502

Q. What idea do you get from the statement "Two in a bed, spoon fashion"? A. I would probably think it was compared in those times as the counterpart of bundling, which was very common in New England in its early days.

Q. You mean wedded people would bundle? A. No, in courtship, due to the lack of fuel, the fiancee would bundle in the bed.

Q. You get the idea of bundling from this line "Two weddings are on dit for next week. This weather kind of suggests two in a bed, spoon fashion." A. As applied at that time, yes, sir. 1503

Q. And two in a bed, spoon fashion, what posture would that indicate to you? A. I imagine they would be very proximate to one another and probably have their sides very close in a bundled fashion.

Q. They would be about as close together as they could get, wouldn't they? A. I should imagine so. They did that when bundling.

Q. But you admit that wedded people, married people, don't bundle, or didn't bundle? A. There wasn't any neces-

sity for bundling with married people. They could go to bed
1504 conventionally.

Q. And this deals with wedded people or married people, doesn't it? A. Yes, sir.

Q. The one underneath that, an epitaph:

"Here lies the body of poor old Charlotte.
Born a virgin, died a harlot.
For 18 years she kept her virginity.
An all-time record in this vicinity."

A. Yes, sir.

1505 Q. Is there anything indecent about that? A. It is in bad taste; it is as corny as Paul Revere.

Q. It is in bad taste, but you say it is not indecent? A. No, sir; it is not indecent.

Q. And you would say the preceding item that we have just referred to about the two in bed is not indecent? A. Not indecent, no, Mr. Hassell.

Q. Take the third item:

"In future, all communications to the Muldoon will be marked with an asterisk to show that the editor disclaims responsibility. Each correspondent will have his own a-s-t-e-r-i-s-k." A. Yes, sir.

1506 Q. Now—

Mr. Hassell: Thanks to counsel for showing me that.

Mr. Bromley: Stop rubbing it in, will you?

By Mr. Hassell:

Q. Do you understand what that means, the use of the simple asterisk at the end of the sentence? A. Your pro-

nunciation on it, Mr. Hassell, makes it very understandable. 1507

Q. Would you read that from the item? A. "Or: 'In future, all communications to the Muldoon will be marked with an asterisk to show that the editor disclaims responsibility. Each correspondent will have his own *.'"

Q. You say there is nothing indecent about that? A. Not unless the reader wants to imply indecency.

Q. It is perfectly decent and proper to refer to the portion of the human anatomy sought to be referred to by this item, is it? A. Yes, insofar as being decent is concerned, yes. It has been commonly done. 1508

Q. Now, look at the next item:

"When Chipeta, Queen of the Utes, went to Washington, Day pretended that she had been seduced there by an eminent gold standard statesman. He followed the case for nine months, announced the birth of a boy, named by Day for the statesman, and chronicled the alleged boy's growth for years by that name." Do you think that is a perfectly decent and proper allusion to an ordinary occurrence? A. Yes; it is properly reported. Many things in and of themselves are obscene, but the reporting of such in an article is not obscene.

Q. You think the thing reported there was obscene? A. Pardon me, sir? 1509

Q. You think the thing reported by this item was obscene? A. I say that the report itself is not obscene, but the factual thing that is reported in itself is obscene.

Q. You say the factual thing reported in this item is obscene? A. Yes, but not the report.

Q. I see. Now, refer to the July issue, Mr. Croteau. At page 87 the cartoon strip "Exploits of Esky", numbers 55 and 56 on that page, in the center of the page, show a bearded

1510 figure standing beside Esky with a smile on his face, and Esky with his goggle-eyes and a handful of what appears to be money, and four females or mermaids, and in cartoon number 56 the same individuals with Esky rather goggle-eyed looking at a drawing of a mermaid with breasts fully exposed.

The text underneath it reads:

"You see—women are women the world over. Esky turned to Verne: 'Say, there's something I always wondered about mermaids—'. 'I wouldn't know', replied Verne."

1511 What is your theory as to what is intended to be implied there as to what Esky has always wondered about mermaids? A. I don't think there is any question but what the text to the picture is double entendre all the way through, and one may or may not draw whatever inference he wants to from it. It is obvious, however, that it is intended to be exactly what is implied, and I repeat that this is the worst feature of Esquire.

Q. But, you wouldn't say that this is indecent, would you? A. No, sir; it is in very bad taste.

Q. It is not lewd, lascivious, filthy or indecent? A. Not unless one wants to imply the worst meaning of the double entendre.

1512 Q. May I have Respondent's Exhibit No. 8? Life of September 6, 1943, pages 69, 70, 71, and 72. Those pictures in Life depicting scenes in the farce "Good Night Ladies," shown in Chicago. A. I understand that it was shown there, yes, sir.

Q. You said that certain of those figures were undraped and showed undraped female figures? A. Yes; sir.

Q. Which one of those are undraped? A. These two in the shower scene. It is a shadow shot and this one here is partially undraped.

Q. At what page is that? A. This is page 70 and 71. 1513

Q. Page 70 is the one you say is partially undraped? A. Yes, sir, and then on page 71, this one is totally undraped. It is a shower scene.

Q. How can you say that she is totally undraped? A. It is obvious by looking at it. It is a shadow shot.

Q. How do you know this particular female doesn't have a garment on? A. Well, I concede that there is no absolute way in which you can define or tell that she has not; but it is obvious that they are intended to be shadow shots.

Q. Did you see this show, sir? A. No, sir, I did not, but I did see that same shadow shot reproduced in a moving 1514 picture shown in our town, "Main Street Girl," which was one of the scenes which the Boston Censors objected to.

Q. We are not talking about that, we are talking about these scenes from "Good Night Ladies." And you would not be able to say that these shadow shots do not show females that are fully covered or attired in garments? A. It is just my reasonable assumption that they are undraped.

Q. I see. Now, you have used your imagination on these shadow shots, have you not? You have used your imagination on those? A. Yes, sir.

Q. And have arrived at the conclusion that they are totally undraped? A. I say that it is reasonable to assume that 1515 they are.

Q. Reasonable to assume? A. Yes, sir.

Q. But isn't it a fact that this lower one might indicate by this bulge that she has something on her body? A. I think it is just a wrinkle in the torso, sir. It is my impression.

Q. A rather curious wrinkle, isn't it? A. Well, she may be a little flabby around the middle.

Q. But you have used your imagination to undrape this

1516 model in the shadow shot? A. I say that it is a reasonable assumption.

Q. Now, where are the undraped models on page 72?

Mr. Bromley: Well, Mr. Hassell, don't you admit that the woman in this picture is shown as being in a shower bath taking a shower and is it your position that she has on long flannel underwear while taking a shower?

Mr. Hassell: I do not admit any such thing, that she is taking a shower.

1517 Mr. Bromley: But in the picture she is shown as taking a shower and the two men are peeping at her.

Mr. Hassell: But, as a matter of fact, there isn't any such thing. This witness, in his own imagination, has unclothed her.

By Mr. Hassell:

Q. Where are the unclothed females on page 72? A. If my memory serves me rightly, I said 6, 7, and 8.

Q. 6, 7, and 8? A. Yes.

Q. On this page? A. Yes, sir.

1518 Q. These here? A. These (indicating).

Q. Now the ones you point to are at the top and two underneath these (indicating)? A. Yes, sir.

Q. And the first one you come to, reading from left to right underneath, that is all right, that is draped, is that it? A. Yes, sir, she is.

Q. But the next one to the right of that is undraped? A. My reason is that she is in the process of having removed a brassiere which would have undraped the upper part of her body.

Q. But this picture doesn't show the brassiere off, does it? A. No, it doesn't, it shows the naked back. 1519

Q. But it doesn't show the front part of the body, does it? A. No, it doesn't.

Q. Are you certain it shows the naked back? A. If my eyesight is good, yes, sir.

Q. But the back is in shadow, isn't it? A. Well, not so much.

Q. Answer it. The back is in shadow, isn't it? A. Yes, it is.

Q. She has a skirt on of some sort? A. I think they call them panties. 1520

Q. It extends half-way down her thigh? A. Yes, sir, it does.

Q. You say the two lower ones are undraped? A. That is right.

Q. The two bottom pictures on this page 72? A. Yes, sir.

Q. The first one has on panties and she is holding a dark garment in front of her? A. Yes, sir.

Q. She has on a brassiere? A. Yes, sir.

Q. You say it is undraped? A. It is a net brassiere and so are the panties.

Q. You are using your imagination on the net, aren't you? A. It is obvious that is net, it is lace. 1521

Q. I see some lace on the side of it there A. The entire thing is lace, look at the next picture.

Q. I am looking at this picture. A. All right, but they are a sequence.

Q. You say she has got on net panties and a net brassiere? A. Yes, sir.

Q. Can you see through it? A. No, sir, I can't.

Q. You don't know whether it is all net or not, do you?

1522 There might be something underneath it? A. There might, yes.

Q. Now the last picture to the right you say is also undraped? A. Yes, sir.

Q. But she has on panties that cover her midsection pretty thoroughly, don't they? A. Well, they are lace panties.

Q. And she has on a brassiere which covers her breasts? A. A lace brassiere, yes, sir.

Q. Now the lace, that is your assumption that it is lace, is it? A. My assumption is that it is a lace pantie with a black fringe attached to it.

1523 Q. You have used considerable imagination, haven't you, Mr. Croteau, in describing or appraising these pictures in Life? A. I have tried to use common sense.

Q. Don't you feel you have used a little more imagination in those pictures than you have in this material that is from Esquire that you have testified to? A. No, I don't feel so.

Q. You are trying to be eminently fair, aren't you? A. Yes, sir, I am.

Q. Now, the July 5, 1943, issue of Life, which is the next Respondent's exhibit. Reference has been made, Mr. Croteau, to Respondent's Exhibit No. 9, to pictures appearing on pages 86, 89, and 90.

1524 Q. In connection with your testimony, I believe you referred to these pictures as showing females, undraped females. Look at this picture on page 86. A. Yes, sir.

Q. You say this model has no clothing on? A. I do not.

Q. What clothing does she have on? A. She has on apparently a negligee with lace trimming and a pair of panties.

Q. The garment she has on covers the upper part of her body thoroughly, does it not? A. Yes, sir.

Q. They cover the lower part of the body a good deal, down past the middle? A. Yes, they do. 1525

Q. They expose the thighs and the legs and feet of the model only, do they not? A. That is correct.

Q. Would you call this an undraped female?

Mr. Bromley: I don't think he called it undraped in his direct, Mr. Hassell. He said this was an example of leg art.

By Mr. Hassell:

Q. You think anything that shows women's legs is leg art? A. No, not necessarily so. 1526

Q. Do you recall anything similar to this picture in Esquire? A. Yes, sir, I do.

Q. What picture in Esquire is similar to this one, Mr. Croteau? A. If my memory serves me correctly the title of it is "Hew To The Line".

Q. "Hew To The Line, Let The Chips Fall Where They May"? A. I believe that is correct, Mr. Hassell.

Mr. Bromley: I think that is "skirts", Mr. Hassell.

Mr. Hassell: "Skirts". I beg your pardon. 1527

By Mr. Hassell:

Q. That would be on page 127 of the August, 1913, issue of Esquire. You say this cartoon in Esquire, page 127, August issue, is the same sort of thing as that shown in Life on page 86? A. Not the one picture but the series of pictures, taking them as a whole.

1528 Q. How does the picture on page 86 of Life compare with the picture on page 127 of Esquire? A. Well there is there reference to leg art that is taken into consideration; one of them is obviously a posed photograph, whereas the other is a crayon or color reproduction of a set of legs, and very badly done at that.

Q. Now in the picture on page 86 of Life the model is in a modest pose, sitting with her legs close together, on the edge of a bed, isn't that correct? A. That is correct, sir.

Q. In the picture on page 127 of the August issue of Esquire the model is lying on the ground. She has on what
1529 appears to be a filmy yellow-colored brassiere and a filmy yellow-colored pair of panties which are loose around the thighs, isn't that right? A. That is correct, sir.

Q. And one leg is high in the air while the other one is on the ground or on the floor or whatever it is, is that right? A. Yes, sir.

Q. Do you think that pose is comparable to the pose on page 86 of Life? A. Well, the thing to be considered here is the fact that one is a true life model and the other is a caricature and, I repeat, very badly done.

Q. Now, the other pictures on pages 89 and 90 show girls in the top picture putting leg makeup on their legs, and the
1530 lower picture shows what appears to be dark-skinned girls demonstrating length of bottled stockings. They are lying on their backs with their legs close together but in the air and the midsection of their bodies are very effectively covered, are they not? A. That is correct, sir.

Q. How would you compare those with those pictures appearing on page 127 of the August issue of Esquire? A. On the same basis that I compared the first ones. That those are true life models, whereas these are caricatures.

Q. Will you say that in a true life model it would be

possible to get a woman as that shown on page 127 of the August issue of Esquire? A. Not unless she was a contortionist. 1531

Q. You don't think a woman could lie down on her back and raise one leg in the air or have somebody push her leg as is shown in this cartoon? You don't think that would be possible? A. I think to some extent, yes, it would be possible, but I don't believe to the extent that this caricature is produced.

Q. Have you ever seen a dancer doing a split, Mr. Croteau? A. Yes, I have.

Q. Their legs are rather farther apart than that, aren't they? A. There is a vast difference in doing a split where you hit a hard surface and where you are up in midair. 1532

Q. You are sure you aren't trying to go the limit in behalf of this cartoon in Esquire as against the pictures in Life, are you? A. I concede that it is a very bad and improper caricature, Mr. Hassell, but it is not indecent or obscene.

Q. You are quite anxious to justify it, aren't you, Mr. Croteau? A. It seems to me you are the person that is anxious here, not I.

Q. That will be judged from your answers to my questions. 1533

Now, refer back to the July issue of Esquire, page 141. There we have matter boxed in showing three dogs or drawings of at least three dogs and a goggle-eyed man with his arms indicating that he is waving the dogs on apparently, and underneath that a heading "Dog's Worst Friend."

Did you read this? A. Yes, sir, I did.

Q. What does it tell? What does it deal with? A. Well, in short, it shows probably what a dog would like to do to a lot of human beings who have abused his natural habits.

1534 It is humorous, silly in part, but there is certainly nothing indecent or obscene about it.

Q. You say you are portraying by verse or prose of the habits of dogs, referred to here, with which we are all familiar? A. Yes, sir.

Q. It is not filthy, is that right? A. Not filthy, no, sir. Probably in bad taste, but not filthy.

Q. And you wouldn't say that coupling those well-known habits with the thought or idea that those habits might be applied to the lower extremities of certain persons referred to in this, would be indecent or filthy? A. I didn't
1535 apply that at all anywhere in the reading of this thing.

Q. You didn't? A. No, sir, I did not.

Q. Now, look at page 146, the advertisements of Esquire's by-products and the female figures reproduced thereon, and particularly the center one. A. Yes.

Q. Does the center one appear to you to be clothed? A. With the exception of a transparent hat over her buttocks and her thighs, no.

Q. She has no clothing with the exception of that transparent hat? A. That's correct.

Q. And you think it is perfectly proper and decent to portray the figure of a female in that fashion, do you? A.
1536 On the contrary, I think it is improper, and, in this case, very bad taste, but I don't think it tends to corrupt the morals of any particular individual.

Q. How is it in very bad taste? A. Well, it is not the accepted standard of good society to present this sort of thing.

Q. Now, refer to page 148, sir, of this issue. Here we have a perfume counter, apparently in a store, and on the counter a placard advertising apparently a perfume en-

titled or called "Burning Desire" and under it another placard advertising a perfume called "Baby's Breath," and behind the counter stands a female clerk and in front of the counter an elderly bald-headed white-haired man who possibly is the floorwalker, and the legend underneath says: 1537

"I think, Miss Hill, it might be advisable to display those a little farther apart."

Do you think there is no indecent, lascivious or salacious implication to be derived from this cartoon? A. I don't think so, Mr. Hassell, and I think our National Board of Censors of Motion Pictures didn't think so either, because they allowed it in a picture. 1538

Q. They allowed it in a cartoon? A. It was not a cartoon: it was a scene. I can't recall the picture, but I remember distinctly seeing it.

Q. You don't remember the picture? A. I can't recall, no.

Q. You don't know whether the scene is exactly the same as this or not? A. It is approximately the same thing.

Q. You think this is a plagiarism? A. I doubt very much that it is a plagiarism because this particular scene is an old one, it is a chestnut as old as the hills.

Q. What does it mean to you, Mr. Croteau? A. Here, again, the meaning of this thing is what is inferred by the person reading it. I know this is becoming very irksome to you, but a good many people could apply the meaning that the floorwalker was advising the girl to separate the two signs. 1539

If a person was obviously possessed of a dirty mind he would, of course, give the dirty inference, and he might imply the effect that the idea is that she should separate the signs farther apart.

1540 Q. Where would be the joke if you didn't apply the worst implication to it? A. I don't think there is any joke in it. I fail to see the joke at all.

Q. Do you have any reason why such cartoon with such a legend should be included in a magazine such as Esquire? A. I think the only reason is that in some degree it is entertaining to some people. I mean, it doesn't mean a doggone thing to me.

Q. How would it be entertaining to some people? A. Simply because some people will read it and take it for what it is worth and get a little humor, and somebody else
1541 will give it a dirty inference.

Q. You say "take it for what it is worth." I assume that is the way you take it, for what it is worth? A. Yes, sir, and I repeat it doesn't mean a doggone thing to me.

Q. In other words, it might be just so much blank paper, so far as you are concerned? A. Yes, sir.

Q. You can't see the point at all? A. I can, if I stop to analyze it. I can sit down and get either point that I have just explained to you.

Q. I want to hear the other point, the point that has no obscenity. A. It is not obscene unless the individual wants to apply obscenity.

1542 Q. All right. Give me the other point. What is it? A. The other point is that the floorwalker, assuming he is being reasonably efficient, wants the two signs on the counter separated.

Q. For what purpose? A. For the purpose of showing the two items on the counter to better advantage. He is a floorwalker.

Q. And you say that would be the joke? A. I say there is no joke.

Q. You see no point in it at all? A. No, sir, I don't.

Q. All right. 1543

Now, let's come to the August issue of Esquire.

Now, refer to the item on page 10, the "Sound and the Fury", under the heading "Considered Opinion." Reading:

"In your May issue (this year, too!) page 93, article entitled 'Broadway for the Boys,' it is said '20 percent don't, 20 percent do, and 60 percent might.' While in no way representing the opinion of the Navy Department, it is the considered opinion of this patrol squadron that 20 percent don't, 20 percent do, and 60 percent don't get the opportunity. Now, you guess which category we fall in!"

Mr. Croteau, to what subject do you think these do's and 1544
don'ts refer? A. To the play "The Eve of St. Mark."

Q. I am referring to this part of the play referred to here "20 percent don't, 20 percent do, and 60 percent don't get the opportunity."

Don't get the opportunity for what? A. For whatever one wants to imply, whether it is fun on a leave, whether it is the seeking of a female companion while on leave, or probably the worst connotation, that you can get out of it, is that probably they are seeking sexual intercourse.

Q. But you wouldn't get that out of it until you had studied it for a long time? A. That is the worst implication one could apply to it, Mr. Hassell. 1545

Q. Wouldn't that occur to you first, or would it occur to you last? A. I don't think it would occur to me first, no, sir. I don't think this particular article, or any articles in Esquire are intended to be sexey, they are intended to be humorous.

They do contain a certain amount of double entendre and if a subject is susceptible to that sort of thing no one can have control over it.

1546 Q. You don't think any of the articles in Esquire are intended to be sexey? A. No. Some are risque.

Q. And if other experts on filth and obscenity who preceded you on the stand had admitted that Esquire was sexey and spicy, has a reputation of being sexey and risque, you won't agree with them, will you? A. I would not, no, sir.

Q. Now, refer to page 30: "Many Wives Too Many," pages 30 and 31. A. Yes, sir.

Q. Look at the title of that article, the sub-title, the name of the author under which appears "article" and under that a symbol. Do you know what that symbol means? A. A prescription symbol.

1547 Q. A prescription symbol. A prescription that this is a recommended article by Esquire? A. Yes.

Q. What does this article deal with. You read it, didn't you? A. No, sir, just parts of it.

Q. So you would not be able to state what it deals with throughout? A. Not throughout, no, sir.

Q. Since you are not familiar with the article throughout you would not be in a position to pass an opinion upon any part of it, would you? A. Not competently, no, sir.

Q. Now, on page 38 we have the Varga girl picture entitled "Vacation Reverie." Would you say this model is unclothed?

1548 A. Not unclothed. She is partially undraped. The shoulder strap of the left shoulder is unfastened.

Q. Now, in one of the pictures in Life that we were talking about a while ago, you called attention to the fact that a woman standing with her back to the camera had the ends of her brassiere in her hand. A. Yes, sir.

Q. You gathered from that that she was in the process of removing her brassiere. Now, in this picture we have here, Mr. Croteau, this is one-piece garment, isn't it? A. Yes, sir, that is correct.

Q. What might be called a brassiere covering the breasts is attached to the balance of the garment? A. That is correct, sir. 1549

Q. Which is quite scanty? A. Yes, sir.

Q. Following the same deductions or reasoning that you followed with respect to the photograph in Life, would you get the idea that this Varga girl at page 38 of the August issue of Esquire is in the act of removing her garment? A. I am not following the same reasoning.

Q. You are not? A. No, sir, I am not.

Q. What reasoning have you thought up since to apply to this? A. I don't think I have thought it up since. I think by looking at this picture here it is obvious this girl is sitting on the sand on a beach, and it is a very common practice for a girl to turn her back to the sun and get a suntan. I imagine that is what this girl is doing. 1550

Q. Where is the sand here? A. You don't see sand or anything else on any Varga picture.

Q. But you have used your imagination to supply a beach which is totally absent in this picture? A. Just the same as you used your imagination yesterday to tell me that there was a springboard upon which one of the Varga girls was sitting.

Q. No, I didn't use my imagination. A prior alleged expert on filth and obscenity supplied that, though. 1551

Chairman Myers: He wasn't an alleged expert.

Mr. Hassell: I think the record will show who supplied it.

Chairman Myers: That is the wrong assumption.

By Mr. Hassell:

Q. But you are using your imagination in conjuring up explanations and excuses for the Varga girl pictures? A. I don't have to conjure up any excuses for Varga girls.

1552 Q. You don't have to use your imagination to put them in decent and proper and appropriate settings, do you? A. No, sir, I do not.

Q. But here you have to put this person on a beach, don't you? A. I say that is the reasonable assumption.

Q. Now, look at page 73. There we have a color photograph purporting to show this model in natural flesh colors, do we not? A. Yes, sir.

Q. It is entitled "Mood For Red Hair." A. Yes, sir.

Q. And would you, looking at that picture, draw the conclusion that underneath these filmy drapes thrown across the
1553 upper and lower parts of this model's body there isn't any clothing? A. I would say that it is very difficult to tell whether or not there is any clothing, just as difficult as it was in the picture in Life to tell whether there was any clothing under the girl's lace panties.

Q. Do you see anything to indicate that she is clothed under these drapes? A. No, sir, and I didn't in the other one, either.

Q. Do you think the purpose of the use of this manner of draping a model is to facilitate the male readers and subscribers to Esquire in mentally undressing her and removing these drapes? A. No, I do not, sir.

1554 Q. You don't see anything salacious or lascivious in this picture? A. No, sir. I think it is a photograph that does justice and credit to the photographer himself.

Q. Now, refer to page 89 of the August issue of Esquire, "Paste Your Face Here." A. Yes, sir.

Q. Showing a girl in a brassiere and scanty panties seated astride over the shoulders of the figure who has no face, but is in a sailor uniform, on sand, with what apparently is intended to be a background of water of some sort.

Do you think there is anything indecent, lewd, or lascivious in this picture? A. There certainly is not.

Q. I believe you stated on direct this is an occurrence that is seen every day on the beaches? A. Not every day, but during the summer resort months, I would imagine one would not have to travel or try very hard to see a good many times the same reproduction. 1555

Q. And the fact that this picture is so arranged that the individual readers of Esquire may paste pictures of their faces where the sailor's face was, does not make this picture indecent? A. There is nothing in the picture that conveys indecency, Mr. Hassell—not in my opinion.

Q. You don't think there would be any indecent connotation in the fact that a total stranger who had never seen this girl, could paste his picture here and hang this picture up on the wall of a room as a pin-up and contemplate himself in this position with this woman? A. There is nothing indecent about the position. 1556

Q. You can't possibly see anything indecent about that? A. No, sir; I cannot.

Q. Now, look at page 90, the cartoon in the upper left-hand corner of the page, a women in wedding gown in a factory, apparently, and the legend underneath: "She came directly from the wedding—Boy! That's patriotism".

What do you get out of this cartoon, Mr. Croteau? A. That the subject here was highly patriotic and considered her duty towards her country far more important than her honeymoon. 1557

Q. That is all you get out of it? A. Yes, sir.

Q. You don't get out of it any idea that she was so patriotic that she eschews the first night marriage bed or anything of that sort? A. No, sir; I did not.

Q. That had not occurred to you at all? A. Not at all.

Q. So as far as you are concerned, that cartoon is a wash-out, a blank, a dud; no reaction at all? A. No, it is humorous.

Q. Why is it humorous? A. To think a girl was patriotic
1558 enough to want to go back to the factory rather than on her honeymoon.

Q. Is that your brand of humor? A. I am frank to admit that to me it is rather humorous.

Q. I see. Now, look at the cartoon on page 105, the lower right-hand corner, with the legend: "Thank God—help at last". A. Yes, sir.

Q. Showing the grinning black girls in the background and the white man in the ragged shorts clinging to a tree on shore and a sailor in a small boat paddling towards shore: "Thank
1559 God—help at last". A. Yes.

Q. What do you think this cartoon means? What kind of help is coming to the man on shore? A. Well, it is obvious that the man has probably been lost at sea and is on some South Sea island and is being rescued.

Q. Not rescued from the females in the background, four of which are shown? A. I shouldn't say so.

Q. You wouldn't get this idea at all? A. I wouldn't get that. I wouldn't get it at all. If I wanted to let my imagination run along in that channel, of course I could get it. That is involved there.

Q. Why do you think this cartoon and similar cartoons
1560 are published in this alleged risque publication? A. For entertainment value.

Q. And they have entertainment value when you apply the interpretation you just applied to this? A. Depending on the reader's point of view.

Q. They have entertainment value to you and you interpret it as the reaction of a ship-wrecked sailor who is being rescued by another sailor? A. Yes, sir.

Q. As from hunger and so forth, and not from the females? A. Well, from the looks of the cartoon here, it seemed to me that the fellow was starving to death.

Q. So the females are just so much useless inappropriate, inapplicable scenery in the background of this cartoon, so far as you are concerned? A. So far as I am concerned, they are just there to dress up the background. 1561

Q. Now, look at the cartoon at the bottom of page 110 of this August issue of Esquire. A. Yes, sir.

Q. Note the male figures shown in this cartoon, the attitudes, expressions, and so forth. Note the size of the breasts on the female person shown in this cartoon and the name applied to her in the legend underneath which reads: "That's Miss Blimpton, our special nurse for low blood pressure patients." 1562

Do you associate her name with the size of her breasts? A. Not necessarily, no.

Q. And those two items, the expressions on the faces and the attitudes of the men shown in the cartoon? A. Yes, sir.

Q. I say, do you associate those? A. Associate them with what?

Q. In the cartoon with the name of the woman? A. Blimpton?

Q. The size of her breasts and the expressions on the faces of the men shown in the cartoon. A. It is obvious that there is a connection between the three and it has some entertainment value, but it is not obscene. 1563

Q. The man commenting on a passing woman's breasts by saying "That is our special nurse for low blood pressure patients"? A. There is nothing here that says there has been comment on her breasts. That is the inference.

Chairman Myers: Some women do have large breasts, don't they?

The Witness: I believe so, Mr. Myers.

Chairman Myers: Are they obscene for that reason?

The Witness: I should say not.

By Mr. Hassell:

1564 Q. Referring to the matter appearing in the article or story of that portion of the magazine on page 144, the article entitled "Offensive on the Home Front", and the last paragraph of the third column: "Dorothy began to cry loudly and headed out of the room. Dizzy and with the taste of blood in his mouth, he noticed how large the uniform made her behind look". Would you say that so characterizing the portion of the woman's anatomy as indicated would be indecent or filthy? A. No, Mr. Hassell. Many women have large posteriors. That does not make them obscene or indecent or
1565 filthy.

Q. I am not talking about the women being obscene or indecent, I am talking about this language. A. The language here depicts a woman's posterior and it is not indecent or vulgar or obscene.

Q. To refer to it as here, it is not? A. No, sir; it is not. There are many people that do.

Mr. Hassell: Could we stop here until 1:30?

Chairman Myers: We will adjourn until 1:30.

(Whereupon, at 11:55 o'clock a. m., the hearing was
1566 adjourned until 1:30 o'clock p. m.)

AFTERNOON SESSION.

(The hearing was resumed, pursuant to the adjournment, at 1:30 o'clock p. m.)

Chairman Myers: All right, gentlemen, we will proceed.

LOUIS J. CROTEAU, resumed the stand and testified further as follows: 1567

Cross Examination by Mr. Hassell (Continued):

Q. Now, sir, let us take up the September issue of Esquire.

I call your attention to the matter appearing in the third column on page 10: "The Sound and the Fury", headed "Conservative Suggestion", and I read:

"Recently I have read that Varga paints all his models in the nude and after that puts their clothes on. (I mean the pictures, of course.) 1568

"Why doesn't he leave them as they are, thereby cooperating in this National Emergency by conserving paint?"

And signed: "The Height of Expectation".

Do you believe that, in the event the Varga girl shown in these issues was painted without the covering that most of them have, their salaciousness would be enhanced? A. No, I am afraid I do not agree with that, Mr. Hassell.

Q. Now, will you look at the Varga girl picture on page 38 of this issue and the verse: "Military secrets", noting the diary in the model's hand and the expression on her face. Would you say that the garment that this model has on serves to emphasize her nudity or not? A. I should say not, Mr. Hassell. 1569

Q. You would not think the picture any more objectionable if that garment was not on it, would you? A. I should think not, sir.

Q. You say that picture is not indecent, lewd or lascivious? A. Well, I repeat what I said this morning that it is not a true characterization of any true individual. It is a composite picture.

Q. It is a what picture? A. Composite picture.

1570 Q. What do you mean by "composite"? A. Well, it is made up. It is a picture that is made up from several photographs which the artist works from and makes his interpretation of what is a true Varga girl. It is not individual.

Q. How do you get that out of looking at the picture or from looking at the picture? A. I didn't get it from looking at the picture, sir.

Q. I see. So, in your opinions and views you have expressed heretofore you have gone beyond the picture itself, have you, into some other store of information not dis-

1571 closed, of the picture and the verse accompanying it? A. Up to my coming here I went by only what I saw in the magazine, not knowing how Varga did various pictures. I have since been informed that he draws them from actual photographs, but not one.

Q. Who informed you of that? A. I believe, if my memory serves me correctly, the editor of Esquire.

Q. And you think that has a bearing on whether or not the pictures are indecent? A. I do; yes, sir.

Q. On page 43 we have another one of the cartoons that counsel has denominated or called the Sultan type of cartoon.

1572 This shows two girls not entirely clad, on a rostrum, and the Near East gentleman in turban, apparently auctioning them off, and in the audience is what looks like an American soldier with a cigarette in his mouth, and a tank is shown in the background.

Under the picture is the legend: "Sold American."

What would you think the soldier who has the money in his hand and is handing it up to the auctioneer, would do with two slave girls in a war zone? A. Well, I think

primarily the picture is meant to be humorous. Implying the worst inference that can be drawn from your description, it is very obvious that he intends to have a good time with them. 1573

Q. I see. Do you take exception to that description of them, Mr. Croteau? A. No, not so, if your mind is running along in that channel.

Q. Well, what channel would your mind run in? How would you describe it? A. To me it is simply humorous; it has entertainment value.

Q. How does it have entertainment value? A. We have every week, I think, the "Sold American" program by Lucky Strike, and the Sultan feature of cartoons is not unusual, and I think it is a combination of the two. 1574

Q. A combination of what two, sir? A. Of the Sultan feature and the radio program that we hear, "Sold American". It is intended to be humorous.

Q. Did you have in mind that the Sultan cartoon is a feature in this magazine Esquire when you gave your testimony of that? A. Yes, sir; I have seen it for a number of years, I believe, in Esquire.

Q. So, in appraising this cartoon, you had in mind what you have seen in other copies or issues of Esquire? Is that correct? A. I associated it with what I have seen previously. 1575

Q. And you think there is no indecent or salacious connotation to be had from that picture? A. Not unless the individual wants to imply it.

Q. Look at page 65, the cartoon there. There we have the cartoon of the man with the checked apron leaning out the kitchen door, and the milkmaid, who is curvaceous, delivering the milk, and underneath this legend: "Come back later, sweet—my wife hasn't left for the factory yet."

1576 Do you think that cartoon conveys any idea of a liaison between the milkmaid and the husband? A. Yes, I do; Mr. Hassell. I think it is obvious that the connotation here, and the pictorial description of the two subjects is intended to show that at least these two individuals will get together at some later time and probably do a little necking or something.

Q. But you see nothing indecent in that? A. No, sir; I do not.

Q. Now, look at the cartoon on page 66, showing the girl seated in a man's lap—that's the next page, up at the top—

1577 in very close embrace with the man in whose lap she is seated. A. Yes, sir.

Q. Is that a common every-day scene, scenes of that sort? A. Well, it is not one that I see every day. It is humorous. I do not contend that it is probably the best form of entertainment, and it certainly depicts a certain amount of necking, but the fact that the mother is there with apparently a housekeeper or someone, is certainly indicative to me that there is nothing sexy about it.

Q. You think there would be nothing sexy about that position of the two young people? A. Well, I will concede that it is a rather risque necking scene, but it does

1578 not actually imply obscenity.

Q. You think there is nothing indecent about it? A. No, I don't believe it is indecent. Probably improper.

Q. Now, look at another cartoon on page 84. Note the necking couple seated on the couch in this cartoon, and particularly the juxtaposition of the mouths of the two. Would you say that this is as bad a cartoon or as sexy or as suggestive or whatever you want to call or apply to it as the one you just looked at on page 66? A. In my opinion,

it is in the same classification. It is just that sort of thing which the other one represents. 1579

Q. You wouldn't say it is worse by reason of the fact of the position of the mouths here shown and so forth? A. No, I wouldn't say it is any worse, Mr. Hassell. As a matter of fact, the mouths are very badly done.

Q. Now, turn to page 86: "Goldbricking with Esquire". A. Yes, sir.

Q. And note the item at the beginning of the column at page 86, at the bottom. A. Yes, sir.

Q. "A sergeant was home on emergency furlough to be with his wife who was expecting a baby". Have you read that? A. Yes, sir; I have. 1580

Q. Do you find anything suggestive in that? A. No, I am afraid that I don't, Mr. Hassell.

Q. You don't find anything at all suggestive of any impropriety? A. No. I will concede that it is probably improper.

Q. Do you find anything suggesting indecency in that? A. No, not indecency, sir.

Q. Now, on page 87, at the bottom of the third column. A. Yes, sir.

Q. "She: 'Would you like to see where I was operated on for appendicitis?'. 1581

"He: 'No, I hate hospitals.'"

Do you see any indecency suggested in that alleged joke? A. One can be inferred if the individual wants to imply the indecency. However, it is a very corny joke; it is as old as the Gay '90s.

Q. What is the one that can be inferred? A. Well, the worst would be that she would probably show him where her appendicitis scar was.

1582 Q. Now, look at page 102, the full page color cartoon shown thereon. Note the scene of the man and the young lady lying on the beach with her legs cocked up and underneath the cartoon at the bottom there is a quotation of apparently what the man is saying: "Ain't it a damn shame—plenty of water on this island, plenty of food, and now I get hallucinations".

What sort of hallucinations do you think that this refers to? A. Well, of course, the vision of the woman lying on the beach which, in all probability is so and not a hallucination, and granting the worst that could be inferred from
1583 it, there is little that he could do about it in this particular condition.

Q. You think there is nothing indecent or there is no indecent connotation to be drawn from that? A. Not in my opinion, sir, no.

Q. Now, refer to the October issue, page 10, the third column at the top, "The Case of the Classy Chassis", purporting to be a letter from a reader of Esquire. Down in the middle of the second paragraph it states:

"Though my liking for the Varga wenches is supreme, I would not replace the chassis on page ten for a Varga dame. It is too bad you could not provide a larger of such photo, so that we, who appreciate such shapely forms, could
1584 pin up. A spot has been reserved on my wall to deposit such a dish. Why not give us the face."

Do you agree with the writer of this letter in his reference to the Varga girl pictures as "Varga wenches"? A. No, I do not, Mr. Hassell.

Q. What is a wench? A. A wench is a rather lewd, obscene woman.

Q. I see. When reference is made to "such a dish", referring to a woman or a picture of a shapely woman, when

such a reference is made by a man, what does he mean? A. In this particular instance I fail to see how it could mean anything, because the picture which he referred to was a silhouette of a woman, fully clothed in trousers, and without a head. It didn't make much sense to me at all. 1585

Q. I see. Now, refer to page 37 of this issue. We have a cartoon in the lower right-hand corner showing a white man seated on a beach, apparently with a tropical scene in the background, and a native woman unclothed above the waist looking at a hula dancer tattooed on his biceps, which he is apparently flexing. A. Yes, sir.

Q. Do you think any objectionable connotation can be derived from that cartoon? A. I do not. The only thing I could get out of it is that it is just plain silly. 1586

Q. I see. Now, refer to pages 38 and 39.

Mr. Bromley: Mr. Hassell, would you mind telling me what dirty interpretation you put on that harmless little cartoon?

Mr. Hassell: I will when I take the witness stand.

Mr. Bromley: I thought you might help me out now. I don't have the slightest conception of what you think it portrays.

Mr. Hassell: It wouldn't occur to counsel that possibly this hula dancer is doing the "bump", as described by this witness? 1587

Mr. Bromley: On the arm?

Mr. Hassell: On the arm. The sailor is making this girl do that.

Mr. Bromley: That is what you mean by being dirty?

Mr. Hassell: I refer to what the cartoon shows.

1588 ***By Mr. Hassell:***

Q. Refer to pages 38 and 39. Have you read the article: "Wise Men Pick 'Pyknic' Girls"? A. Yes, I have, sir.

Q. Do you consider the references to the development of the body of the woman discussed, or types of women discussed, not to be indecent? A. They are not indecent, sir. They are just practical.

Q. You think that a man could read this article and be assisted in the type of wife he would pick? A. I don't think it would help him to make up his mind at all, no, sir. It has entertainment value, but I don't think it makes any
1589 individual reach any concrete decision.

Q. Now, refer to pages 43-44, the Varga girl, "Torches at Midnight". A. Yes, sir.

Q. Would you agree that this model is in a recumbent position? A. Yes, I do.

Q. That she is quite scantily clad? A. She has on a diaphanous teddy suit, if that is what you mean.

Q. And that is principally the only garment she has on? A. I think probably she has stockings on the legs, very sheer, but I think they are stockings. I don't think it is the flesh.

Q. Her legs are of a different color than the arms and
1590 the upper part of her body? A. Yes, sir.

Q. Do you see the umbilicus through this garment? A. There is a shaded impression. It doesn't necessarily show an umbilicus.

Q. How about the ribs? A. There again you have the shaded impressions.

Q. Is the nipple of the right breast prominent? A. The mound itself is prominent. There is nothing there to distinguish the nipple.

Q. You don't see a point in the drawing? A. Well, all breasts have a point. 1591

Q. Well, you don't see a point in this drawing, in the drawing of this breast? A. Yes, there is a point in this one, Mr. Hassell.

Q. Do you think this model would be less or more enticing were she to be shown without this diaphanous covering? A. I don't think it would make a confounded bit of difference. I don't think it would improve her any.

Q. You don't think she would be any more indecent if she didn't have anything on? A. No, not in comparison with a living model who performs in just this sort of attire, 1592 namely Diane Rolland, who is a strip queen artist, and she wears exactly this when she goes on the stage and proceeds to take off the entire thing with the exception of a covering over the pubic mound.

Q. Apparently this model hasn't any such covering on, has she? A. It is not shown in the picture, no, sir.

Q. You are thinking beyond this picture to some strip teaser, comparing this picture with a strip teaser you have seen in the past, is that it? A. Only two weeks ago, yes, sir.

Q. That is what you are doing when you say there is nothing indecent about this picture? A. I fail to see that 1593 it is any more indecent in here than it is on a public stage and it is generally accepted by the public and viewed by the public.

Q. Not this particular model. A. No, but one extremely alike and dressed in just that sort of attire.

Q. And red hair? A. No, she is a blonde. Probably that is the only difference.

Q. Now, look at the cartoon on page 49 of this issue, the one with the legend underneath, "Hello, dear, this is the gentleman who sells us our fuel oil." A. Yes, sir.

1594 Q. And the cocktail glasses on the buffet table and the cocktail shaker and the woman seated on the big, husky, overalled, red haired man's lap, and apparently an indignant husband fully clothed standing to one side. Do you see any indecent connotation to be gathered from this picture, Mr. Croteau? A. I think applying the worst inference that can be drawn, Mr. Hassell, yes. It is an old counterpart of the old iceman theme and I don't think anyone needs an awful lot of imagination to break that down.

Q. But you don't think this is indecent? A. I repeat that if you want to infer the worst inference, yes, it is.

1595 Q. What would be an inference that is not the worst or some other inference? A. Apparently the worst inference that you could draw would be that there has been something connected with sex between the two. You could withdraw that inference and say that they were just having a good time and had a couple of cocktails and she was seated on his lap. You can go from one extreme to the other.

Chairman Myers: Maybe he was delivering fuel oil in a cocktail shaker.

The Witness: That is true, too.

By Mr. Hassell:

1596 Q. What is the reasonable inference to be drawn from that cartoon, Mr. Croteau? A. Well, that depends on what the individual who is viewing this particular subject thinks. The reasonable one that I would draw is that they are apparently on a necking party and that they have gone pretty far.

Q. And the husband is apparently indignant, judging from the expression on his face? A. If he is any kind of a husband he should be.

Q. Now, pages 56 and 128, "The Portrait Above The Fireplace." This is a prescribed story as the symbol indicates? A. Yes, sir. 1597

Q. Did you read that story? A. Yes, sir, I did.

Q. Would you say that the confronting of a man who has idealized the picture of a strange woman as that of his mother, whom he never knew, and being finally, in fact, the picture of a madam of a bawdy house, that there is a filthy connotation or inference to be drawn from that story? A. I don't know as I concede the word "filthy." I think in this case the individual got an awful let-down as to what he had idealized, when he found she was a madam or a prostitute. 1598

I repeat what I said this morning, that in itself prostitution is obscene, but the reporting of prostitution is not.

Q. And you don't see anything indecent or filthy or lewd or lascivious in that story? A. Not in the treatment of this article, no, Mr. Hassell.

Q. Now, refer to page 93, "Goldbricking With Esquire." Have you read the second item in the first column of page 93? A. Yes, sir, I have.

Q. About the man seated in the lobby being solicited by a woman? A. Wait a minute.

Q. The second article from the top, the first column of page 93. A. Yes, sir, I did. 1599

Q. And he says, "Liquor is my weakness." A. That is correct, sir.

Q. Do you agree that that item or joke or whatever you want to call it does imply that the man was solicited by a prostitute? A. It implies impropriety, yes, sir.

Q. Do you think there is anything indecent about that joke? A. No, sir, I do not.

Q. Now, look at the third item on that page, the one immediately under the small cartoon. A. Yes, sir.

1600 Q. "A Pullman porter who had started out on an all-night run had his trip cancelled." And it goes on to tell that he went home and he saw some shoes, or some feet, sticking out from under his bed, and he says to his wife, "If dem shoes stickin out from under the bed ain't got no feet in 'em, Ah is gonna shave," when his wife asked him what he was going to do. A. Yes, sir.

Q. Does that joke, if it may be so called, convey any indecent, lewd, or lascivious connotation to your mind? A. Not to my mind. It may to some, I grant you that.

Q. What would it convey to your mind? A. The fact
1601 that he says, "If dem shoes stickin out from under the bed ain't got no feet in 'em"—there is nothing here to show the shoes have feet in them. They may or may not have.

Q. I see.

Now, refer to item 17, which is the second item in the fourth column of that page. A. Yes, sir.

Q. "What does f-e-e-t spell, Johnnie." Have you read that? A. Yes, sir, I did.

Q. Do you think there is anything indecent, lewd, or lascivious in that alleged joke? A. No, sir, I do not. I think it is improper.

Q. Now, refer to pages 104 and 105, "The Sporting Scene."
1602 Did you read that? A. Yes, sir, I did.

Q. And you have that article or story in mind? A. Yes, sir.

Q. And it winds up:

"She married a 4-F guy and they were very congenial, having twenty-one progeny just as fast as nature would allow." A. That is right, sir.

Q. And, "One day her husband said: 'Kids are handy as tax exemptions, but when I think of bills I feel faint.'

"Luberta went to her spouse and patted him tenderly.

'I know, Honey, but you don't realize how much fun something can be without so damn much advice.' 1600

"She meant doing the children's washing, possibly."

Do you think there is an obscene, lewd, or lascivious or indecent connotation to that story? A. I don't think there is any lewd, lascivious or indecent connotation to it. I think the story is in bad taste and probably should not have gone as far on the borderline as it did, but it is not obscene.

Q. It is on the borderline, though, isn't it? A. It is very descriptive, yes, sir.

Q. Now, refer to the November issue of Esquire, the Varga girl picture at page 46, and the verse: "Virtue Triumphs." 1601

Did you read this verse? A. Yes, sir, I did.

Q. And considered it in connection with the picture? A. Yes, sir, I did.

Q. The model sitting cross-legged, dressed apparently in a girdle of some sort? A. Yes, sir.

Q. And the expression on her face? A. Yes.

Q. And you say there is nothing lewd or indecent or lascivious in that picture? A. If there is I fail to see it, Mr. Hassell.

Q. In connection with the verse, of course? A. Yes, sir. 1602

Q. If one of the other witnesses here who preceded you had testified that he considered this the worst or most objectionable of the Varga girl pictures, would you agree with him? A. I am afraid I would not, Mr. Hassell.

Q. You think there are others worse than this? A. I think there are one or two that are, in my opinion, a little worse.

Q. Now, look at page 52. This is another one of the sheik or Sultan cartoons, a full page cartoon in colors. A. Yes, sir.

1606 Q. It has underneath, "Such a neighbor—always borrowing," and shows one Oriental gentleman waving his arm to another in the background going away with two girls, very scantily clad. What do you think this cartoon implies, Mr. Croteau? A. I think it implies impropriety. I concede that the locale of the scene is where concubines are commonly used and I will go so far as to say that probably they are exchanged between Sultans.

That is the worst inference you could possibly place on this cartoon.

Q. Now, what is the best inference you could place on it?

1607 A. Well, I should think that probably the Sultan who was walking away with the two girls is taking them away for a good time other than sex, for entertainment in his own palace.

Q. Now, look on page 61, the first sentence of the textual matter, describing this color photograph on page 60.

"The Esquire Canteen." Reading: "Here are five perfectly good reasons why service men and mere civilians pause for laughter, libation, and libido at the Folie Bergere."

Do you know what libido means, Mr. Croteau? A. I believe it is a form of hilarity or liberality associated with fun.

1608 Q. Would you say associated with sex? A. Probably in some instances, yes, Mr. Hassell.

Q. You see nothing objectionable in that language coupled with the picture on page 60? A. No, I don't, Mr. Hassell. The picture is a scene that is very common in theaters today. As a matter of fact, I have seen chorus girls with a lot less clothes on.

Q. You have had quite an experience, far more than the average individual, have you not? A. Well, my duties require that I do. It is not from a matter of choice, I promise you that.

Q. But you have had the experience with at least six or eight burlesque shows a week? A. Yes, sir. 1609

Q. Does that run all the year? A. It runs 40 weeks a year, Mr. Hassell.

Q. Forty weeks a year? A. On an average.

Q. Now look at page 66, cartoon at the top of that page, two soldiers with their hands up and broad smiles on their faces, surrounded by natives, apparently South Sea Island girls, with nothing on but sarongs around their middles, and the title "It's no use, Sarg—we're outnumbered—Yippppeeee."

What do you think that picture connotes, Mr. Croteau? A. It may connote the fact that they are tickled to death to give up to the natives. The worst inference that you can place on it is that perhaps at least they see some women around and having been probably on duty for a good number of years or months or probably away from female company they are tickled to death to be caught by them. 1610

Q. But you see nothing indecent in that picture? A. Nothing indecent, no, sir. Probably in bad taste.

Q. Now look at the cartoon on the opposite page, page 67. A. Yes, sir.

Q. There is a female person in the center of that cartoon. Would you say with over-sized breasts, considering the balance of her person? A. Well, it is a very poorly done, cartoon, and I will concede the over-sized breasts. 1611

Q. And the over-sized hips and thighs? A. I will concede that, Mr. Hassell.

Q. And the legend underneath that: "At the U. S. O. in New York they just gave us cigarettes." That is what one of the soldiers is saying? A. Yes, sir.

Q. Do you derive any indecent connotation from that cartoon, Mr. Croteau? A. I do not. The worst I could derive is an impropriety.

1612 Q. What would the impropriety be? A. Well probably as suggesting that they do some necking or do anything other than smoking these Turkish pipes.

Q. Now, turn to page 73, the color photograph "Golden Mould." This model is in a recumbent position, is she not? A. Yes, sir, she is.

Q. Apparently she is only covered with a sheer or wet and sheer silk-like material thrown across her body and whatever she is lying on? A. That is correct, sir.

Q. You wouldn't say that there is any indication of any clothing underneath this material she is covered with? A.
1613 It does not indicate any clothing, no, sir.

Q. Now, do you consider that picture indecent, lewd, or lascivious in what it reveals? A. Positively not.

Q. Page 77, "First Nights and Passing Judgments." Did you read that article? A. Yes, sir, I did.

Q. Did you note the references in paragraph numbered 1? A. Yes, sir.

Q. 10, 15, and 21? A. Yes, sir.

Q. And your testimony is that the language there used is not filthy? A. Not if used as a true transcript reporting actual details. I say that is a fairly reasonable example of reporting. I wish that my agents could do as well.

1614 Q. And perfectly proper to appear in a magazine of this sort, Mr. Croteau? A. Yes, I believe it is.

Q. Now look at page 83, the cartoon at the upper left-hand corner of that page with the legend underneath. "My date's at the awkward age—all hands and no dough." A. Yes, sir.

Q. Does the "all hands" reference in this legend as being mentioned by one girl, who has her mouth open, to the other, seated, have any connotation of indecent use of the hands by the escort of this person? A. If the reader wishes to apply it, obviously.

Q. What would you imply from it? A. I imply exactly what it says. He is at an awkward age and he has awkward hands. 1615

Q. Awkward hands? A. Yes.

Q. It doesn't say awkward hands, does it? A. Well, he is all hands. An awkward child is probably all hands and all limbs.

Q. Don't you think an awkward child is all feet, usually, he stumbles about? A. Well, that is probably a more accurate description.

Q. You see nothing indecent in that cartoon? A. No. The worst inference that one could draw is an impropriety. 1616

Q. Now, referring to page 89, the scantily clad figure in the lower right-hand corner of that picture. A. Yes, sir.

Q. You say there is nothing indecent, lewd, or lascivious in the scarcity of clothing on this model in this color photograph? A. Nothing but what you could see every day on a circus ground or in a theatre.

Q. Now, referring to page 94 and page 95, "Goldbricking With Esquire," and take the fourth item therein, the one beginning at the bottom of the first column on page 94. A. Yes, sir.

Q. And extending up to the top of the next column. A. Yes, sir. 1617

Q. Have you read that? A. Yes, sir, I have.

Q. About the two luscious blondes reposing in the berth of this man when he comes to occupy it? A. Yes. I have read it, Mr. Hassell.

Q. And he tells one of them that he is sorry, "One of you girls will have to leave." A. Yes, sir.

Q. Do you find any indecent, lewd, or lascivious connotation to that alleged joke? A. I do not. I think that in his

absentmindedness he made a very frank statement. Of
1618 course there is a second interpretation to it, and that is the dirt that is intended there.

Q. Why do you say absentminded? What is there in it to indicate that he was absentminded? A. I imagine if I walked in to my berth and I found two women in it I would be a little bit embarrassed and possibly wouldn't think quite clearly.

Q. And you think this was a slip of the tongue on the part of the man? A. I say that is the inference that I got upon reading this thing. If you want to go back further
1619 and want to imply a filthy inference, you can imply exactly what it says here "One of you will have to leave".

Q. A filthy inference, isn't it? A. Yes.

Q. That would be a filthy inference, wouldn't it? A. Yes, sir, it would.

Q. Now look at item 15, which is the fourth item in the fourth column of page 94. A. Yes, sir.

Q. The he and she.

"I see your husband has been promoted to a master sergeant. I suppose he's brilliant and knows everything?

"She: Don't fool yourself, he doesn't suspect a thing."

Is that a double entendre joke? A. I think it is intended
1620 to be, yes, sir.

Q. Do you think it is intended that an indecent connotation should be derived from it? A. Oh, I think the connotation is in bad taste. I don't think it is indecent.

Q. Take item 24, which is the first item at the top of the second column on page 95. A. Yes, sir.

Q. "Home on furlough the soldier was surveying his sweetie whom he hadn't seen in months: 'Slimmer, aren't you?', he asked.

"'Yes', she replied, 'I have lost so much weight you can count my ribs.'

"'Where,' asked the G.I. with a gleam in his eye, 'do I start?'" 1621

What do you think that means, Mr. Croteau? A. I think it means exactly what it says. I think he intends to start counting the ribs and he is making no bones about it at all.

Q. Do you think that is an indecent connotation? A. It is an improper connotation; it is not an indecent one.

Q. Item 27, which is the last item in that column—

A. Yes, sir.

Q. "The beautiful Army hostess, newly arrived in camp, thought she would take a nude dip," and so forth. She scampers out of the water without any clothing on and gets the dishpan for a shield, and there is no bottom in it. 1622

A. Yes, sir.

Q. What do you think is the meaning of that? A. The meaning of that is plain. It is obviously in very bad taste. I don't see that you can call it as obscene. It is rather an embarrassing situation and probably very improper.

Q. Would you say that it is the reporting of an indecent incident? A. Of an improper incident; I shall not concede indecency.

Q. You would not say there was anything indecent about it? A. I don't think so. It is a situation that is brought about in a very natural way and is not planned that way. 1623

Q. Now, look at item 28, immediately under that:

"'Have a good time at the party, daughter dear, and be a good girl.'

"'Make up your mind, Mother.'"

Do you see any indecent connotation in that? A. No. I don't see that it is indecent. I think it is intended to be humorous.

1624 Q. Does it imply that the girl thinks she might not be a good girl? A. She might be a bad girl if she did a lot of necking. She doesn't necessarily have to go beyond that.

Q. Ordinarily, when being a good girl is referred to, what does it refer to, sex contact? A. Ordinarily, I don't believe so.

Q. Look at item 30, the buck private item in the same column, lower down. "I'm afraid we can't have much fun tonight", and so forth. A. Yes, sir.

Q. Do you see any indecent connotation in that? A. No, sir; I don't.

1625 Q. You think that is perfectly proper, do you? A. I think the girl is looking forward to a grand petting party, probably, which does not necessarily imply sex.

Q. The last item in that column, "Pardon me, Miss," said the sentry"— A. Yes, sir.

Q. Do you see any indecent connotation to be derived from that? A. No, sir; I do not see any indecent connotation.

Q. That indicates that this female person is going in bathing in the nude, doesn't it? A. Yes, sir.

Q. And the sentry says: "It ain't against regulations to undress, lady". A. That is correct, sir.

1626 Q. You say it is not indecent for a soldier to suggest undressing to a lady under those circumstances? A. I don't think he suggested it. I think she is undressed. I don't think anything here was prearranged or planned.

Q. Now, take the cartoon joke, the 35 item, the very last column at the center of page 95, showing the soldiers camouflaged as trees peeking at the girls in bathing, and one about to go in, and the legend underneath: "You're sure there are no soldiers around here?" A. That is right, sir.

Q. Apparently one girl said that to another. A. Yes, sir. 1627

Q. Is there any indecent connotation that could be derived from that joke? A. I think not, sir. I think the girls are entirely ignorant of the camouflaged pictures and Army procedure. There was nothing intentional on their part.

Q. You think it is perfectly proper for soldiers from behind camouflage, to look at young ladies in bathing in the nude? A. I do not consider it is proper, sir; it is very bad taste.

Q. You don't think there is anything indecent in the picturization of such a scene? A. I say it is not indecent, no, sir. 1628

Q. Item 36, the one immediately following the cartoon we have just adverted to. This is Willy in the bushes and it turns out he is 79, darn it. Have you read that? A. Yes, sir.

Q. Have you read that? A. Yes, sir, I did.

Q. Is there any indecent connotation to be derived from that? A. Nothing indecent. It is in bad taste.

Q. Nothing lewd or lascivious in it? A. I think not.

Q. In your discussions of this testimony with counsel, particularly the Varga pictures, did you suggest to counsel that you were going to supply backgrounds to some of them, or did you discuss that with him? A. I made no suggestion whatsoever, sir. 1629

Q. You didn't discuss that with counsel? A. No, sir; I didn't discuss it with counsel.

Q. Mr. Croteau, would you say that the New Yorker magazine is the same type of magazine as Esquire magazine? A. It is very similar and probably could be placed in the same brackets, yes, sir.

Q. It carries the same class of material? A. Yes, sir.

1630 Q. It is published for men? A. It is published for men, yes, sir.

Q. Does it say it is published for men? A. I don't believe it does, no, sir. I think it is generally accepted that it is for men.

Q. That is your conclusion, that it is published for men? A. I understand from the New England distributors that the majority of its circulation is sold to men.

Q. But you didn't derive that from any printed matter to that effect in the magazine itself? A. No, sir; I didn't

1631 arrive at that conclusion from any printed matter in the magazine.

Q. Would you say that Time magazine is the same type of magazine? A. I don't believe Time belongs in exactly the same bracket. I believe it is more informative, sometimes probably more scientific, more generalized.

Q. Now, is Time magazine a weekly news magazine? A. Yes, I believe it is, yes, sir.

Q. And Esquire is a monthly magazine? A. Yes, sir; that is correct.

Q. And it doesn't carry news? A. It reports news items at various times. It doesn't carry a regular news feature the same as Time does.

1632 Q. What kind of news items does Esquire carry? A. The reporting of theatrical productions or scientific treatises like Pyknic girls, and so forth.

Q. Is that a news item? A. I said scientific treatises.

Q. I thought you said a news item. A. No, sir.

Q. Your attention was called to a black and white picture some three inches tall by two inches wide in the third column of page 44 of the August 2, 1943, issue of Time, a picture of Ann Corio. Underneath the name "Ann Corio"

is the word "l-o-g-i-c-a-l". What does that mean? A. L-o-g-i-c-a-l, I am afraid I don't know the meaning of it—you mean logical? 1633

Q. I just wondered why "logical" under the name "Ann Corio".

Well, aside from that, that is not a very distinct picture, is it? A. No, but it is a pose in which I have seen Ann Corio on various occasions.

Q. When you saw this picture you thought of Ann Corio as you have seen her at times. Did you? A. Not necessarily. As she is represented right here, sir.

Q. You can't tell from this picture whether she has any clothing on the upper part of her body or can you? Apparently she has. A. I can't tell from the picture, but I can tell you from what I know that she has. 1634

Q. Apparently she has in this picture. Doesn't she have a jacket on, or something? A. Yes. That is what is known in the profession as a leotard.

Q. As a what? A. A leotard.

Q. Now, you think this picture in this issue of Time magazine is comparable to what pictures in Esquire, if any? A. It is comparable to the diaphanous pictures of the Varga girls. As a matter of fact, that leotard is a cellophane-like garment which is worn on the diaphanous nude and under certain light on the stage it is impossible for anyone even in the front row to distinguish that the performer has a garment on. 1635

Mr. Bromley: You mean it is completely transparent?

The Witness: It is completely transparent: yes, sir. We lost a case in Boston about four weeks ago on the same thing.

By Mr. Hassell:

1636 Q. Now, your attention was called to page 18 of the September 16, 1942, issue of Yank. Do you recall that? A. Yes, sir; I do.

Q. The picture of Mrs. Alexander Kirkland. A. That is correct, sir.

Q. Gypsy Rose Lee. A. Yes, sir.

Q. That is in black and white, too, isn't it? A. That is right, sir.

Q. And even the umbilicus in this picture is covered, isn't it, Mr. Croteau? A. Gypsy Rose Lee usually keeps
1637 her umbilicus covered even in the worst features of her tease. She is probably the most modest of the strip tease artists.

Q. Do you know of any pictures in Esquire comparable to that picture? A. Yes, sir; I do.

Q. What pictures? A. I don't recall the exact issue now, but I think it is the Folies Bergere in which there are five sets in the picture.

Q. Now, your attention was called to Life magazine of July 12, 1943, page 78. The one in the night club. A. Yes, sir.

Q. Do you recall that? A. Yes, sir; I do.

1638 Q. What pictures in Esquire are comparable to this picture, Mr. Croteau? A. I don't quite recall any right off-hand now, Mr. Hassell.

Q. Now, your attention was called to Time magazine of February 15, 1943, at page 40. A. May I interrupt you, Mr. Hassell, to say that on reflection I think that last picture which you showed me in some features recalls the strip pictorials in one of these issues of Esquire.

Q. What strip pictorials? A. Where there are six plates

on two pages representing the can-can, the grind and the bump. 1639

Q. Those are the drawings? A. The drawings; yes, sir.

Q. That you stated were very good representations to those movements in burlesque shows? A. That is correct, sir. That is the nearest that I can associate with that picture.

Q. Now, your attention was called to the February 15, 1943 issue of Time, page 40: "Shall I have this baby?", Respondent's Exhibit 14.

Do you recall that? A. I don't know that I do, sir.

Q. Here (handing Respondent's Exhibit No. 14 to the witness). A. Yes, sir; I do. 1640

Q. Will you point out to the Board the humor in that article, if any? A. I fail to see any in it.

Q. I see. What feature in Esquire does that advert to, or is that comparable with? A. I don't know as I can associate it with any particular feature in Esquire.

Mr. Bromley: It is intended to be compared with "Dear Doctor Diddle".

Mr. Hassell: I object to counsel supplying it to the witness. I will get at it.

By Mr. Hassell: 1641

Q. Now, counsel has suggested that this was intended to be associated or compared with the "Dear Doctor Diddle" joke. Just suppose you compare it. How would you compare that to the "Dear Doctor Diddle" joke? A. Well, I think it is dry, and it doesn't connote any particular thing: "Have your baby. Don't mention your condition to the sailor". I don't say that it is—

1642 Q. Is that article you have there— A. Well, down below here where it says: "That you can take action against the innkeeper", that compares with it to some degree.

Q. But you say there is no joke in this— A. It is a likable type of humor, yes.

Q. Now, you have changed your statement that you formerly made. You do want it understood, and you state now, that this thing has some humor? A. I want it understood that there is a resemblance in the humor in this article as compared to that part of the other. I don't say that it is identical.

1643 Q. You don't see any humor in the "Dear Doctor Diddle" joke? A. I think it runs in a rather humorous vein, yes, if the individual wanted to apply humor to it; otherwise, it did not contain too much of a joke to it, as I see it.

Q. But when I first handed it to you and you read it, you said you could not see any humor in it. A. I had not gone through this part of the paragraph, sir. I was reading over here (indicating).

Q. You hadn't finished reading it until counsel suggested to you that it was to be compared with the "Dear Doctor Diddle"? A. I hadn't read up to there at that time, no, sir.

1644 Q. I show you Respondent's Exhibit 15, being Time magazine for January 18, 1943. Your attention was called to page 75 thereof. What matter in Esquire is comparable to that matter there? A. I think the Esky features are comparable to this one.

Q. But that is not a cartoon you are referring to there, is it? Isn't it the marked matter in the text of the page? A. You want the marked matter? I am sorry; I was reading this.

Q. But you would say the cartoon strip on that page is comparable to the Esky cartoon? A. Well, in character 1645
it is a cartoon which resembles Esky.

Q. Go ahead with the text of that. A. Well, I associated it with the cartoons in Esquire that I read in one of the features.

Q. What cartoon in Esquire? A. Well, I think they are in the Esky features where the nudes are being depicted as having heavy breasts, and so on, where Esky is peeking from behind the bushes.

Q. It is the language here and not the cartoon, though; is it? A. That is correct, sir.

Q. Just what is the language that reminds you of the 1646
Esky strip or cartoon? A. "Each week's strip has been built around a separate guy and decorated with damsels as breasty and near-nude as Caniff dared draw them."

Q. Do you think that is a good description of the Esky cartoons? A. Well, it is certainly associated with it. I should think it is, particularly the mermaids in the Esky strip.

Q. You think it is just as bad or not as bad to describe cartoons by words such as described here on page 75 of Respondent's Exhibit 15 as actually showing the cartoon strip and accompanying them with descriptive words spoken by the participants or actors in this strip? A. Well, I 1647
think that I have seen some cartoons that in themselves were obscene, but the description of them was not.

Q. Mr. Croteau, you mentioned Inspector-in-charge, Tennyson Jefferson, in your testimony yesterday. Do you know Mr. Jefferson? Do you have personal contact with him? A. The last time I saw Mr. Jefferson was several years ago.

Q. Was he inspector-in-charge then? A. No, sir; he was not. I don't recall the name of the inspector. His name

1648 began with a "B" and he lived in Melrose. That's all I recall at this time.

Mr. Ellis: Breslin, isn't it?

The Witness: Breslin, yes.

By Mr. Hassell:

Q. Would it surprise you to know that Mr. Tennyson Jefferson, after your testimony yesterday, advised us that you were unknown to him or any inspector handling obscene matter in the office of the inspector-in-charge at
1649 Boston? A. It would surprise me if he said that; yes, sir, because I have talked with Mr. Jefferson in his home at Reading at the time of a very important case three or four years ago.

Q. And further, as far as Mr. Tennyson is able to ascertain, you have never visited that office? A. That is correct, not since I have been the executive secretary.

Q. Are there any publishers who contribute to the fund maintaining your organization, Mr Croteau? A. To my knowledge; no, sir.

Q. Do you know the business of all the contributors and members of your organization? A. No, I do not, Mr.
1650 Hassell.

Q. You could not testify positively that there are no publishers contributing to it? A. Not under oath; no, sir.

Mr. Hassell: That's all.

Chairman Myers: Any questions, Mr. Bromley?

Mr. Bromley: Yes, sir.

Redirect Examination by Mr. Bromley:

1651

Q. You said yesterday that in the theatrical world, the phrase "Go flub your diddle" was an accepted phrase. Tell me what it means, please. A. I think that as it is intended in the burlesque presentation, it means "Go jump in the lake", or "go chase yourself", or something of that effect.

Q. If "diddle" is used in that connection in a burlesque or other show in Boston, is any attempt made to expurgate it or take it out of the script? A. I know I have never attempted to take it out, nor has the city censor.

1652

Q. Now, are most of your activities in connection with the censorship or inspection of magazines, exercised on behalf of the defense of publications or in support of the prosecution of publications? A. I think it is safe to say that approximately 95 per cent is devoted to the support of the prosecution. This is a very unusual case.

Q. In other words, it is very unusual for anyone representing the New England Watch and Ward Society to appear as a defense witness in support of any publication. Is that correct? A. That is correct, sir.

Q. So far as you know, have any of the Thorne Smith novels referred to in the advertisement of the Literary Guild in the March issue of Esquire, ever been banned, in New England? A. No, sir; I know they are being sold there.

1653

Q. During the noon recess, at my request, did you read the article "Many Wives too Many", appearing in the August issue of Esquire? A. Yes, sir; I did.

Q. Does the reading of that article change your opinion in any way as to the obscenity or decency of the August issue of Esquire? A. No, sir.

Q. Did you find anything in the reading of that article

"Many Wives too Many" that is in any wise lewd, lascivious,
1654 obscene, indecent or filthy? A. No, sir; I did not.

Q. Can you tell me whether or not your opinion as to the decency of Esquire is or is not reinforced by other censorship bodies with respect to these cited issues? A. I think my opinion is reinforced by other bodies such as the New York Society for Suppression of Vice and the Illinois Vigilante Society, and so on.

Q. You mentioned, I think, a thing I didn't know before, that the city of Boston had a city censor. Is that a public office like police commissioner? A. That is part of the
1655 mayor's office known as the licensing division, and the head of that division is known as the city censor.

Q. Does he have authority to prevent the sale and distribution of obscene magazines, among other things? A. Not an obscene magazine, no, sir. That jurisdiction lies in the power of the commissioner of police.

Q. Has the city censor, police commissioner, or any other official in Boston ever banned any of the eleven issues of Esquire now under consideration? A. Not to my knowledge.

Q. Do you know what the National Order of Decent Literature is? A. I do.

Q. What is it? A. It is an organization devoted to the
1656 examination of magazine publications.

Q. And on its list there appears from time to time such publications as in the judgment of that organization are obscene or indecent. Is that so? A. That is correct. We receive the list regularly.

Q. Are you familiar with the list? A. Yes, sir; I am.

Q. Can you tell us whether or not any of these eleven issues has appeared on this proscribed list of N.O.D.L.? A. As a matter of fact, I know they never did.

Q. I hand you what purports to be ten lists running from January, 1943, through October, 1943, and ask you whether those are the lists of the N.O.D.L. listing magazines which are by that organization held to have sinned against one or more provisions of its code for clean reading? 1657

Mr. Hassell: I object—

Mr. Bromley: I am just identifying them, Mr. Hassell.

The Witness: Yes. Facsimiles of the same list I have received at the office.

By Mr. Bromley: 1658

Q. Are you familiar with the Code for Clean Reading of the National Order of Decent Literature? A. I am, but I have never committed it to memory. I have seen it from time to time and I am familiar with it as I have seen it here.

Mr. Bromley: I offer these ten lists in evidence.

Mr. Hassell: I object, if it please the Board. Here we are attempting to pile dubious matter on top of dubious matter. Here are some lists that this witness undertakes to identify, of an organization that has an alleged code or a code with respect to decency in literature, that is not in evidence. 1659

I submit that this matter would be of no value to the Board.

Mr. Bromley: May I say in answer merely that the code for clean reading of that organization appears on every list so the standard is expressed?

Chairman Myers: That may all be true. I doubt the competency of that on the further ground that

1660 it is probably hearsay as far as this witness is concerned.

The objection is sustained.

Mr. Bromley: May they be marked for identification?

Chairman Myers: Surely. They should be marked for identification.

(The documents above referred to were marked Respondent's Exhibits 17-A to 17-J, inclusive, for identification.)

1661 *By Mr. Bromley*:

Q. In connection with the picture in Esquire of the five girls from the Folies Bergere, I show you an issue of Life for August 16, 1943, and ask you whether there is therein contained pictures of the same night club presentation? A. Yes, sir; the same night club presentation except they are not in color and probably not as effective.

Mr. Bromley: I ask that this issue of Life for August 16, 1943, be marked for identification.

1662 (The document above referred to was marked Respondent's Exhibit No. 18 for identification.)

Mr. Hassell: I object to that on the same grounds.

Chairman Myers: That will be noted when it is offered.

Mr. Bromley: I offer this issue of Life in evidence. It is now marked for identification Respondent's Exhibit 18. I call particular attention to the pictures on pages 63, 64, 65, and 66.

Mr. Hassell: The same objection.

1663

Chairman Myers: It is admitted subject to the objections Mr. Hassell has made heretofore.

(The document heretofore marked for identification Respondent's Exhibit No. 18 was received in evidence.)

Mr. Bromley: I want to call attention to the pictures on the first and second pages of the series.

Mr. Hassell: Did you say first and second pages, counsel?

Chairman Myers: Pages 63 and 64.

1664

Mr. Bromley: Will you mark for identification, please, the issue of Life for May 31, 1937?

(The document above referred to was marked Respondent's Exhibit No. 19 for identification.)

Mr. Bromley: I offer that issue in evidence, which has now been marked Respondent's Exhibit No. 19 for identification, calling particular attention to the Minsky Brothers article and the spread of pictures on page 21.

Mr. Hassell: I object to this and I might also add to the objection that I don't see that it is proper redirect examination.

1665

Chairman Myers: What have you to say on that point, Mr. Bromley?

Mr. Bromley: It is redirect because of his attack on the disclosures made by the pictures which I introduced on direct examination.

Mr. Hassell: I submit, if the Board please, I sim-

1666 ply went over the testimony that counsel went over in his direct examination, which I had a perfect right to do.

Mr. Bromley: Well, I have tried to make a selection of pictures out of the many, many thousands which are as close as I can think of to the Esquire pictures.

Now, you seemed to think, Mr. Hassell, that the pictures I introduced did not contain the same amount of undrapedness as Esquire's, so I have got some new completely nude women taken on the burlesque stage.

1667 Chairman Myers: Your objection is overruled, and it will be received subject to the conditions previously stated.

(The document referred to was marked Respondent's Exhibit No. 19, and received in evidence.)

By Mr. Bromley:

Q. Assuming that burlesque has a sensory appeal, Mr. Croteau, to many people, would that fact, in your opinion, render the descriptions of burlesque or illustrations thereof obscene, lewd, lascivious, filthy, or indecent? A. No, Mr.
1668 Bromley. I repeat again, it may be becoming irksome, but I want to say many things in and of themselves are obscene. Any number of things may be very offensive to society but the description of them in a report or in an article does not constitute obscenity.

Q. Is it your position also that people can draw obscene, lewd, lascivious, filthy and indecent suggestions or implications from almost anything that relates to sex? A. If an individual were so constituted that his mind were deranged

and he may be a sexual pervert and degenerate or moron, he may derive a sexual implication from anything. A picture, a piece of hair, a piece of clothing, that is commonly acknowledged by all psychiatrists. I do not purport to be one. I don't know anything about it, I only have a general knowledge of the thing, but on the whole I can say that it is so. 1669

Mr. Bromley: That is all.

Recross-Examination by Mr. Hassell:

Q. Does burlesque have a sensory appeal? A. To a minority it does, yes, sir. I mean I visit burlesque houses and see the same three or four rows of bald-headed men down in the front row week in and week out and to me I can't see but that those men are abnormal to go and see that sort of thing. 1670

Q. But to you, Mr. Croteau, that has to visit burlesque shows six times throughout the week, it is just a sort of a pain in the neck, isn't it? A. It is a doggone unpleasant job, Mr. Hassell.

Q. Now, you said you read this article in Esquire, "Many Wives Too Many"? A. Yes, sir.

Q. Do you think it is not indecent to visualize, as in an article of this sort, having six wives and thereafter assigning to them each their respective duties, and especially assigning them to their duties and discussing their duties with respect to sex? You say that that is not an indecent matter? A. No. I was quite impressed when I read the article with the amount of liberality that the article had taken. I think he went just as near the brink as he could, but I fail to see that it was indecent. It is certainly in bad taste, the entire article is. 1671

1672 Mr. Cargill: While Mr. Hassell is finding his voice, I would like to ask a question.

Did I understand you to say in your former testimony that the Watch and Ward Society had changed its policy and rules on obscenity?

The Witness: No. Its rule on obscenity is not a hard and fast rule, sir. It is more elastic now and it has been since 1934. Prior to that time they considered the thing as a whole and not parts of it.

Mr. Cargill: Well, is that generally known? Was it advertised that they had changed their rules?

1673 The Witness: There was an announcement to that effect at the time to the trade, yes, sir.

By Mr. Bromley:

Q. What you have just stated is backward, isn't it? A. Pardon me.

Q. What you have stated about your policy is just backward, isn't it? A. I don't quite know what you mean.

Q. You said your policy used to be to consider material as a whole and not parts of it. A. I don't quite follow you, Mr. Bromley.

Q. Well, maybe I didn't follow you. Go ahead. A. Well,
1674 up until 1934 the New England Watch and Ward Society would review or examine a book or magazine and they would state their opinion whether or not the material contained therein was obscene, if the book contained only two sentences, the entire book was considered obscene. Whereas today it takes a more liberal point of view. That is, it does not consider the entire book or magazine obscene because it contains some questionable passages.

Mr. Cargill: You have answered my question.
The Witness: Thank you. 1675

By Mr. Hassell:

Q. Referring to Respondent's Exhibits 18 and 19, I will refer to 18 first, which purports to carry some scenes of pictures of women from the Folies Bergere. Will you refer again to the November, 1943, issue of Esquire, page 61? A. Yes, sir.

Q. And look at this Respondent's Exhibit No. 18, and tell me where in that Exhibit 18 there is a description of the Folies Bergere as in Esquire comparable to this "Here are 1676
five perfectly good reasons why service men and mere civilians pause for laughter, libation, and libido at the Folies Bergere." A. You mean you want me to compare the text or the pictures?

Q. Well, do you find anything in the text in the Life article of this sort that you find in Esquire, especially with reference to the libido? A. Oh, I don't think there is anything here so far that I have read, except probably that you could say this sentence here, "I love my wife but oh you kid loveliness." I mean a double entendre, or second inference could be applied there.

Q. That is the only thing comparable in the text that you 1677
find comparable to the matter I have read? A. Not knowing the definition of Callipygian, I can't say that there is any similarity.

Q. Not knowing the definition of what? A. Callipygian. It is defined here as Callipygian beauties.

Q. Now, referring to Respondent's Exhibit 19, to the picture shown on page 21 thereof, did the New England Watch and Ward Society, through you, examine this issue of Life

magazine? A. I remember having examined that magazine.
1678 yes, sir.

Q. And did you pass that? A. Yes, sir, it was passed.

Q. The lower picture there? A. This one here, sir?

Q. In the right lower corner, shows poses of these ladies pictured entirely nude, doesn't it? A. I won't say that it does because it is very possible that they are wearing leotards.

Q. Well, suppose they are, can't you see the nipples on most of the breasts of these women? A. You can if they are wearing leotards. I might say, Mr. Hassell, that an arrest was made in the Morris Casino in Boston and the girls were
1679 brought before a justice of the Municipal Court and the reason we lost the case was because they produced the leotards that they had on. Now the text of the statute states that they must be entirely lacking in any costume. I am the first to admit that the costume doesn't do a thing because it is absolutely transparent; it is practically cellophane and form-fitting.

Q. Now, this text of the statute was of the State of Massachusetts? A. Yes, sir.

Q. You do not have reference to the Postal Obscenity Statute, do you? A. No, sir, I don't.

Q. Well, aside from that statute, would you consider
1680 these pictures of Life obscene? A. I do consider them obscene in stage presentations, yes, sir.

Q. I mean in this magazine, do you consider those obscene? A. No, I don't.

Q. But they show the breasts and the nipples of the females there? A. That is correct, sir.

Q. You think it is perfectly proper? A. Well, it is presented every day in the burlesque house and so is this picture.

Q. Your Society would not object to a magazine carrying pictures of this sort of females with a very small triangular shaped cloth over the pubic area and nothing at all above the waist? A. That is correct, sir. 1681

Mr. Hassell: That is all.

Mr. Bromley: This copy that you have been referring to is of an issue of Life back in May, 1937. Now the Post Office never did anything about it, did it, Mr. Hassell?

Mr. Hassell: Oh, I can't tell you, Mr. Bromley. I don't want to make a statement to be a form of evidence. We have, from time to time, excluded from the mails issues of Life magazine, I think. 1682

Mr. Bromley: Well, if this one was excluded you will prove it, won't you?

Mr. Hassell: It is not incumbent upon me to prove anything about Life or to prove anything about Life magazine. Life magazine is not under consideration and I object to this whole line of testimony and have until I am almost hoarse.

Mr. Bromley: Well, I don't want to suggest even by inference to the Board that I have put into evidence a magazine which has been excluded from the mails because I did not intend to do so. It was my information that this magazine was never excluded by the Post Office Department and that it was mailed second-class in 1937. That was my point. 1683

Mr. Hassell: It may be possible that it was not excluded. As a matter of fact, we don't have the facilities for reading every piece of material that goes through the United States mails. It runs into the hundreds and thousands of tons of material every

month. We don't have any such force as that. Occasionally material such as that gets by. That does not prove it is not obscene.

1684

Redirect Examination by Mr. Bromley:

Q. Now, directing your attention to Respondent's Exhibit 18, Mr. Croteau, to the pictures of the Folies Bergere girls, I want to ask you whether this text, in your opinion, is not the equivalent in moral implication to the use of the word "libido" in Esquire under this Folies Bergere picture, and I read from Life: "But notwithstanding such near-disasters, the Folies Bergere has managed to establish itself as unique in at least one respect: its tall, leggy show girls are probably the best-looking, the highest paid and most gorgeously costumed in any night club anywhere.

1685

"Located but one block from Billy Rose's Diamond Horseshoe, long recognized as the most dazzling showcase for I-love-my-wife-but-oh-you-kid loveliness, the Folies Bergere has succeeded in usurping that distinction."

Mr. Hassell: I object to the question, and submit that this witness is not qualified, from anything that I have heard, as an expert on the interpretation of the English language.

1686

Chairman Myers: Well, you asked the same corresponding question.

The objection is overruled.

The Witness: I would say that the implication was almost identical to what appears in Esquire.

Mr. Bromley: That is all.

Chairman Myers: Anything further?

Mr. Hassell: That is all.

(Witness excused.)

Chairman Myers: We will take a recess for ten minutes. 1687

(Whereupon, a short recess was taken.)

Chairman Myers: Proceed, gentlemen.

DR. CLEMENTS C. FRY, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Bromley: 1688

Q. Your name is what? A. Dr. Clements C. Fry.

Q. Clements C. Fry? A. That is right.

Q. And you live, Dr. Fry— A. 1253 Trumbull College, New Haven, Connecticut.

Q. Trumbull College is a part of Yale University, is it? A. Yes, it is.

Q. What is your profession? A. A doctor of medicine, and a psychiatrist.

Q. Now, will you tell the Board something about your educational background and the work that you have done? A. Well, I have a B.S. degree, and also an M.D. from 1689
Northwestern. I was for two years resident at Boston Psychopathic Hospital after serving a very general internship at Louisville General Hospital.

In 1926 I went to Yale University as psychiatrist to the University Health Service. Since that time I have been appointed as a lecturer in psychiatry with professorial rating, and my main work is with the student body at Yale and a few other colleges.

1690 I served as psychiatrist to Wesleyan University for five years from 1928 to about 1933.

At the present time I am in charge of the psychiatric division of the University Health Department at Yale University.

I have written, with Dr. Howard Haggard, one book called "The Anatomy of Personality" and I have just written a book, which has been published, "Mental Health in College" in collaboration with Dr. Edna Rostow.

This book is a survey of the ten years experience from 1926 to 1936, and views the types of problems that we see
1691 in the University Health Department.

I am also psychiatric consultant at the New Haven Hospital and on the courtesy staff of Hartford Retreat and also trustee of Fairfield State Hospital.

Q. Have you had any work with college girls? A. Yes.

Q. Where? A. At New Haven. They have been private patients referred from Smith, Vassar and other colleges.

Q. So that your psychiatric experience has been very broad as far as college youth is concerned, is that right? A. It is.

Q. Are you doing any work for the government at the present time? A. I am.

1692 Q. What is that? A. A special piece of work for the National Research Council which is investigation of psychiatric problems in the armed forces.

Q. And in the course of that and other work, about how many detailed case histories are you familiar with, and have you studied? A. Well, in the last six months, working over this particular government problem, we have gone over about four thousand histories. I am familiar with many more. I suppose a couple more thousand at least.

Q. Have you ever had occasion in your professional ex-

perience or in your studies of case histories, to find therein referred to, as contributing in any degree to abnormalities or sexual problems or weaknesses of college youth, the magazine Esquire? A. I have not.

Q. What can you say generally your opinion is as to the effect of magazines generally upon sex problems of college age youth? A. Personally I don't feel they have any great effect upon college youth at all.

Q. Have you found them, in your experience, to be a factor of any importance at all contributing to sexual delinquencies? A. No. Of course, I might have to modify that in terms of what particular magazines you are referring to.

I don't know whether these photographic types of magazines—are they called magazines—these little booklets that are put out of photographs of various poses and positions in sex.

Q. Do you mean just photographs, pornographic practices? A. Yes.

Q. I have never seen them. I don't know what they are called. They are not what I comprehend within my question as magazines.

Doctor, have you examined the eleven issues of Esquire complained of in this proceeding? A. I have.

Q. And have you particularly examined the Varga girl drawings in the issues? A. I have.

Q. Based upon your experience are you able to express an opinion to the Board as to what effect this material would have, if any, upon college youths? A. I have.

Q. What is that opinion?

Mr. Hassell: I object. The same objection as before.

Chairman Myers: The same ruling. The objection is overruled.

The Witness: In my opinion, I don't believe they
1696 have any effect upon youths; At least, with my cases. I have never seen any of these cases that have been affected by these particular pictures.

I think the abnormal boy, so-called abnormal boy—I had better say first that I don't only see abnormal boys, but I see normal boys, as well—I think some of the abnormal youngsters who are sex perverts—I wouldn't be surprised if they wouldn't use these pictures or any other pictures or anything as stimulation.

1697 They use religious pictures as sex stimulation, especially those boys who have a fetish. They may use a stocking or a hat or a dress or a shirt, or anything else to stimulate them, from that standpoint. But they already have in their minds the fact that they are going to be stimulated. The thing is not brought to them. They go looking for it.

Q. In your opinion, is there anything in these Varga girl drawings which would tend to corrupt the morals of college age youths? A. No, nothing.

Q. Or lower their standards of right and wrong toward sexual matters? A. No.

1698 Q. Or stimulate sexually impure thoughts? A. No. I might qualify that. I would like to know what you mean by "impure thoughts."

I think, as I said, a good many pictures will stimulate boys to a sex thought. Whether that is improper or not is according to your own definition of what impurity is.

I have seen boys who had these pictures in their rooms and would laugh about them and comment about them, but I don't believe they were necessarily impure thoughts.

They were comments, as they would comment or whistle at a girl's figure. 1699

Whether that is impure, or not, I don't know. I doubt it.

Q. Have you examined in these eleven issues the other pictorial matter like the Sultan cartoons? A. Yes.

Q. And the Esky comic strips? A. Yes.

Q. And all the other cartoons and pictures? A. Yes.

Q. Is your opinion the same with respect to those pictures? A. I think pretty much. I think that in general they are a little more of a sex humor type of thing. I don't believe that they stimulate immoral thoughts, but I think it is common sex humor that the college youth has.

He will comment on those things and make remarks usually in a rather humorous manner himself. 1700

Q. Do you think the fact that he does that is morally disintegrating or morally detrimental to him? A. No.

Q. Do you think this kind of sex weakness expressed in this humorous vein is rather advantageous than otherwise? A. If it is in the setting of the whole living and life. If it is a continuou thing all day long and a chronic affair, I would say that after all the boy was a little lopsided in his sense of values.

Q. Have you read the stories and articles like "Portrait Over the Fireplace" and "Many Wives Too Many" and the theatrical columns of Nathan, Seldes, and the other textual matter in these eleven issues of Esquire? A. I have. 1701

Q. Is your opinion the same with respect to them so far as obscenity and detrimental moral effect is concerned? A. It is. As a matter of fact, those articles, I thought, were very good, especially the one on burlesque. I don't think the one Pyknic girls was too good, it was all right, but scientifically it was fairly good.

Q. Are there burlesque presentations in the town of New Haven? A. There are not.

1702 Q. There are none? A. They usually go to Bridgeport.

Q. Are there burlesque shows in Bridgeport? A. There used to be. I don't know whether there are at the present time.

Q. Would you think the Paul Gallico article on burlesque if read by college youth, especially Yale men, would have any detrimental effect on them? A. I do not.

Mr. Bromley: That is all.

Cross Examination by Mr. Hassell:

1703 Q. How long have you been studying Esquire for this case, Doctor? A. How long?

Q. Yes. A. I think it was about a week or two ago, and I have been here since last Tuesday night and I have been reading it as I was sitting over in my hotel room, all the time. I have read a great many stories other than the ones he inquired about.

Q. You read all the material and looked at all the material especially pointed out in these eleven issues? A. Yes.

Q. How much time, all told, have you spent in examining this material and studying it? A. Well, I can tell you. I have been in my room most of the time since Tuesday,
1704 especially in the last couple days, waiting to be called and most of that time has been spent looking over these magazines. I have gone over each separate article about three times.

Q. Are you ordinarily a subscriber or reader of Esquire? A. I am not.

Q. Have you read the magazine as thoroughly before? A. In the past, years ago, I read it.

Q. How many years ago? A. About five or six.

Q. You were a subscriber to it then? A. No. 1705

Q. You saw it occasionally? A. Yes.

Q. What is your daily fee for testifying in a case of this sort, Doctor? A. Do I have to answer that?

Chairman Myers: Oh, I expect this is a pertinent question bearing upon the case.

The Witness: It is?

Chairman Myers: Yes.

The Witness: I don't know what it is going to be, to tell you the truth.

By Mr. Hassell: 1706

Q. What arrangements have you with the publishers of Esquire as to your being paid to testify? A. No arrangement.

Q. No arrangement? A. No. They asked me how much I would charge them, and I told them I would wait until I got through.

Q. So they agreed to pay you anything you charged? A. No, they didn't say a word about that.

Q. So the arrangement with you is that you are to be paid anything you ask for substantially? A. I don't believe so.

Q. What are your usual charges for testifying? A. I have never testified before in my life. This is the first time I have ever been in court so I don't know what the fees are. 1707

Q. I am wondering whether your fee would be comparable to that of Dr. Tillotson. Do you know him? A. I know him, yes.

Q. He said his ordinary fee was five hundred dollars. A. Well, I'm glad to know that.

1708 Chairman Myers: Don't forget, Doctor, you are just as good as he is.

By Mr. Hassell:

Q. How many days did you spend on this before you came down here, Doctor? A. Well, I don't think I spent many days. I got the magazines on Saturday and I spent most of Sunday afternoon and part of Sunday evening reading them before I came down here.

Q. You are going to include that time in your bill for your services? A. I will have to ask Dr. Tillotson. I
1709 wouldn't ordinarily do it.

Q. Now you stated that you had, in the last six months, examined case histories, as I understand you— A. Yes, sir.

Q. —of about four hundred cases? A. Four thousand.

Q. Four thousand. I beg your pardon. Four thousand cases. A. Yes, sir.

Q. Did you interview everyone of these individuals? A. Not every one of them, no.

Q. How many out of the four thousand? A. About two-thirds.

Q. Two-thirds? A. Yes. I have also in that six months period seen about two hundred students.

1710 Q. You took the case histories of about two-thirds of this four thousand? A. That is right.

Q. In the last six months? A. That is right.

Q. How long did you spend with each? A. With each history?

Q. Yes. A. I can't tell you exactly. I did it in two ways; first, I have an assistant, this Mrs. Rostow that I referred to, who has abstracted these histories under my direction, a great many of them. Some of these histories I have only

gone over the abstracts, others I have gone over myself. It usually takes you about half an hour, forty-five minutes, something like that, fifteen minutes, according to the history. 1711

Q. Fifteen minutes, half an hour, or forty-five minutes for each history? A. That is right.

Mr. Bromley: Are you sure you are talking about the same thing? He is asking you, Doctor, how long it took you to take the history, not to read it.

The Witness: Take the history?

By Mr. Hassell:

1712

Q. Yes. A. Oh, that is a different thing. Some of these histories are one interview, a great many of three or four or five, some of them go on for a year and even more for a longer period. Some of these patients we have seen over a period of four years, especially the more difficult type of case. There is no history that the boy has not been given a full hour. It has usually taken an hour at least to get a history of his problem, his background, and so forth.

Now, in doing this, I must say we have a form which we have him fill out, which has to do with the age of his father and his mother and their backgrounds and their educational standpoint, and the standpoint of nervousness, and 1713
so on, the marital situation, where they live, whether it is a rural or small town, or whatever it is, a city; so this form that we have gives us our technical material, which is a time-saver for us. Then the intimate history, that is, the problem that the boy comes to see you about, which may be nervousness or may be a sex problem, or it may be almost anything. Then we confine ourselves to that and try to build from there, allowing the patient to tell his own story and

1714 see what comes of it, and then question him from that standpoint, whatever we find.

Q. Now these four thousand patients you refer to as having gone into case histories of during the past six months, were they cases of abnormalities? A. No.

Q. Or diseased condition? A. No. I can tell you a little bit about this. Perhaps I had better explain what they are.

The National Research Counsel came to me and asked me to try to outline and study the question of psychiatric problems in the armed forces. This investigation was endorsed by the Surgeon-General of the Army, the Surgeon-
1715 General of the Air Forces, and the Surgeon-General of the Navy. The idea being to find out, not how poorly do these boys do in the armed forces, but how well they do. That means getting a cross section. We feel that our patients are more or less a cross section at Yale University.

The book that I wrote had about 1257 cases. We classified as abnormal 105. They were what we call the sex cases. The rest of them were what we considered of the minor nervous disorders or some personal problem.

To get into it a little more fully for you, about 21 percent of our patients, freshmen, freshmen that we have seen, come to see us with sex as a particular presenting problem. That
1716 might mean that masturbation might be the problem, or it might be heavy petting, which is a very common thing, which gets them upset and rather nervous, or it might be a question of an attempt at intercourse, or it might be intercourse, or anything along that line.

As I say, 21 percent of the freshmen come to see us with that as a presenting problem.

About 35 percent of the sophomores, 35 percent of the juniors, and 35 percent of the seniors come to us presenting their particular problem in terms of sex.

About 55 percent of the graduate students come to us with that as a basis. 1717

Now, about one-third of our cases are graduate students. As they get older it seems that they come to the psychiatrist with sex as a presenting problem a little more often than when they are freshmen. In the freshman year it is usually more of a question of family relations or scholarship difficulties or social difficulties that they are troubled with.

Q. Each one of these four thousand cases came to you voluntarily? A. Not necessarily. They are either sent to me by the deans of the various schools, or they are sent to me by the counsellors or through other physicians in the University Health Department. A boy may come to the Health Department complaining of insomnia or a stomach ache or indigestion or diarrhea or anything else, and after the physician has examined him and he feels that it is an emotional problem, then he usually presents that case to me, but 40 percent come on their own. 1718

Q. Is there any difference then in the willingness and freedom of the patient in answering the questions whether he was sent to you involuntarily, or whether he came to you voluntarily? A. Not a great deal, no. I think I can honestly say that if he is coerced, if he is sent by some person who says to him "Something is wrong with you, you are nuts, you better go over to see the psychiatrist and be psychoanalyzed" then we spend a little more time with him because he comes to us with a chip on his shoulder; or if it is a case of sex peepers, or a case of feeling— 1719

Q. Sex peeping? A. Sex peeping.

Q. What do you mean by that? A. Well, that is the so-called peepers. Once in a while you get a kid who goes around peeping in windows and so on who is picked up by the police.

1720 Q. How many of these 4,000 that you examined in the last six months did you ask the specific question whether they read Esquire? A. I will tell you what I did.

On the question of sex we have an outline in which we try to get their total sex history. We start out this way: We ask the boy how he was introduced to sex, when he first ran into the question of sex, who introduced it to him, how did it come about, was it through another boy, was it something in his own thoughts, or how did he come to be confronted with this situation at the particular time.

We then ask him if he ever had intercourse, we ask him
1721 about masturbation, and in masturbation we ask what stimulates him, what are the various factors that seem to stimulate the boy towards this act.

If it is a question of intercourse, we go into some detail about it: Is it a prostitute, is it a so-called nice girl, do you know the girl, are you in love, how did you happen to do this, how did you happen to feel that you had to have sex relations.

If it is a question of petting, again we go into some detail about how that boy happened to take this on.

One of the main things we find is that a great many of the boys who get into sex difficulties start quite early in
1722 their careers, and they are usually introduced to it by other boys through mutual masturbation or being told about it or something of that nature.

In a few cases—we had a course, French 41. When I first went to Yale that was the course that seemed to stimulate a great many boys. It was a French literature type of thing, and many boys would be bothered by the fact that they were aroused by this particular type of literature, and they would be very ashamed about it in some cases, or they would be worried about it, and they would think there

was something wrong, and they would come to see us, or some friend would send them to us. 1723

I might say this, in addition: Most people feel that a psychiatrist, of course, believes in freedom of sex. As a matter of fact, we do not. We don't feel that a fellow should have that type of freedom and do as he pleases. We don't encourage them.

I might say we rarely ever advise as to what these boys should do. We present to them the fact of what is the function of sex, and, personally, I feel that in presenting it in that way they seem to get a little more out of it than if we tried to scare them or tried to coerce them or what not.

In general, the psychiatrist, I believe—or at least I, believe there is a function to sex. The first function is the creation of children, a biological function. 1724

The second function is in answering the sort of urge that seems to be in the body.

The third is a question of pleasure, and the fourth is the consummation of love between man and woman.

That is the usual line we take with the youngsters, saying: "This is a sociological as well as a biological problem."

We don't advise what they should or should not do. We discuss the thing from various angles.

I might say that we don't take up the religious angle of the problem. In certain cases where the boy is religious, if there happens to be a pastor around that we have faith in, we might send him to him. In the past I have sent a great many cases to Father Riggs, who used to be the Catholic chaplain, or Mr. Lovett, the Episcopalian chaplain. We worked in cooperation with those people. 1725

Q. Doctor, these boys are influenced in their special urge or sex life, by things that they read. They are at times in-

1726 fluenced by pictures they see? A. At times, they are influenced; yes, sir.

Q. Would you say they would be affected by beautiful near-nude pictures? A. Some boys would, yes.

Q. These boys that you are talking about now in this 4,000, are they regarded as normal? A. I wrote a book called "Mental Health in College", and in the introduction of that I discussed that problem, stating that most of our patients are regarded by their friends as normal people, and that the psychiatrist regards them as fairly normal, too.

Q. As fairly normal? A. Yes, that is the statement I

1727 made.

Now, it is according to how you want to interpret that. I feel stronger than that, and I state in a chapter that it is pretty much a cross section of the university that we treat. We see the Phi Beta Kappa and the rather stupid boy, the rich boy and the poor boy, and the athlete—I have seen captains of Yale—and we see the non-athletes.

We see the very brilliant fellow and the stupid fellow. It is pretty much a cross section of the University.

I might say in addition to that that I have also acted as physician to the crew on various occasions, and have gone up and lived with about 150 youngsters that are up there.

1728 and I have become pretty well acquainted with them.

I have been a member of various fraternities at Yale and I talk a great deal about sex to them. They always want to hear about it. In general, I think they have got a pretty good straight-forward attitude toward sex. Whenever I have talked to any group on sex they have been rather serious, asked good questions, and discussed it in a pretty straight-forward manner.

Q. Doctor, would you, from your contact or knowledge of boys at Yale for a good many years, say that in their at-

titude towards sex, their education on sexual matters, their reaction to various things in a sexual way, it is a pretty fair average of the whole United States, everybody in it? A. I should think so. 1729

Q. What is the basis of your comparison? A. Other college youngsters of that particular group. I would say perhaps I would have to modify my answer and say that in terms of college youth—I know college youth, not only Yale youth—but I have seen Princeton men and Harvard men and men from small colleges.

Q. You have in mind college men. Aren't they a little bit above the average of the common run of youngsters? A. Not in the question of their drives and desires and wishes. They are just human beings from that standpoint. They may be a little more intelligent. 1730

Q. And a little better educated as to sex? A. No, they are very ignorant as to sex.

Q. They are very ignorant as to sex? A. One reason is that their families never tell them anything, they don't know how to tell them.

Q. Do you advocate sex instruction in the home? A. I do, very strongly. I don't believe in calling the boy in when he is 18 or 19 years of age and suddenly saying to him: "Now, son, it is about time I told you of the dangers of life." 1731

I think sex should be a part and parcel of life in terms of education of that child. There should not be any overemphasis on it.

A great many people feel they are educating the child in sex if they run around in the nude and have the children run around nude. That might arouse a little curiosity, if nothing else, if in the rest of their life they paid no attention to the child.

1732 Q. Is that the procedure you follow with your children, Doctor? A. I have no children.

Q. You have none? A. No.

Q. Your contacts with boys and girls have been almost entirely with college boys and girls? A. Almost entirely. I have done some work in the dispensary at the New Haven Hospital, and also at the Boston Psychopathic Hospital.

Q. You have seen some of these Varga girl pictures, you say, in the boys' rooms at Yale, I believe? A. Yes.

Q. And they would laughingly refer to them? A. Not always. I mean, it just seemed to be a part of the whole set-
1733 up. I don't think they paid any great attention to them after they put them up, any more than we pay attention to a great many pictures that we have in our rooms.

What they have done when I am not there, I couldn't tell you.

Q. I was coming to that. You wouldn't testify here, as a matter of fact, that they don't make any improper use of those pictures? A. I couldn't say that, no.

Q. Doctor, I guess you are not very well pleased at the prospect, but we will have to, by reason of the broad answers you made to the questions on direct, go through all of this matter in all of these issues.

1734 Mr. Bromley: You don't have to as far as I am concerned, Mr. Hassell.

By Mr. Hassell:

Q. Doctor, will you refer to the matter appearing on page 6 of the January, 1943, issue of Esquire? That is boxed in under the heading of "Shor Nuff".

I call your attention to the character—

Chairman Myers: We have been talking about this. If it will help some, the Board is willing to sit late tonight to get through with Dr. Fry today. However, a preacher once said there was no soul saved after the first twenty minutes, and I agree with him strongly. 1747

Mr. Hassell: I am in this position, Mr. Chairman. Of course, all this matter has been introduced here over my objection. It is all in the nature of a surprise to me.

Chairman Myers: This was introduced by you, not over your objection.

Mr. Hassell: I am talking about this so-called opinion testimony that I have objected to and consider irrelevant to the matters here involved. 1748

Chairman Myers: We don't.

Mr. Hassell: I am glad to have the Chairman's statement on that. But I want to say in my own defense that I am taken by surprise, and I think it is only fair to me not to crowd me in presenting the testimony in this case. I protest and object to going on beyond five o'clock.

Chairman Myers: If you want to go on and bring the Doctor back on Monday that is all right with us. But I was trying to say if you could get through we would sit later tonight in order to help you get through. 1749

Mr. Hassell: I understand, Mr. Chairman, but I don't see any prospect of getting through with it by five o'clock.

Mr. Bromley: Speed it up a little and you might get through.

Mr. Hassell: I appreciate counsel's desire to speed it up by my not making any reference to it.

1738 *By Mr. Hassell:*

Q. Coming to the first paragraph of this matter boxed in on page 6. There is a characterization, you will note, Doctor, of the spicy cartoons in Esquire. It says:

"Esquire, the four-bit magazine, which is always busy as a little beaver sandwiching good advice between its spicy cartoons"—do you agree with that general description of Esquire, from what you know about it? A. Spicy?

Q. Yes. A. Well, it is according to how you define spicy. In general, I guess, yes.

1739 Q. Sexy? A. Not sexy. Again, I would say "spicy" might be a good word, yes.

Q. Spicy, not referring to sexy? A. That is right.

Q. In other words, you would define spicy as something entertaining, something piquant? A. Yes, it might refer to sex sometimes, too.

Q. Sometimes? A. Yes.

Q. This matter that you saw and read practically all refers to sex? A. Yes, this here (indicating).

Q. I mean the eleven issues here; in the eleven issues. A. No, I don't know whether it is all referred to that way, to sex. I mean, if you are using sex in the very broad sense

1740 I am with you, but if you are using it in a very narrow sense, I am not.

Q. Now, how would you use sex in a very narrow sense and how would you use sex in a very broad sense? A. Well, whether it is not a very nice thing, or whether it is part of the drive within one and so forth.

Q. Is that the broad or the narrow sense? A. I think that is the narrow sense.

Q. What is the broad sense? A. Well, it is just part of the whole life picture and we know that these things exist

in the outside world and these are in our problems that we have to meet and these situations that we are up against, and so forth. 1741

Q. You mean these matters here in Esquire are certain problems that you have to meet? A. Not matters in Esquire, no, not necessarily.

Q. In this last paragraph of this article under "Shor Nuff", there is this: "Comes it then breeding (no, not that)". A. The what?

Q. "Comes it breeding." A. Oh, I see. "Comes it then breeding".

Q. Yes. "Comes it then breeding (no, not that)". What does that mean, Doctor, as referring to "no, not that", what does that have reference to? A. Well, I should say—I don't know exactly—but I infer that is just a little addition in there; that we can't refer to breeding in this magazine or anywhere else, that it is a taboo subject to talk about. Nice people wouldn't like it, so we put this in a little parenthesis. 1742

Q. You mean the "no, not that"? A. Yes.

Q. Reference to what kind of breeding that is not usually spoken of? A. In polite society.

Q. Now, at the top of the next column I will read the whole paragraph: 1743

"The pay-off on what kind of a guy this Woodhead is comes quick. He figures a gal's dancing ability is worth 20 points. Sex he gives .10. So he'd rather dance."

The pay-off on what kind of a fellow Woodhead is? Would you gather from that that Woodhead was a wood head as to sex matters? A. Well, he puts more emphasis on dancing, quite a little bit more than on sex.

Q. So that Woodhead is a sort of a dead issue? A. No, he puts more value on dancing.

1744 Q. He would rather dance? A. He would rather dance. Other people like sex.

Q. Now, down at the bottom of that column, the number 7, juking. A. Yes.

Q. "a. That's right. Just what you're thinking about". What do you think that has reference to? A. That is sex.

Q. That is sex? A. Yes.

Q. You say there is nothing in this article of an indecent character about that? A. I wouldn't say it was indecent. I think it just happens to be someone's opinion of the importance of sex. Now, whether it is the sex act, or whether
1745 it is sex in general, I am not sure. I think it refers to the sex act. Whether it refers to intercourse or whether it refers to petting or excitement of the whole thing, I don't know, but sex in general is what they are talking about, and he is putting 400 as a value on it.

Q. Now, taking this article as a whole where these things are pointed out, do you think there is anything in it of a lewd, lascivious or obscene nature? A. No.

Q. As referring to a man's magazine? A. Man's or woman's magazine.

Q. Do you know the reputation of Esquire among the boys and girls as being somewhat risque? A. I don't believe
1746 so. No, I don't think so.

Q. You never heard it had that reputation? A. No. I don't think they go out to buy it to be stimulated as far as I know.

Q. Now, Doctor, I call your attention to the matter appearing on page 45 of this January issue: "Benedicts, Awake!", the first part of the first verse and the first two lines of the last verse.

The first verse reading:

"Men sleeping besides your wives, Awake!
Awake to gaze longingly, lastingly
Upon soft skinned thigh and softer breast
Revealed by careless gown."

Do you think that is suggestive? A. Yes, it is.

Q. Suggestive? A. Yes.

Q. Suggestive of sex matters and sex contacts? A. Oh, I suppose so, or love in general.

Q. But you say that it is not indecent, lewd, or lascivious? A. I wouldn't think so, no.

Q. That is a perfectly proper subject discussed in the pages of a man's magazine? A. Yes, I think it is all right.

Q. And you say the same— A. I have been through too many poems like it all the way through, for my own personal opinion. I would get a little tired of it.

Q. But you don't think such sentiments as that of such verse or such pictures conjured up by these words are calculated to have any deleterious effect? A. No, I don't.

Q. On impressionable young men? A. No, I don't. As a matter of fact, you know it is a very funny thing. At some stage it might help them a little bit. That may seem an odd statement, but some boys might be better off stimulated by the female body than the male?

Q. You mean the perverts? A. Yes.

Q. They are very rare, aren't they? A. No.

Q. I am talking about the population as a whole. A. As a whole, yes.

Q. Are they rare taking the student body of Yale as a whole? A. Well, it is according to how you define Yale. It is rare; you see them now and then.

Q. Now, the material appearing on page 83 "Star and Garter Blues", the article by Gilbert Seldes.

1750 Doctor, did you see that show in New York? A. No, I didn't see it. I didn't see this show.

Q. So, in your examination of this article you did not have the benefit of anything that you might have gotten from seeing this show.

Now, you read this article? A. Yes, I did.

Q. This is one you read three times? A. Yes.

Q. In the first column in the first paragraph, down in the second sentence: "The scene is the old familiar burlesque routine of the court room; Clark is presiding, as an owl should; and merely as an incident Gypsy Rose Lee
1751 is the defendant against whose navel Clark finally blows a paper tickler."

Is that an entirely decent subject of conversation to write about? A. It is describing what went on in that show, I suppose.

Q. Now, going down to the next paragraph beyond the middle of the photograph: "For the past few years he has leaped into the air, clicked his heels sideways (how?) and sung of himself as "Robert the Roue from Reading, P-a," weaving and winding his frame around tall show girls, peering through his non-existent glasses into the bosoms he isn't tall enough to see unless he jumps."

1752 Do you think there is nothing indecent in that phrase? A. Well, if you pick it out that way it is a different thing to me. In terms of the whole article, I thought it was a very good description of the play. He wasn't endorsing the play to my mind; if anything, he was panning it.

Q. Now, over in the center of the third paragraph of this article on this page. A. In the center?

Q. In the center of the third column, the seventh paragraph. A. The third sentence?

Q. Yes. "There is also a character from the night clubs

who makes her breasts jiggle, and this is considered funny, but I don't think so even at the night clubs where her frankness was greater, her skill no more engaging. A stripper who does an orgiastic dance verges on the erotic." 1753

Would that last phrase convey to you anything, or what would that last phrase convey to you as to occurrences or happenings in this show? A. Well, I should think it is self-evident that it is a question of a fellow describing a very erotic dance. He states what the stripper does, and he does not approve of it.

Q. You say that it is entirely proper and not indecent to describe or advertise any review as an erotic dance? A. In detail? 1754

Q. As described here. A. As described here I would say it is perfectly all right.

Q. But a boy reading this might say: "Well now, there is my chance to see something hot", mightn't he? A. There is a possibility of that, yes.

Q. "A stripper who does an orgiastic dance." A. Most of the boys that I have been familiar with know about it, anyway. I don't think this would bother them very much. They know what it is.

Q. They have already seen the show? A. They have seen the show. Perhaps they have.

Q. Do you believe, then, that this would have no effect on the fellows you are associated with? A. Well now, it is according to how you—if you want to get a magnifying glass and look at that as the only thing, why perhaps it would have some effect, but when you take this whole thing as an article it is a very good description and a very good criticism, to my mind, and I think it would be to the average college student, of this show. If he read this article, I would doubt that he would go to see the show. As a matter 1755

1756 of fact, some of them would be disgusted with it. Others would say it wasn't spicy enough, perhaps.

Q. Now, beginning at page 97, we have the Varga girl calendar. This first one on that page is for January. You find nothing indecent in the scantiness of that lady's costume? A. No, I don't. It is like any beach. You go on any beach and you find the same thing.

Q. Now, on page 98, February. The model with the magazine, "Dreamland" draped partly over her buttocks and practically with no clothes on. Would you say that that would be calculated to excite impressionable youth? A. Not

1757 necessarily.

Q. There wouldn't be anything lewd, lascivious— A. No.

Q. (Continuing): —indecent in this? A. No.

Q. Would you have any different opinion if she had no pretense of any covering on? A. It is according to where the emphasis was and it is according to where this was, if it was hung in a museum, or whether it was well done or what not; whether the emphasis was put on certain features, and what not.

Q. Now, the March— A. I might say not features, I would say position more than anything else.

Q. Whether she is reclining? A. No. If she was a little

1758 more suggestive of the sex intercourse, or something to that effect.

Q. Now, the March Varga girl. Do you find anything objectionable in that? A. I do not; no, I don't.

Q. Now, would you say that the size of the thighs, Doctor, are a little over-emphasized here? A. I don't know. I don't think so. I don't believe so. I don't think that would make very much difference because some men like big thighs and some like little thighs and so on, and the Turks like the big fat ones, and so on.

Q. The feminine curve, the curves of a woman's body, are calculated to excite sexual desires in the opposite sex? A. Not necessarily. It might excite a sense of beauty or admiration as well as sex. 1759

Q. What do you say with respect to out and out plain nudes, Doctor, would you say that that would be more or less exciting than models scantily covered for the purpose of stimulating by partial concealment? A. I don't know what to say about that, to tell you the truth. I don't know.

Q. I see. A. It is according, again, what the position is. There would be a lot of factors to my mind that would enter into a situation; if you had a nude in a museum it might be one thing, and if you had a nude in a saloon it might be another thing. It is according to how you want to use this thing. It is according to yourself or your view of it. 1760

Q. Well, coming closer down to cases. Suppose someone paid 50 cents for a magazine to look at these near-nudes dealing with that person, do you think that enticement in a sexual way is enhanced by partial concealment of the female body? A. It is according to the individual, I would say. In the old Victorian days, if they showed their ankle, it was considered rather indecent. Now, the boys on the beach and the girls are very scantily clad and they pay very little attention to it.

Q. Then, if all of us practiced nudism, why we wouldn't be interested in sex any more, would we? A. I wouldn't say that at all. A great many people might become more interested in it, and maybe some in a constructive way and some in a destructive way and for some people it might be bad for them. I mean to suddenly take a group of young people who have been brought up rather strict, in maybe a good home, and suddenly say: "Now, you have to go to a nudist's colony and appear in the nude." I think it would 1761

1762 be quite a shock, and certainly girls no more so than the fellows. I think they would blush a little more than the girls might.

Q. Now, just where do you draw the line, that is, between nudity and partial nudity, Doctor? A. I draw it for the individual who is looking at it.

Q. What parts of the body? I am talking about the female now. We are talking about these figures. A. Yes.

Q. What part would you want covered up to make them less erotic? A. Well, it would not make much difference to me, professionally speaking. I don't believe that most

1763 boys would be abnormally stimuated by a good-looking limb. I don't think they are necessarily stimulated by a so-called good looking bosom, or what not. It again varies with those fellows. I wouldn't know what to cover up.

Q. You referred to boys brought up in decent, Christian—I assume—homes. A. Some; yes.

Q. Do you think this type of picture we are looking at now, throughout this January issue, this Varga girl, would be the type of picture you usually find in the ordinary, average American home? A. I have seen them in a lot of good homes, what I consider good homes. After all, we have to consider how the famiy approaches these things with the

1764 youngster. If they over-emphasize the dirt of sex and that sex is always impure or what not, and that to see a woman's bosom is just a terrible thing, but to see her leg or to look at pictures or what not and consider them merely from the sex standpoint, that might be a little different thing, but if you have a good healthy outlook on the matter, I don't see where it stimulates them.

Q. Have you found, Doctor, in the homes you visit, that the female members of the family are ordinarily usually pictured in display pictures of this sort, hung up on the

wall for the edification of the family and visitors? A. Some have Troy Kenny pictures of dancers. 1765

Q. I am talking of members of their own families. How would a boy like to see his own sister or his own mother pictured like this? What effect would that have on him? A. I have never seen it but one time. I know a woman who has been a model for Troy Kenny's pictures, and she had it in her home and the boy knew it.

Q. That is a rare case? A. A rare case.

Q. The only one you know of? A. The only one I have ever had.

Q. So, ordinarily, a boy in his own home does not see pictures of this sort, his mother in this type of bathing suit? A. He has seen his mother in this type of bathing suit, the 16 year old youngster who goes to the beach with his mother. 1766

Q. Which bathing suit, which month? A. I would say about May.

Q. Now, if that is a bathing suit and that verse reads— A. Not when I made that remark.

Q. —

"May's a balmy sort of month
That makes me apprehensive,
A lot of fellows get the urge
To start their Spring Offensive." 1767

What do you think that refers to, a spring offensive in a sexual way? A. It may be. It is according to how you define sex. For instance, the American girl likes to be admired and sought after and that may be a spring offensive, too.

1768 Q. Doctor, let's don't get away from this May bathing suit costume that you picked out here. A. I said I have seen women in that type of thing and others have seen them in the same thing, and I stick to that.

Q. You would call that an ordinary, usual and customary bathing costume for women on the Connecticut beaches? A. I have seen almost similar.

Q. Cut down as low as that, Doctor? A. Pretty nearly. I can't see the back part so much.

Q. There is nothing holding this costume on the front, is there? A. That is right, there usually is something.

1769 Q. That would probably be ineffective in bathing. She wouldn't have it on very long after the waves hit her? A. That's true.

Mr. Bromley: You can't see around the neck, Mr. Hassell. You can't see around the neck whether there is a string around there or not.

Mr. Hassell: The Doctor agrees with me that it is an ineffective bathing costume.

Mr. Bromley: He is just as wrong as you are, then.

By Mr. Hassell:

1770 Q. I believe you stated you find nothing objectionable about the pose? A. No.

Q. Or the costume or lack of clothing coupled with the verse in the May picture? A. No.

Q. And nothing in the April picture? A. No.

Q. Nothing in the June picture? A. No.

Q. And that picture, that model, evidently has on no brassiere. Do you note that, Doctor? A. She has not, but the artist is taking a little precaution, I guess, about that with her arm and the flowers.

Q. You wouldn't call that a bathing costume, would you, Doctor? A. No, I would not. 1771

Q. The grass or whatever she has around her waist would not withstand the waves very long? A. No, but I don't know what she has under.

Q. And the July picture and verse:

"July is a patriotic month
And you will agree—
Whoever dreamed this suit up
Took a lot of liberty!"

Would you say that is a daring costume? A. It is daring, yes. 1772

Q. But not indecent? A. Not indecent.

Q. Now, coming to the August picture, would you say that this model is reclining on her back? A. I should think so, yes, as far as I can judge.

Q. And would you say that the clothing draped around a part of her body is very sheer? It doesn't conceal very much, does it? A. Her bosoms are there—her nipples don't show—the pubic hairs are not showing. It is concealing quite a little, I guess.

Q. Can you see the umbilicus? A. No, I can't.

Q. Now, the verse there in the August number: 1773

"I find a cool secluded beach
A perfect August shelter,
But all the men who pass my way
Just look at me . . . . and swelter!"

Do you associate that with the August weather, wherever this young lady may be, or a rise in blood pressure of the men who look at her? A. Both. I don't think that is an improper thing, though. Men do it.

1774 Q. You think it would be perfectly natural for a young man to get a rise in blood pressure from contemplating these pictures? A. Most of these fellows don't get very much a rise in blood pressure, unless you are using that sort of symbolically.

Q. So, the sweltering part there is sort of an over-advertisement of the effect of this picture? A. I have never seen any youngsters get excited about these pictures.

Q. They don't tell you they get excited about them, anyway? A. As I said, I have examined a lot of them.

Q. They don't tell you everything, do they? A. They tell
1775 me almost everything. They tell me more than they tell their fathers and mothers.

Q. But, can you testify that they actually tell you everything A. No, certainly not, but I can testify they tell me more than they tell their mothers and fathers, and the deans of the colleges.

Q. How do you know what they tell their fathers and mothers? A. Because I have seen a lot of the fathers and mothers in consultation.

Q. And they have testified that the kid has told you more than he has told them? A. In certain cases, yes.

Q. So your information there is entirely hearsay, isn't
1776 it? A. Well, yes.

Q. It depends on the veracity and the mood of the father and mother? A. And the trouble the fellow is in.

Q. And how much they want to reflect on the habits and thoughts of their progeny, doesn't it? A. Will you state that again?

Q. I say, it depends entirely on the mood of the fathers and mothers and how much they want to reflect on the habits and thoughts of— A. Not if they are sincere people who want to help their youngsters. I think if you had a youngster

who had a physical illness and you went to the doctor, you would tell him everything you could about it, and give him all the information so that he could make a diagnosis. It is the same thing in terms of these emotional things. If the parents have the child's interests at heart, I think they will be pretty straight-forward and frank. 1777

Q. Now, Doctor, don't you know it to be a common failing of the lay person, and I am speaking of a non-physician, not to give emphasis to a lot of things, not to remember a lot of things that possibly they should remember? A. That's so, but we ask them questions.

Q. So, the information that you have obtained has in measure depended upon the accuracy of that information? A. Not wholly. 1778

Q. If a matter depended upon the intelligence and ability to remember on the part of the person who is telling you—in this instance the parents. Is that right? A. To a certain extent, and we then ask them questions and find out more. I might say in addition to that, that in the past—not in all cases—we have the information sometimes from their friends, and information from social workers that we send out to get that particular information. We have also certain psychological tests that we use.

Q. Now, Doctor, couldn't a boy, the ordinary, average, normal boy, get libidinous thoughts from viewing these pictures of these Varga girls, and the other matters in Esquire, without being a problem boy? A. That I can't tell, because I have not seen those fellows. 1779

Q. I see. I say, couldn't that happen? A. I don't know. I can say this: If you will allow me to I will say this: They get stimulation from a lot of things. They get stimulation from the Bible. Some boys go to the Bible and pick out things. Some boys definitely pick out dirty passages in Shakespeare.

1780 Q. I am not talking about the exceptional boy. I am talking about the average, ordinary boy. Isn't it a fact that it has been said by authorities that 99 men out of 100 have at some time in their lives masturbated and the other one is a liar? A. That is right, some people say that.

Q. And if it has been testified here that 90 per cent or more of the men have masturbated, would you accept that? A. I don't know. I would put it about 85 or somewhere near. Those are figures that have been handed down for generations and every doctor has kept repeating those figures to their patients year after year, and no one has ever gone out to find out about it.

1781 There was a study made at one of the girls' colleges which showed the girls were as bad as the men in regard to sex, but, unfortunately, I know of no good statistics on the question of the percentage of people who have at some time in their lives masturbated.

Q. So if that is a fact, you would not be able to testify positively, as a matter of fact, that this August Varga girl would not stimulate such activities on the part of the average boy? A. That it wouldn't?

Q. Yes. A. No, I couldn't testify that it wouldn't any more than I could testify that the Bible would not stimulate him.

1782 Q. I see. Now, note the September Varga girl and the verse:

"September brings us cooler days
But still I have to pose on,
Oh, Mr. Varga, hurry up
And let me put some clothes on!"

The verse there, Doctor, is manifestly designed to point to and call attention to the lack of clothing on the part of

this model, isn't it? Wouldn't you get that idea? A. Yes, I think I would. 1783

Q. Now, this clothing painted on the upper part of this model's body—and, by the way, she is in a reclining pose with one leg cocked up, isn't she—this clothing reveals her body very effectively, doesn't it? I mean, it doesn't conceal very much. A. No more than the average woman's clothes that you see these days, I suppose.

Q. The average woman's clothes? A. Evening gowns or what not.

Q. Doctor, have you ever seen an evening gown like that? A. Pretty nearly.

Q. Without any skirts on at all? A. Oh, you are talking about the upper part? 1784

Q. I am talking about all this picture we see here. A. I misinterpreted that.

Q. You have never seen an evening gown at all like that? A. Oh, just add the skirt—

Q. And you have not seen an evening gown fitting over the pubic area, the mons, as closely as this? A. If that is the mons, it is pretty high up; it is bad anatomy.

Q. The dark shadowed area adjacent to the upraised thigh? A. I see what you mean.

Q. That would be the mons, wouldn't it? A. Yes.

Q. And it is shadowed dark as though it might be showing what appears underneath? A. Yes. 1785

Q. And you would say that this picture would not be calculated to especially stimulate the average normal boy that you know? A. No, not the average normal boy.

Q. You would say there is nothing lewd, lascivious, or indecent about this pose? A. I don't believe so, no.

Q. And with respect to those two pictures, August and September, do you think a boy would contemplate his sister

1786 or his mother in such costumes as those? A. I don't know. I don't know whether that is very important or not.

Q. In other words, the females he has been raised with in his own household, never practiced the wearing of such diaphanous or revealing garments. I am talking about the average boy, Doctor. Isn't that a fact? A. He has seen his mother in negligee, he has seen his mother in bathing suits and so on, and I am not so sure that the human form as it is portrayed here is going to excite the average normal boy very much. In my experience it has not. These youngsters, to my mind, seem to take these things in their stride.

1787 the average normal boy.

Q. That is, the average normal college boy? A. Yes.

Q. He is a little more sophisticated usually than other boys? A. Not necessarily. He may be pretty protected in lots of ways, but he has gone to prep school, he has been protected by his family pretty much. That is, he may not be as sophisticated as the high school youngster, as a matter of fact.

Q. But your experience with other boys, outside of college boys, is not very extensive, is it? A. Not as extensive as with college boys. I have seen a lot of them. I can't tell you how many.

1788 Q. But it would be comparatively a few as compared with the number of college boys you have seen? A. Oh, yes. I see a certain number of boys around 15 and 16 going to prep schools and so on.

Q. Now, take the October and November pictures on pages 106 and 107. Would you describe the October costume as a bathing costume? A. Well, you caught me on that other one. I don't know whether to or not. I should think so; I am not sure.

Q. I see. It is quite a revealing costume, in that it follows the contours— A. I will tell you what it recalls to my mind. It recalls some of these professional swimmers. 1789.

Q. And the November costume, there again we don't seem to have anything holding the brassiere part of the costume up and it is cut very scantily around the upper part of the hips, isn't it, Doctor? A. Yes, but I don't know where you are going to stop on a lot of that stuff. Do you make it six inches above, or two inches, or what?

Q. I see. You wouldn't know whether it would make much difference to make that a few inches longer or a few inches shorter? A. No. 1790

Q. A few inches shorter might reveal some of the pubic area, might it not? A. Not in the back. A few inches shorter in the front would expose the bosom, the abdomen, and perhaps some of the pubic hairs.

Q. Doctor, you don't think there is anything in these pictures that would especially stimulate the boys you have come in contact with in these colleges? A. Not as far as I know. I have never seen them stimulated, and in case histories none of them have ever referred to them.

Q. And that applies also to the December number on page 108? A. That is right. Now, of course, there is a little question of what you call stimulation, too. A lot of these youngsters, sure, they would say something about this and make remarks. Now, what kind of remark? Is it a remark that will hold for them or just a casual thing? We know that youngsters do say something about sex. They know a lot about sex in one sense of the word. They don't know the biology of it or the psychological factors involved or the sociological implications. They make quite a few remarks. They don't know all the implications. They might refer to these things as in some way stimulating 1791

1792 them. I don't know if you want to say stimulating to impure thoughts or what.

Q. Doctor, you made reference to some of these boys getting stimulated by things they see in the Bible. You wouldn't compare things you see in the Bible to these Varga girl pictures? A. I don't think we can compare them.

Q. That is, from a sex stimulating standpoint. A. I have seen boys stimulated by all kinds of things.

Q. But you wouldn't compare the sex stimulating qualities of things appearing in the Bible to things you have gone over in Esquire, would you? A. I don't quite understand.

1793 Q. You wouldn't compare the sex stimulating qualities of things in the Bible to things in Esquire? A. In terms of degree, do you mean, that the Bible would stimulate them more?

Q. Yes, or Esquire more. A. Or Esquire would stimulate the more?

I have seen youngsters who have gone and searched out certain little passages—

Q. We are not talking about the exceptional—

Mr. Bromley: Let him finish his answer.

Mr. Hassell: It is a waste of time.

1794 Chairman Myers: He has a right to finish his answer.

The Witness: I have seen them go to all kinds of literature to be stimulated, and I would say certain boys would go to these pictures to be stimulated. They will go to stories, and they go look at girls on the street, and they do all kinds of things to create within themselves a certain stimulation. Now, some of us may look upon these youngsters as ab-

normal individuals, or, perhaps it may be a phase in their life that they go through and, later on, they drop this kind of thing. It may be, as I say, just a phase that they go through. 1795

Q. Have you finished? A. Yes.

Q. You want the Board to understand that you think the Bible is just as sexually stimulating as matters found in Esquire? A. Oh, no.

Q. I didn't think you did, Doctor. A. Oh, of course not.

Q. Would you compare the matter in Esquire to passages in Shakespeare—Hamlet, for instance? A. I can't recall Hamlet very well. If you will quote for me— 1796

Q. Hamlet has been referred to here. The Chairman can quote it to you, I imagine.

Chairman Myers: Doctor, do you recall the story of Abraham and his first wife who could have no children?

The Witness: Yes.

Chairman Myers: He got himself a handmaiden so he could have children.

The Witness: Yes.

Chairman Myers: Does that remind you of anything as to the Sultan pictures? 1797

The Witness: I don't think so.

Chairman Myers: And Abraham's godson, Jacob, worked seven years for the wife he thought he was going to get, Rachel, and his father-in-law gave him Leah, and he had to work seven more years to get Rachel and then he had two wives.

It looks like they used to sell women. And one picture in there is "Sold American." It looks like the only difference is they "Sold Israel."

1798 ***By Mr. Hassell:***

Q. Doctor, when you came along as a youngster was the Bible required reading in your family? A. Yes. I got $1000 from my father for reading it.

Q. By reason of the fact that it was required reading you maybe never got much kick out of it, like I do. A. I enjoyed it. I went to a church school until I was 18. I don't know what kick you got out of it.

Mr. Hassell: This would be a good time to adjourn.

1799 Chairman Myers: The hearing will adjourn until 9:30 Monday morning.

(Whereupon, at 5:05 o'clock, p. m., the hearing in the above-entitled matter was adjourned until 9:30 o'clock, a. m., Monday, October 25, 1943.)

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HEARING OF OCTOBER 25, 1943.

1801

PROCEEDINGS RESUMED.

Chairman Myers: All right, gentlemen; we are ready to resume.

Mr. Hassell: I would like to make a little opening statement before we proceed with this witness.

Saturday night for the first time I saw the record, and since I don't want to be accused of pulling a rabbit out of the hat when we come to arguing this thing, I think it is up to me to make a statement.

1802

Chairman Myers: All right.

Mr. Hassell: In the opening statement, in my statement, I see that my statement at page 7 of the record is not sufficiently full. Counsel in his statement at page 17 of the record indicated after I made that statement that he was still in doubt, as was indicated by certain portions of his answer that I moved should be stricken. This had to do with the alternative, in the event that this Board should decide that there is nothing in these issues the matters are still non-mailable.

1803

The position of the Department is that even then the matters are still of such a character that the publication does not comply with the fourth condition of the second-class Act. That is an alternative position that we propose to take in arguing this case.

Now, if counsel is, by reason of anything that I have stated here, misled, or if he thinks he has been misled, that he would have taken a different course in the examination of the witnesses that he

1804 has produced here or the witness I have produced, I am willing to enter into a stipulation with him to cover that.

Mr. Bromley: What kind of stipulation?

Mr. Hassell: Well, if in any way you think you would have produced different testimony from these witnesses. In other words, I have from the outset of this case endeavored in every way I knew how to be as frank and as free with the Respondents so that they should not be taken by surprise.

1805 As a matter of fact, as I recall when I first talked with Mr. Harding and Mr. Gingrich about this matter, after the citation had been served, I mentioned this matter. I will confess that since then I have concentrated so on this non-mailable thing that I have temporarily or apparently from what I have said overlooked the other feature.

But it is an alternative proposition, and I think this Board should give due consideration to that in the event they should decide that they will not accept a ruling of the Solicitor as to the mailability of these matters, and will set that aside and decide the publication is mailable.

1806 We should then consider the other, the alternative. Is it matter, as contemplated in the fourth condition of the second-class Act—does it comply with that by reason, of course, of its objectionable character?

Mr. Harding: I am somewhat surprised, Mr. Hassell, because I understood that you were willing to stipulate that we complied with the fourth condition except insofar as the matter might be non-mailable under the obscenity statute.

I had witnesses here on the general character of the magazine whom I dismissed, because I understood that that was your position. 1807

Mr. Hassell: My position is that you comply with the first three paragraphs of the second-class Act.

Mr. Harding: Do you have a copy of your letter to me, Mr. Hassell?

Mr. Hassell: Yes, I have read that. Apparently I did not have this in mind at that time. In other words, I didn't emphasize that at the time.

I did in this letter—I will be glad to have it go into the record—say that we were relying on the citation and, to paraphrase that, the charges in the citation here, and we contend that this matter comes under Section B of the citation. 1808

Then, this letter of October 8, 1943—do you want me to read it?

Mr. Harding: The paragraph with relation to that.

Mr. Hassell: Page 1, the third paragraph:

"The rule or citation charges that each of the issues of 'Esquire' named therein is non-mailable under 18 U. S. C. 334; that because of the inclusion of such matter the publication has not fulfilled the qualifications of the Fourth condition of the Second Class Act, 39 U. S. Code, 226; and that the publication, by reason of the inclusion therein in a generally uniform and systematic manner of matter in violation of 18 U. S. Code 334, is not a mailable periodical publication of the second class of mailable matter. As I explained to you when you called here, I shall not contend in the hearing aside from the non-mailable obscenity angle that the publication does 1809

1810 not comply with the Fourth condition of the Second Class Act."

I should not have said that.

Mr. Bromley: I think you should. That is perfectly accurate and perfectly sound.

Mr. Hassell: That is not in accord with the understanding I had with Mr. Harding.

Mr. Harding: That is what I understood.

Mr. Hassell: When I conversed with you didn't you get a different idea?

Mr. Harding: No, I did not. That is why I

1811 wrote you.

Mr. Hassell: I thought I was perfectly plain in discussing with you this particular feature.

Mr. Harding: I admit I had some doubt about it, so I wrote you, and after I got this letter I thought we were perfectly clear on it.

Mr. Hassell: After you included in your answer matter which would indicate you were proceeding along the lines of our previous conversation—

Mr. Harding: I included in the answer what was necessary.

In what respect don't we comply with the fourth

1812 condition?

Mr. Hassell: Our position is that it is inconceivable that Congress created the second-class privilege for the publication of this sort which consistently and persistently carries that type of objectionable matter.

Mr. Harding: What particular words of the fourth condition don't we comply with? That is what I am still interested in.

Mr. Hassell: The fourth condition of 39 U. S. Code 236: "It must be originated and published for

the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry". 1813

Mr. Harding: That is what you claim?

Mr. Hassell: By reason of carrying this type of objectionable material.

Mr. Harding: We must be a hundred per cent included within those things?

Mr. Hassell: That is our contention.

Mr. Harding: Well, that does put us in a position of having excused some witnesses. I would like to consider some possible stipulation with you. Suppose I try and work out something. 1814

Mr. Hassell: All right.

Chairman Myers: I got the impression myself at the outset that Mr. Hassell was not waiving anything; that he was going to stand on the notice as served. I just got that generally.

Mr. Hassell: That is what I intended to convey but I confess some of the things I said especially in this letter are not clear.

Chairman Myers: I don't know about that but I got the impression from your opening statement that you were going to rely on everything that was set forth in the notice. How, I got the impression, I don't know, but that was the impression; how I got it I don't know. 1815

Mr. Bromley: Of course, that ground was not set forth in the citation, Mr. Myers.

Chairman Myers: Yes, I think it was.

Mr. Bromley: No; no claim that we did not come under the fourth condition.

Mr. Hassell: We contend that that is embraced in paragraph (b).

1816 Chairman Myers: Paragraph "b" says: "That because of the inclusion of such matter in the publication it has not fulfilled the qualifications of second-class mailing privileges established by the fourth condition of 29 Stat. 359 (39 U. S. C., Sec. 226)".

Mr. Harding: The "such matter" relates back to 18 U. S. C. 334, which is the obscenity statute.

Chairman Myers: I beg your pardon?

Mr. Harding: The "such matter" relates back to 18 U. S. C. 334, which is the obscenity statute.

Chairman Myers: This fourth condition is the
1817 fourth condition of the classification act.

Mr. Harding: But the "such matter" referred to in the citation, "because of the inclusion of such matter", and sub-paragraph b.—

Chairman Myers: Yes.

Mr. Harding: —refers back, as I understood it, to "a", 18 U. S. C. 334, the obscenity statute.

Chairman Myers: Well, 18 does not have the effect and force of that, does it?

Mr. Harding: I thought it did.

Chairman Myers: Well, I guess we are clear on that point then.

1818 Mr. Hassell: In order to save the time of the Board and the Respondent, and myself, I wonder if counsel would be willing to stipulate from now on with reference to this witness, that his testimony will be substantially similar to that of Dr. Tillotson?

Mr. Bromley: I should have been glad, if the Board pleases, to make that stipulation before the witness testified. I don't see how I can do it in the middle of his testimony because his testimony has already been different from that which Dr. Tillotson gave.

Mr. Hassell: I have reference to those matters about which this witness has not already testified, with particularity. In other words, so far as cross examination we will understand that this gentleman's further testimony would be substantially similar to that of Dr. Tillotson. 1819

Mr. Bromley: No, I don't believe it would.

Mr. Hassell: In other words, I will have to go through this matter in detail and tire this witness out and tire everybody out.

Mr. Bromley: You have already accomplished that purpose. I don't see how you can take that position in the middle of the witness' testimony. 1820

Mr. Hassell: All right.

Mr. Bromley: If you will now announce that you will do that with future witnesses before they start and give me a chance to make up my mind on that, of course I will do it, but I don't want to do it in the middle of a witness' testimony.

Mr. Hassell: Well, where you have cumulative testimony, as I understand it, I think it is within the discretion of the Board to determine whether we would hear such cumulative testimony. We might stay here for ten years if you are going to bring all the psychiatrists of the United States here. 1821

Chairman Myers: I think the general rule on that is three witnesses on the same point.

Mr. Bromley: Well, three witnesses on the same point. Of course, this is not duplication at all.

Chairman Myers: No, I understand it.

Mr. Hassell: I would be glad to go ahead with the witness.

1822 CLEMENTS C. FRY, a witness called by and on behalf of the Respondent, having been previously duly sworn, resumed the stand and testified further as follows:

Cross Examination by Mr. Hassell (Continued):

Q. Doctor, what is the difference between a psychiatrist and a neuro-psychiatrist? A. Well, a psychiatrist is a physician who confines his work to the diagnosis and treatment of mental disorders and so-called nervous disorders and emotional factors and personality problems and so on.

1823 A neuro-psychiatrist is a man who is a psychiatrist but is also trained in neurology and has to do with the definite organic neurological diseases.

Q. Which of those are you, Doctor? A. I am a psychiatrist.

Q. You are a psychiatrist? A. I am a psychiatrist.

Q. Doctor, will you admit that the Varga girls as shown in these issues of Esquire would be attractive to the young adolescent boy? A. I think they would be attractive, yes.

Q. In what way? A. I think he would notice them. He might comment on them and he might be somewhat stimulated by them.

1824 Q. Now, would you say that these pictures are calculated to glorify the American girl? A. Glorify her?

Q. Yes. A. I suppose in a Ziegfeld way as you used that term.

Q. Just how is that, Doctor? A. I think that he emphasized the good-looking, well-built individual and the chorus girl type of individual and he claimed that was the American girl. Now, I don't know whether it is or not.

Q. But if these figures are out of proportion and having feet too large and limbs too long, you wouldn't think that

would glorify the American girl, would you? A. Not if that statement was true. 1825

Q. Now, Doctor, I believe we were at page 123 of the January issue, the "Dear Doctor Diddle" joke or whatever it may be called. Would you agree with the Century Dictionary definition of "diddle" as follows:

"To move rapidly up and down or back and forward"? A. Well, I can't disagree with the dictionary, but I think there is, as it is used with a youngster—I think there are several sides to it, and one is that to diddle around means to fool around. They use it in terms of petting and kissing, and I think they also use it in terms of definite intercourse. I think it has several meanings as used by these youngsters, and it is according to who the youngster is, I guess. 1826

Q. How do you think it is used here? A. As a matter of fact, that first joke I couldn't understand myself. That is the "Dear Doctor Diddle" joke. It reads:

"I am a young woman and I want the boys to like me, but every time I take my Scottie for a walk they admire her more than they do me—what shall I do?"

That goes over my head, I am sorry to say.

Q. I don't understand that is the one we are talking about. A. Which one are you talking about?

Q. This is the second item on page 123, fourth column: 1827

"Dear Doctor Diddle: 'I am a beautiful brunette but I have a serious problem—every time I take a bath I blush. What shall I do?"

And the reply:

"Before you undress, put on a blindfold." A. That also went over my head a bit. I couldn't quite see what they are trying to arrive at, honestly.

Q. Now, let's refer to page 137—that is the January issue. We have the air raid warden picture in color—black and

1828 some color on it—two air raid wardens at a skylight on top of the building, one looking through the skylight with his fingers in his mouth and his eyes very wide open, and the legend underneath, "And to think I gave up drawing."

What is your thought as to what this man looking in the skylight sees, Doctor? A. I suppose there is a woman involved and, whether it is a question of physique or act, or what, I don't know. It brings a lot of things to mind. It may be just a question of a petting going on which this fellow feels is amusing, or it may be that a girl is undressing or it may be dozens of things, I should say.

1829 Q. Which one do you think is the reasonable assumption? A. It is according to your own way of thinking, to my way of looking at it.

Q. Doctor, we have here a man's magazine and we have seen a number of risque cartoons and jokes.

Taking these things into consideration, and also the comments in "The Sound and the Fury" column of the publication, would you think it would be natural to assume that he is somewhat entranced by a nude he sees through this studio skylight? A. A nude or a partial nude perhaps.

Q. Now, the February issue, Doctor. I believe you testified that there is nothing obscene, lewd, lascivious, or in-

1830 decent about the Varga girl picture on page 34 of this issue? A. That is right.

Q. She is rather scantily clad, isn't she, Doctor? A. Yes, I think so.

Q. What would you call that costume, a night dress of some sort? A. I would assume that would be the thing.

Q. And it is quite transparent, isn't it? A. Yes.

Q. And, it is manifest, is it not, that she has nothing on underneath it? A. Yes.

Q. And this model is in a recumbent position, isn't she? A. Yes. 1831

Q. Now, page 65, the cartoon: "What am I bid for this one hundred pounds of sugar?"—this lady apparently being sold—or woman being sold—and I ask if her hair is dressed in Oriental style, Doctor, or can you tell? A. I can't say.

Q. She has what she might call a semi-bob. She doesn't have full-length hair, does she? A. No, that is right.

Q. And you would say that possibly she has a permanent wave? A. I would say so, yes.

Q. And would you say that she looks possibly more American than she does Turkish, or whatever this scene is supposed to represent? A. Oh, she is not Turkish, so far as I know. 1832

Q. In other words, she does not appear to be the near-East type, does she? A. No.

Q. She has light hair, rather Nordic features, and yet we have this auction sale where she is being sold by this sheik-like person with the fez and the people in the foreground and those you can see in the background are possibly from North Africa or Arabia or Egypt where they wear such clothes.

In view of those considerations, Doctor, do you think this cartoon is entirely without any connotation of indecency? A. Yes, of indecency. 1833

Q. It is entirely without any such connotation? A. I think so.

Q. That American-looking girl with light hair is here being sold as a sack of sugar to certain near-East persons. You think that is not— A. Not necessarily, no; not to my mind.

Q. You say "not necessarily". Do you mean not at all. that you couldn't get such a connotation from it? A. Some people could get that connotation, yes.

1834 Q. But you would not? A. I would not, no.

Q. Doctor, did you read the article "Home Sweet Ruby Street" on pages 76 and 77 of the February issue of Esquire? A. Yes. Again, I might say I had a little time with that. I didn't read this one three times.

Q. You didn't? A. I read it once and it was a little hard going.

Q. It was a little hard reading it once, was it, Doctor? You mean it was hard to follow or lacking in interest? A. Well, it was a question of the vernacular, I suppose.

Q. Or was it a little too dirty in its implications? A. No,
1835 it wasn't dirty to me.

Q. It wasn't dirty at all? A. No.

Q. You take the position that depicting by word or picture or cartoon such scenes as are depicted by this story—it is labeled fiction—has no indecent connotation at all? A. Not any indecent connotations, no.

Q. Now, you will note the cartoon which shows the colored woman, somewhat stout, seated in a chair in the right foreground of the picture. A. Yes.

Q. Now the foreground of the picture has a young colored man in the act of putting on his trousers? A. That is right.

Q. He is starting to insert his left leg in the trousers.
1836 In the background center is what may be a young colored woman putting a dress or something over her head. In the right foreground two apparently older colored people, the woman having a slip of paper or something in her hand. Then, to the left of the cartoon, is this statement: "Mrs. Finn entered with considerable alacrity." The story shows that that is the woman seated in the chair in the right foreground.

"Mrs. Finn entered with considerable alacrity the living quarters of the Vermillion family. She noted with regret

that Society had not yet arrived due in part to the early hour, in part, perhaps to the fact that the Vermillion's bowing daughter, Mrs. Edna Wilson and her fiance, Radiant, were not yet up. They arose when Mrs. Finn entered, sulkily rubbing their glossy fists against their cheeks. Mrs. Finn, on noting them, longed for a fan, but blamed it giddily on the Springtime." 1837

Then in the center column of that page, near the center of the column, it is stated:

"It was not the response Mrs. Finn had hoped for, and left her at rather loose ends. Thinking it better to begin afresh, she fastened her good eye severely on her notebook and presently flung at Mrs. Vermillion a new leaf, the writing on which became slightly furry as her wandering eye, cast presumably in the direction of the ceiling, caught Edna and Radiant gingerly dressing. Radiant, only half clad and suspecting the vagrant eye to be focused on him, winked slowly at Mrs. Finn." 1838

You still say that scene so depicted and described has no indecent connotation? A. Not an indecent connotation. I think it is again depicting what such, shall I call them, level of colored society might do. What their life is, how they live, what is their behavior from a sex standpoint.

In certain sections of the country it is a fact apparently that the colored do not bother to get married; they don't feel it is so important to be married, and they live with each other, and so on; that they do lay emphasis on this side of life. I mean, that is the way I would look on this thing. 1839

Q. But, Doctor, what would you think would be the reason for including such a story as this in a publication of this sort? A. I would say it was an informative type of information.

1840 **Q. You would think that the average reader of Esquire would be just inquiring into the intimate details and the manner in which a certain part or possibly all of the colored race conducts itself within the confines of its own home? A. I would think it would enter as to a lot of people.**

Q. You think that this type of article in Esquire delving into such details, into matters of this sort, has no objectionable or suggestive, or indecent connotations whatsoever? A. No, I don't think so. I would think this, it would bother certain people who have certain religious ideas and backgrounds and so forth, but to a great many youngsters I

1841 **think reading that thing, they would look upon it more or less as a sociological article and having to do with how people are living, and we are interested in that; interested in how the other fellow on the other side of the track lives.**

Mr. Cargill: Doctor, if the word "fiction" were not included in this article, would it have any bearing on this thing?

The Witness: Pardon me?

Mr. Cargill: Would the word "fiction" as appearing there have any bearing on your answer?

1842 **The Witness: If the word "fiction" were there?**

Mr. Cargill: Yes.

The Witness: No, I don't think so.

By Mr. Hassell:

Q. Now, Doctor, referring to "The Unsinkable Sailor" on page 95 of the February issue. That starts at page 30. A. Yes, I read the whole thing.

Q. And it is the denominated "article". You noticed that

as you read it, Doctor? A. I read that, I think, twice. I don't know whether I read it three times or not. 1843

Q. You really could stand reading it twice? A. Yes.

Q. Why did you have to read it twice, to understand it? A. No, I was very interested.

Q. Now, in the first column on page 95, that is a long paragraph there, beginning "but Showboat," then down past the center of that paragraph:

"In Las Palmas he went to work as a sort of contact man for an establishment known as the 'Black Cat,' and the less said about that phase of his life, the better."

What would you say that indicates as to the type of work he was engaged in? A. He was a pimp, most probably. 1844

Q. He was a pimp? A. Yes.

Q. Now dropping down past the next paragraph, into the third paragraph of that column, starting "I take the deck at a union meeting," the last sentence or two reads: "I grabbed a piece of the broken glass and I yelled: 'The first sonovabitch that moves .I'll cut his head off!' They left the room—but I went to the hospital."

Doctor, do you say that that word, the use of that word is not filthy? A. Yes. I think it is getting into the culture more or less. For instance, one time they never allowed us to use the terms gonorrhea or syphilis over the radio or in articles. Now people are using those terms, and son-of-a-bitch is getting into a lot of literature all over the place. 1845

Q. And you say "son-of-a-bitch" is getting respectable now? A. It is being referred to. It used to be when we talked about the "bastard son of England," or what not, I think it has taken on the same implications as "bastard" took on, a certain phase of our civilization.

Q. Time has been, Doctor, in referring to the past, that that was what was known as a fighting word, wasn't it? A. That is right, absolutely.

1846 **Q. Reflecting upon the parentage of the mother? A. That is right.**

Q. Of the person to whom the term is applied? A. That is right.

Q. Now you think the term is entirely decent? A. Well, they use it. The soldiers meet and they say, "You old son-of-a-bitch," they comment on it. They address each other with such affectionate terms.

Q. Well, Doctor, it wasn't used with that meaning here. A. No, not at all.

Q. It says, "The first sonovabitch that moves I'll cut
1847 **his head off." A. That is right.**

Q. In other words it was used as a depreciating and derogatory and insulting epithet here? A. That is right.

Q. It was used in its worst connotation? A. If you say "derogatory," yes.

Q. But you say it is not filthy? A. No, I wouldn't say it was filthy.

Q. Now you recall this story, don't you, that this sailor had to obtain a sample of urine and he got it in a fruit jar and he wrapped it up, and you go over in the second column just opposite the material we have been reading? A. Yes.

1848 **Q. And it says, "At any rate, then I get this touch of dysentery and the skipper sends me to a doctor and this tonsil mechanic, he wants I should bring him back a sample. So I buy me a nice fruit jar and go back to the ship to follow the doctor's orders. "Before I go ashore again, I come into possession of some keys, these keys happen to enable me to become the proud and happy owner of six quarts of whisky. So that kept me busy for a while. I finally went ashore with my little fruit jar under my arm, all wrapped in paper, as tidy and neat as a pin.**

"But I didn't go straight to the doctor. I stopped off at a bar or two—and then I visited an establishment where unfortunately a thief stole half of my clothes. So, in turn, I stole a curtain and wrapped it around myself in a becoming fashion and hurried off to the best hotel in the town. 1849

"I had grown a beard and I fancy I made quite a picture. I went into the bar of this hotel, which was all filled with captains and colonels and gentlemen in twin-screw jackets, and I set my fruit jar on a table and sat down and ordered some gin and bitters.

"Everybody was looking at me and I heard one fancy gasooney say to another 'I say! Doesn't he look like Lawrence of Arabia?' 1850

"The upshot of it was that after fortifying himself with a few quick ones, Showboat ordered the waiter to get the manager for him.

" 'What kind of a safe have you got here—a combination or a key safe?' demanded Showboat in his most autocratic manner. The manager said it was a combination.

" 'How many people working here know the combination?', asked Showboat. 'This is a very important matter which I brought here from the States. Will you keep it in the safe for me and I'll call for it in the morning,' and he handed over the wrapped fruit jar. 1851

"Then I asked for a suite of rooms and a native boy to fan me to keep the insects away, and a bottle of whisky. The next day I went to a tailor and got me a pair of pants and a pith helmet—and then I went back to the ship. We sailed that day . . . I wonder how long that manager will keep my package in the safe for me."

Doctor, you say you were interested in this article? A. Yes.

1852 Q. You were interested in this article and you read it twice? A. Yes.

Q. How did you characterize it, what type of story? A. It is the description of the life of one particular individual, a sailor, and the way he is living, and perhaps how he is going against what you and I might feel are the mores of society, how he is bucking them and what type of trouble he is getting into.

Q. Do you think this article, or story, whatever it may be called, represents the ordinary average American merchant marine sailor? A. I don't know enough about it. That is
1853 why I was interested in the article. It is one individual telling the story.

Q. Of course this "Unsinkable Sailor" title intimates or indicates that this is a modern merchant marine sailor, doesn't it? A. I don't know.

Q. Subjected to torpedoings? A. Yes.

Q. The kind of men who are getting the goods to our boys in foreign countries and Africa and the South Pacific, and elsewhere, who are risking their lives every day? A. This is one type of fellow who is doing it. There are other people who are pretty good—

Q. Regarding this article in the light of what we know
1854 about the character and the decency of the men who are actually filling the jobs, the very necessary jobs in our merchant marine, would you think this is a dirty, very objectionable article from start to finish? A. No, I don't think so.

Q. You don't think it is well in time of war to discourage decent young men who contemplate going into the American Merchant Marine, to help out in our war effort, by putting out a story of this sort, do you, Doctor? A. A great many of our boys are having a tough time, boys coming from

certain types of homes and going into the Army and Navy, and meeting with this kind of thing, and they object to it and they find it rather difficult. They suddenly find that all kinds of words are used like "pass the fucking bread," and everything else, and they are used in the Army and Navy all the time. 1855

A lot of the youngsters are having a hard time adjusting to that. That is a fact.

Q. And you think this type of thing is not calculated to discourage young men joining the Merchant Marine? A. I don't think so, no.

Q. You would say it is a fact that our Merchant Marine has multiplied many times since we got into this war? A. Oh, yes. 1856

Q. That the ordinary old type of sailor which this represents is spread pretty thin now throughout the Merchant Marine, if he is there at all? A. I happen to know a lot of queer individuals are going into the Merchant Marine, because of certain feelings about it. All kinds of youngsters are going into it and in any selection of a group of people you are going to get a cross section of civilization.

You are going to get nice youngsters and crooks and sex perverts.

Q. That is true. And that applies to the Army. You had some pretty tough characters in the regular army before the selective service was put into effect? A. Yes, and some of them were very good soldiers as long as they are in action. 1857

Q. Do you think an article of this sort as applied to the regular professional year in and year out soldier would encourage enlistments— A. Of course, we don't have enlistments in the Army now—

Q. —but would give the young draftee a feeling of confidence in the Army he is going into? A. I don't know. It

1858 might show him what he is going to be up against before he gets into it, and it might be good for him to know what he is going to be up against. I have seen instances of people put into the Navy and they have been bothered by being put in with people who curse and so forth.

I know one fellow, 32 years old, who was so bothered he was put in the psychiatric ward in the Navy.

Q. It is a fact the Maritime Commission does and has for some time maintained a school for young fellows who go into the Merchant Marine and they have carried on a campaign over the radio and in the public press and else-

1859 where to attempt to encourage young men to go into that service, is it not? A. Yes.

Q. You realize, as well as I do, that that service is absolutely essential to our winning this war? A. It is.

Q. With those considerations in mind, Doctor, don't you think this is a dirty article? A. No. For instance, I would like to see a story of various individuals who are in that group.

While I was sitting in Mr. O'Brien's office the other day I copied out a little story of a Princeton graduate who is writing on his experiences. This is a Junior Naval Reserve Officer and Military Command by Skinner of the U. S. Naval

1860 Institute proceedings, and it gives an idea of what his views are and what he thinks about it as contrasted to the regular Annapolis man.

I am as interested in that as in this. I would like to see an article by a college boy, a mountain youngster who goes into the Merchant Marine and his reactions. I would like to see some of these tough eggs who go in and how they come out. I would like to get samplings of these individuals and see how people live and what they are up against.

Q. The article you refer to, isn't comparable to the language and so forth here? A. Not the language. It gives a description according to that man's background. 1861

Q. Does that article depict the American Merchant Marine sailor of today like a character such as this Unsinkable Sailor? A. No.

Q. Going ahead with this record, at the bottom of page 95 it states:

"There is a new secretary in the union hall who isn't used to sailors or their language." Note that first sentence.

"It seems Showboat went up to her when she was alone in her office, bent over her shoulder—loop-legged drunk— and rasped, in his peculiarly hoarse and penetrating voice, 'How's chances to lower the boom on you, sister?' The girl jumped up in terror and ran screaming from the room. 'Oh, that man!' That man!', she cried. 'Help', she cried, 'he wants to do something terrible to me.' 1862

"It took quite a few people to calm her down and convince her that this is only Showboat Quinn's way of asking 'How about lending me two bucks for a cup of whiskey, lady?'"

Do you still maintain there is no indecent or filthy connotation in that language? A. Not in those terms. It is describing again what that fellow's life is like, and what he is thinking about and doing, and how he is acting.

Q. Doctor, would you admit that the new secretary in the union hall, who was not used to sailors or their language, got an indecent connotation from it? A. Oh, yes. 1863

Q. And the reader would so— A. It is according to what you mean by "indecent". She got a sex connotation in which she refers to the fact that there is a sex act.

Q. She was terrified, wasn't she? A. Very much.

Q. And she ran screaming from the room? A. That is right.

1864 Q. And she thought this man wanted to do something terrible to her? A. Yes, that is right.

Q. And she did get an indecent connotation from that? A. I don't know whether it was indecent. She got a connotation that this man wanted to have sex relations.

Q. I see. Wouldn't that be indecent? A. I don't know. The act itself might. The desire to—I don't know whether that is indecent or not.

Q. You don't like to use the word "indecent" as applied to any of this matter, do you? A. I will if I run across it in those terms.

1865 You are trying to pin me down. You want me to use it and I don't think it applies.

Q. You just don't want to be pinned down? A. You are asking my opinion and I feel that it is not indecent.

Q. Now, coming to the March issue, Doctor, page 9. We have the advertisement of Thorne Smith's three wittiest, most ribald novels. What does "ribald" mean, Doctor? A. Well, I don't know the accurate definition. I would like to see it in the dictionary.

Q. You would like to what? A. I would like to see the dictionary.

Q. You would like to see the dictionary definition? A. Yes.

1866 Q. In preparation for this case you didn't look up the meaning of that word? A. No, I did not, unfortunately; not enough to be accurate. I have my own idea about it.

Q. What is your own idea? A. As I read along I think it is somewhat of a Rabelaisian humorous type of thing that has a lot to do with man's relation with women from the standpoint of sex.

Q. Would you say that a good synonym for that word would be "smutty"? A. No.

Q. Now, Doctor, have you read the Thorne Smith books

referred to or advertised in this article? A. I have read some of them, yes. 1867

Q. Which ones did you read? A. I have read "Topper". I am not sure whether I read "Skin and Bones", or not. I have read some of his things—I think "The Bishop's Jaegers".

Q. That is not mentioned here. How about "The Glorious Pool"? A. I have not read that.

Q. Now, do you think "Topper" and "Skin and Bones" advertised here are tersely represented in their Rabelaisian aspects or lusty or smutty aspects by this advertisement? A. Well, they state that it is Rabelaisian; they don't use the term "smutty". 1868

Q. Did you find those books ribald and Rabelaisian? A. Yes, I found them rather amusing.

Q. Let's read part of the text of this advertisement. Under the heading: "America's one and only Rabelaisian humorist," in large black type with an exclamation at the end there appears this:

"Only in the pages of Anatole France, Voltaire and Rabelais himself can you match the lusty, zestful fun of Thorne Smith's novels. He is the modern master of daringly sophisticated satire. His characters are completely uninhibited in their passionate tones; and no writer of genius has ever ventured to create such thrillingly improper situations! Such skillfully humorous skating on thin ice is unequalled in recent literature. And yet behind Thorne Smith's splendid comedy, is the deeper, keen wisdom of the classic master that he really is! He punctures hypocrisy and sham modesty. It is this that marks the difference between the 'frank' classic and the merely shocking book. Thorne Smith is as shocking as Rabelais—and as wise! As fantastic as Cervantes—and as full of truth. 1869

"Glance at the titles of the three sparkling Thorne Smith

1870 novels included in this entirely new volume—(the Thorne Smith 3-bagger—the successor to the Thorne Smith triplets, and the Thorne Smith 3-decker) and you'll decide you MUST have it for your very own. It is a big $2.50 value (and spicily illustrated by Roese!), but we have decided to let new Guild subscribers have it without cost! Your's free if you join the Guild now."

That description, coupled with the pictures on the cover of the book shown in the advertisement and the picture of the nude in the lower right-hand corner, with the man holding up a garment in front of her—would you say that

1871 that advertisement holds out shocking reading matter to be obtained by the reader? A. I would say that is a good description of Thorne Smith's novels, the ones I have read.

Q. I see. And you wouldn't take any exception to the description from a decent point of view? A. I am not so sure that these things have so much effect upon youth as a lot of people believe they do. I don't believe they do.

I happen to know about Thorne Smith—"The Bishop's Jaegers"—I happened to get it because a youngster gave it to me and said it was funny. He said it was Rabelaisian—I don't know if he used that term, but that was his inference. I read it and thought it was Rabelaisian.

1872 Q. Was he sent to you as a psychiatrist for advice? A. No, he happened to be my own nephew.

Q. He was not a patient? A. No.

Q. Have these Thorne Smith books entered into any of your case histories of any of your patients? A. No, not that I know of.

Q. You would not necessarily know of every piece of literature or alleged literature that had? A. I do try to find out what they have been reading, not necessarily in terms of this, but, how does this fellow live, what are his habits, what does he do, and so forth.

Q. And do they always frankly and freely tell you about all of what might be called off-side reading? A. Some of them do, yes. 1873

Q. Now, referring to page 10, second column of the "Sound and the Fury", "On putting Esky in a cap and gown", notice this purports to be the reproduction of a letter from an English teacher in a small town high school, and the parenthetical description of himself is "You probably envision a bald-headed gentleman gazing at Varga vistas of forbidden fruit, but as a matter of fact I am quite young and that's not my dilemma."

Do you think the description "Varga vistas of forbidden fruit" is a correct description of the Varga girl pictures? 1874
A. I never looked at it that way, no.

Q. This gentleman goes ahead to say that he is tempted at times to bring a copy of Esquire into his senior literature class for certain articles therein, but that "the only way in which this could be done without disturbing small town codes of conduct would be to somehow camouflage that bulge-eyed masher on the front of each issue and let it appear like the front of, let us say, Harpers or the Atlantic."

Do you get such a reaction about the front covers in Esquire? A. No, I don't.

Q. Or Esky? A. No. 1875

Q. Why do you think he is pictured with such large bulge eyes? A. It is a caricature.

Q. What would you think the point of the caricature would be? What was the reason for it, if any? A. I never thought about it before.

Q. If that drawing of Esky had been referred to as "that seen-everything eyes", you wouldn't agree with that description of it? A. Well, I have never stopped to think about it before until you brought it up.

Q. Page 36, Doctor. This is the Varga girl picture of

the March issue. What would you call her costume, Doctor?
1876 A. Pardon me.

Q. How would you characterize her costume? As a sleeping garment or as a bathing costume or an evening costume or a night dress or just what? A. I don't know what it is, to tell you the truth.

Q. That is just a scanty costume? A. Scanty, yes.

Q. It doesn't cover very much of this young lady's figure in the picture, is that right? A. Well, it doesn't cover her thighs or arms and part of one breast. It covers a bit of her shoulder.

1877 Q. It makes quite prominent the left breast with the point and all, doesn't it? A. Somewhat.

Q. Would you say the look on this model's face is intended to be alluring? A. Alluring?

Q. Yes. A. Yes, I suppose so.

Q. Do you say this picture would not be calculated to sexually stimulate young men at Yale that you come in contact with? A. You mean sexually stimulating? Well, they might say: "There is something pretty good, boys"; they might make some remark about it. It might sexually stimulate them.

Chairman Myers: This seems to be a convenient
1878 place to take a recess.

(Whereupon, a brief recess was taken.)

Chairman Myers: All right, we will resume.

By Mr. Hassell:

Q. Doctor, referring to page 49 of the March issue, the cartoon with the legend underneath: "I wonder how the Sultan knew this was my birthday". What is the reaction you got to that cartoon, Doctor? That it is a birthday present sent to one of these— A. Yes.

Q. (Continuing):—Soldiers? A. Yes, I do.

Q. What would a soldier do with such a birthday present, with a scantily clad slave girl in possibly North Africa— A. Well, the French have their own ideas. I assume that is a French soldier. 1879

Q. You think a French soldier could make use of such a birthday present? A. I should think in some way or other.

Q. But you wouldn't derive any indecent connotation from this cartoon? A. Not necessarily. I think that a lot of this humor when it first hits you, you know it has something to do with the relationship of men and women and that in some way there is sex involved but it is usually humor that goes around throughout the country. I don't go any further than that when I see it. There it is, and I stop right there. 1880

Q. Doctor, you wouldn't say that this portrays a mores of what you know about the French? They customarily don't have slave girls? A. No. They have girls, they tell me.

Q. I think probably, Doctor, you got the same reaction out of this that I got. Here a choice bit of femininity has been turned over to the soldier. A. That is right.

Q. That he can make use of for the time being. A. That is right.

Q. Now, page 68, we have an article by Gilbert Seldes, "The Fall of the Flattering Word". How many times did you read this article, Doctor? A. Oh, a couple of times I should say. I don't remember whether it was two or three, but I read it several times. 1881

Q. It wasn't very interesting to you? A. Yes, it was.

Q. It was? A. Yes.

Q. Do you agree with the sentiment expressed in the second full paragraph in the second column which reads:

"Now, it's a rare odd thing that clothes which *do* enhance the sexual attractiveness of women are sold to them for

1882 smartness—'to make you more poised', to give something called 'allure'; rarely on the justifiable ground that clothes will reveal—and—conceal so craftily that men will be driven mad with desire." "That form of copy is restricted to perfume. Given perfumes, the copy writer goes berserk. (Or maybe only becomes realistic.) Here you have all the traffic will bear in the way of suggestion—beginning with the fact that such things which suggest impropriety and running through quite a lot of suggestiveness, in a nice way, of course, but omitting feelthy pictures. Just why odors should be advertised carnally and fabrics not, I can't be

1883 sure."

Do you think of that statement in this article in connection with the perfume counter cartoon which will be referred to later in Esquire? A. Do you think of that in terms of the cartoon?

Q. Yes. A. Yes. If I remember the perfume, such things as shocking and daring and alluring.

Q. Doctor, in connection with that statement did you note any other advertisement in Esquire, in the magazine Esquire? A. You mean in the same terms?

Q. Yes. A. Well, I don't know. I can't recall whether any stood out in my mind.

1884 Q. Suppose you get the June issue there and look at page 153. There we have an advertisement on the first column showing a young lady in very sheer black somewhat scanty night dress or something of that kind, described underneath: "Repeating a success! Diversion" in very large black bold-faced type.

Underneath appears: "Folly ensnared in black lace and translucence! Rhapsody for the uninhibited! Cobweb black lace above 'Au naturel' midway, sheer black rayon chiffon below. By Lady Leonora. 32 to 40 $7.98".

Would you say that that advertisement occurring in the

June issue is in accord with the sentiment expressed in the Seldes article of the March issue to which we are referring now? A. Not altogether, no. 1885

Q. Since that advertisement is in a man's magazine, would you think that would have any connotation? A. Not to me, because—is it a man's magazine?

Q. Yes. It says here that it is. Did you have that in mind all the time, Doctor? A. No.

Q. It says: "Esquire, the magazine for men". That is the masthead. A. I am sorry. I see many women reading it and the advertisements.

Q. But usually the clothing advertisements in this magazine are men's clothing, isn't it? A. Yes. 1886

Q. Why would you think a man reading Esquire would be interested in a gown described as that one in that June issue, Doctor? A. Well, he may want to get it for his wife. I don't know, for a gift.

Q. Would that go well with the wife, such a costume, Doctor, "Diversion"? A. It is according again to how that term is used. If it is used for diversion because of the fact that he has nothing to do at the office all day and so forth and he comes home for a little diversion.

Q. You think it is diversion in that way by coming home and dressing up their wives in some such costume? A. Oh, no, but it might be very agreeable to do such a thing. Some men I suppose would consider it that way. He might say "Now go ahead and get dressed up in it for me and let us have a little private peep show". I can't quite say that. 1887

Q. He probably wouldn't get very far if he made such a suggestion to his wife, would he? A. I don't think so.

Mr. Bromley: Mr. Hassell, you know, don't you, that that is an advertisement of one of the largest

and most respectable department stores in New York
1888 City, or hasn't that occurred to you?

Mr. Hassell: I wouldn't doubt that, counsel. I don't think that alters the situation here.

By Mr. Hassell:

Q. Now, referring to the third column of this Seldes' article, the one we are referring to, beginning with the first full paragraph in that column:

"When we approach the young of the species, the innocents at college, we are a little franker. A 'show off V-neck' or
1889 a 'skirt pleated for action' (on a bicycle, so be quiet) are at least 'functional' (of course, the great surprise is to find all descriptions of clothes using the term 'fly-front'. Where I come from we didn't talk like that in front of the women folks, we certainly didn't)."

Do they talk like that in front of women folks out in Connecticut? A. Oh, I have heard youngsters all over the country—I don't know whether exactly like that, but they are a little franker in their talk—

Q. They are a little franker than you ordinarily find in common polite society? A. No. I think it is according to how you define that. I have seen an awful lot of nice
1890 youngsters who make little remarks about things, not in a dirty way. They refer to things, articles of clothing and so on. The sweater girl. They might comment on their own girl and say: "You look like a sweater girl" and rub their hands and let it go at that.

Q. You think this kind of conversation or talk is common between these young fellows and their girls and their relations in their homes? A. They don't take it up as a topic of conversation and say "Let us talk about the fly-front", or something like that. I think it comes naturally in the

thing that has passed by. No one places any emphasis on it. 1891

Q. It doesn't make any difference whether there are women around or not? A. No. For instance, I can tell you a typical thing. A fellow had one of these zipper fly things and went to the bathroom and it caught in the zipper and the girls up there thought it was amusing. No one said very much about it. The poor fellow had to get out of the place. The girls thought it was sort of amusing. They didn't discuss it at any great length. That is the way youth is, a lot of them. There are still a lot of people who don't like these things mentioned in front of them. There is no doubt about that. There are certain girls, perfectly nice 1892 girls, not that they are too squeemish in their life, they feel they just don't like that type of thing.

Q. Talking about the population as a whole, would you say there are more of these sophisticated persons than there are the other types as you just mentioned? A. They think they are sophisticated along this line, yes. I mean, they seem to express these things and accept them, if that is sophistication. They accept these things.

Q. You think there are more of those than there are those who don't accept it? A. That I can't tell you. There are an awful lot of them and very nice people, very nice youngsters so far as I can see. 1893

Q. But your experience has been with the young college men at Yale, hasn't it? A. No, it has been at Princeton, Harvard, girls at Vassar, Holyoke, Smith, Radcliffe. Small Southern colleges. All over.

Q. Have you ever had any experience with girls from Wellesley? A. Yes.

Q. You would say that all of these girls and boys are more or less sophisticated with respect to matters of this sort? A. Not all of them. Again, you get your various groups, and there are certain groups. At all of these colleges you

1894 get individuals who don't talk in these terms and don't like it. There are other groups that just seem to accept it as part of the day's journey. There are other groups who always turn to anything that is filthy. I mean they are always talking in a filthy manner or trying to turn anything they say into what you call an impure relation. They keep on sex all the time, so that I don't see how you can say all of them. You always have various groups and individuals.

I can't imagine, say boys at the Dwight Hall, which happens to be a YMCA religious organization, discussing these things at their meetings, but I can tell you that every

1895 year they invite me to talk about sex and they ask all kinds of questions and they have girls there. Fellows that have brought their girls into the class, into the lecture.

Also I give a course in so-called mental hygiene at Yale. Fellows have asked me if they could bring their girls down at the time I am going to give this talk on sex. They accept it and that is all there is to it. Nobody goes out laughing or thinking it is a funny thing.

Q. Now, refer to page 107 of the March issue of Esquire. There we have a black and white full page cartoon under which appears the legend "It seems like somebody's allers clamorin' to somebody to open up a second front, don't it?"

1896 Doctor, would you say that such a scene as this, that is, referring to the woman nursing one kid in her arms and another one bawling on the floor who wants such attention, is a common everyday scene? A. No, it is not a common everyday scene.

Q. But you say there is nothing objectionable about this at all? A. I don't think so, except that one feels a little offense at this sort of thing. Some people don't want to see pregnant women. A lot of women, when they become pregnant stay home and won't go out and show themselves.

Q. But most women when they nurse their babies in this fashion retire? A. That is right. 1897

Q. Seclude themselves from the public gaze? A. That is right. On the other hand, you see them in parks, Italian women and what not, nursing their children right out in front of everyone.

Q. But that is not the customary thing? A. No.

Q. Now, refer to the April issue, Doctor. There we have the front cover showing Esky in a reclining position with his bulging eyes looking up at two female figures. Would you say these female figures are drawn with over-sized or over-emphasized breasts? A. Oh, I suppose so. There are women with breasts that size. I have seen them in the National Geographic. I suppose they are over-emphasized. 1898

Q. Now, look at the Varga girl on page 38. There we have the figure of the young woman with red hair, a smile on her face, and she apparently has blue eyes, dressed in what might be termed a caricature of a private, first class, Army uniform, although around the breasts and the lower end of it it is cut in a feminine fashion. We have the verse there "Peace, It's Wonderful!" in large, bold-faced black type. And this verse reads:

"When this military Beaut
Blows a root-a-toot-a-toot 1899
As a signal that the victory is won . . .
And her soldier boy relaxes
After slapping down the Axis
And then leads her to the altar on the run . . .
She will let him slumber heavily
Where once he woke to reveille
And never bawl him out about his lapse;
But unless my eyes deceive me
He won't be so lax, believe me,
When the clock upon their mantel points to taps!"

1900 Doctor, what do you say that verse refers to, "Unless my eyes deceive me, he won't be so lax, believe me, when the clock upon their mantel points to taps."? A. I suppose it refers to the fact that he is going to consummate his marriage. He brought her to the altar.

Q. You say there is no indecent connotation in that? A. Not in the consummation of marriage.

Q. In a magazine of this sort? A. No.

Q. Now, refer to page 60, the article "The Court of Lost Ladies."

Did you read this article, Doctor? A. Yes, with great

1901 interest.

Q. And how many times did you read that? A. Oh, I don't recall. A couple of times, two or three times.

Q. Was it your reaction to this article that it is written to discourage men and young men from dealing with lewd women, street women? A. Well, I don't know whether it was written with that in mind, but it certainly gives a picture of the lives of these individuals, what they are like, what they are up against, what type of individual practices the trade. That is about what I got out of it.

Q. The identity of the court is not fixed in this article, is it? A. No.

1902 Q. Save and except that the judge is a woman? A. Yes.

Q. The place of the holding of the court, the city, is not shown? A. No, not that I remember.

Q. No one of the participants or characters in this article is definitely identified? A. No.

Q. Now, starting in the first column, page 60, the second paragraph:

"A younger street walker, pert and shapely in a suit of bright green, sneers in disdain and tries to move away. She

cannot because the bench is crowded. So are all six of the prisoners' benches crowded by the sisterhood of the streets. the sisterhood of starvation and syphilis. They have all been 'on the turf' pursuing soldiers on leave and men without women. They have been making shrewd bargains for the sale and resale of imitation of love. Young and old, white and black and yellow, they now attend the opening of court. The young ones sit upright in fear or in bright boldness. The oldtimers whisper to one another and send signals by eye to friends among the spectators. Always the women shift and stir in their places. A heady stream of trade perfumes creeps through the great gloomy court. Coldly the women stare at the policemen who dragged them in at midnight and must soon reel off their cell-door tales. The women wrinkle their foreheads in unaccustomed thought and make ready old, useless lies, old, useless appeals for freedom. 'I'm a good girl, Your Honor. I never did this before.'" 1903 1904

And over in the third column the first sentence beginning underneath the picture:

"The arresting officer tells his story in a dismal rote: A glance and a whisper on a certain street and the quick sales talk. 'She put the price at three dollars and I then placed her under arrest. Yes, I've seen her before.' 1905

"His story, bare and precise, leaves her no room to operate. There's no weak point to debate while she does her slow thinking. She can only deny his charge. And she does. 'Well, I was only fooling, Your Honor, so help me God. I thought he was a friend of mine. The way he looked at me.'

"Laughter, soured with sneers, jiggles up and down the benches and makes a fool of her. She scowls over her trim shoulder. Then, made reckless by anger, she raises her hip into an impudent strut. Her face, cleared of rouge

and powder for her trial, takes on a sullen look. Thus she
1906 gives up, wordlessly reveals her lie.

"Her Honor gives the girl in green a chance to plead for leniency. She asks in a dispassionate tone: 'Is there anything you have to say before you are sentenced?' "

And so forth. Then, going over to the matter at the bottom of column four of that page:

"A sad-voiced policeman, well over middle age, puts on his glasses and slowly reads his testimony. He had been sitting in his car on such and such a street. Along comes the defendant, no doubt a charming picture on her high,
1907 red heels, her Kaffir eyes gleaming in the night. In good humor, almost gaiety, she had smiled and, for a modest consideration in cash, had placed her person, lithe and yellow, entirely at his disposal. She had, moreover, recommended herself highly, saying that her imitation of love was mighty near the real thing.

"He reads precisely, 'She thereupon asked me again if I would like a good time. Following my orders, I replied: 'Yes, I would.' She thereupon invited me to her room. I asked her after we got there if this was the place where we were going to have the good time. She said: 'Yes, Darling.' She then pulled off her dress and otherwise
1908 divested herself. I asked her if I ought to pay her first, and she said: 'All right.' I paid her with three marked one dollar bills which are in evidence. She lay down. I then placed her under arrest.

"She stands mute when Her Honor speaks. It is plain she expected another play, a guiding hand. She looks wildly backward, searches the ranks of spectators, stirred by her beauty and her fear. Their inscrutable faces, hard with thoughts beyond saying, stare at her body. Someone there must know her."

This picture character that has the Kaffir eyes, apparently a mulatto, Doctor, would you say she is pictured as the most alluring of the individuals in this article? A. In what? 1909

Q. In what I have read. A. No, she is not pictured as the most alluring. I don't think any of them are alluring.

Q. She is described as a person that is lithe, yellow and entirely at his disposal? A. Oh—

Q. She is also described as making no doubt a charming picture on her high, red heels, her Kaffir eyes gleaming in the night. You wouldn't say that she is given any complimentary description? A. Oh, yes, I suppose that is complimentary in that particular setting, yes. 1910

Q. Now, continuing with this article, in the third column near the bottom, just past midway, page 61, immediately opposite the picture of the stern-faced matron holding a girl by the arm.

"And now there comes a blonde woman, young in years, not otherwise. Under lush mascara her eyes sent out plentiful looks of hate. She would be the last to deny that she is an old hand at the old game. Yet she is sure of one thing: Her name doesn't appear twice on the probation card. Nobody ever caught up with her before. And she is not caught yet. 'Not guilty' as she sends her answer roughly over the rail. Her loud response hushes the women 1911 behind her, hushes the spectators who are at present bored and are chatting among themselves.

"The arresting officer tells his story. 'And so I put three dollars in marked bills on the table and when I came near her she let her dress fall. I then placed her under arrest.' He steps down.

"The prisoner makes no bones about showing that someone had coached her. Quickly she begins to destroy his

testimony. She remembers all that he said, recalls it so
1912 exactly that one might suppose the trial had been rehearsed. 'Yes, I was in a dressing gown. I never said a word to him and it's not against the law to wear a dressing gown, even if you wear it on the street.'

"Her Honor sees that the prisoner is a little smarter than the others. At least she can remember a sentence from one minute to the next. She says: 'You testify that you were visiting at the apartment when the police came in?'

"'Yes.'

"'Had you been there many times before?'

1913 "'Yes. What about it? Is that wrong?'

"'No. I didn't say it was. Now, tell me again, please, what you did when the officer came into your room. Weren't you surprised?'

"'No. Why should I be? He wasn't in uniform. And there were three or four men in the house. I told him "Hello."'

"'Did the officer say anything when he put the money on the table? Take your time before answering. He didn't testify that he said anything.'

"'No, he didn't say a word. I didn't even see the money until after he arrested me.'

1914 "'The officer has testified that you took off your dressing gown in his presence, is that true?'

"'No, it isn't true. And that isn't what he said. He said I let it fall.'

"'Tell me what happened.'

"'He put his arm around me and the gown fell off my shoulder. Then he let it fall and he held my arm and laughed.'

"'You deny, then, that you were doing anything improper when the officer came into the apartment?'

"'I do.' 1915

"'Case dismissed.'"

Doctor, would you say that this article, considering that it appears in a magazine for men, such as Esquire, such a magazine as contains month after month the type of material we have been calling attention to here, does not go into too great detail in describing these scenes and incidents it purports to describe? A. Yes, I would say that it is all right to appear here.

Q. You would say what? A. That it is all right to appear here. I don't think it is out of its setting. After all, it is depicting a trend or social situation that we have never 1916 faced very frankly. We have never done very much about it except in terms of law. We have not studied it, we have not tried to get at the real thing, what is behind it and so on, and how to control it.

Q. You won't say it goes into too great detail to accomplish the result? A. I don't believe so. It shows that the whole question of starvation, the whole question of syphilis and the rather sordid life or lives of the various individuals, and what they were up against from the sociological standpoint.

Q. Do you regard Esquire as an uplifting crusading magazine for the eradication of prostitution? A. I don't 1917 think that is their purpose, so far as I know.

Q. This is the only article of this type— A. I don't think this will eradicate prostitution. I don't think it will.

Q. This is the only type of article, or only article of this sort that appears in any of these eleven issues, is it not? A. Of this type, yes, as I recall.

Q. So, in view of the character of this magazine, and the fact that the Varga girls have been described not as art, but as entertainment, the cartoons as entertainment, and

1918 possibly other features as entertainment, would you say this is put in here for entertainment of the male purchasers and subscribers to this magazine? A. No. I say, to me, it is more of an informative type of article.

Q. But, Doctor, isn't it a fact that you are more interested than the average individual in matters of this kind? A. Yes, I presume so.

Q. And you would not be surprised if Dr. Tillotson had testified, or by his testimony had indicated, that he was more interested in this type of article than the average individual? A. No.

1919 Q. In other words, it is to be expected that a man in your business would be a great deal more interested in this sort of thing than the average reader of Esquire? A. I think a lot of youths would be interested in this.

Q. Will you answer my question, Doctor? A. Will you state it again?

Mr. Hassell: Will you read the question, please?

(Question read.)

A. I would assume so.

Q. Now, Doctor, let's come to the May issue of Esquire, 1920 at page 32. This is the article "The Savage Beast in Us," with the sub-title "Dispelling the hopes of burlesque entrepreneurs and fears of censors that the strip has sensory appeal."

How many times did you read this article, Doctor? A. I think two.

Q. Did you have a professional interest in this article, also? A. My interest isn't purely professional. It is according to how you define that, again.

Professionally I am interested in these articles in terms of what youth will get out of them, will it do them any good, will it be of interest to them, will it show them a side of life that perhaps they should know about. 1921

It seems to me it should not be sprung on them all of a sudden.

Q. You say you are interested in the articles with a view to determining whether youth will get any good out of them? A. Whether they will see the world as it is and not just wear blinders.

Q. On reading this article twice, did you gain the impression that the effect of the article would be to discourage you in attending burlesque shows? A. Not necessarily, no. I didn't get that feeling, no. I didn't think it would drive them to them, either. 1922

Q. Now, to a youth who had never attended a burlesque show, do you think this article would have been informative as to what goes on in those places? A. Yes, I think so.

Q. Would you think that in spots this article would sharpen his interest in having a visual demonstration of what goes on at those places? A. Oh, yes.

Q. Now, the Varga girl at page 37 and 38. A. Yes.

Q. Doctor, here we have a two page sized Varga girl drawn in life-like colors. This subject has red hair that is apparently falling out of bounds, a rather informal appearance, wouldn't you say—her hair? A. Yes. 1923

Q. Would you call that a smile that she has on her face, appearing through her fingers? A. Yes, a smile.

Q. Rather provocative? A. Provocative?

Q. Enticing maybe is a better word. A. How far do you go with that word? She's rather a nice looking girl with a nice smile.

1924 Q. Would you say alluring, Doctor? A. Yes.

Q. That costume, Doctor—would you say that is a bathing costume or what would that be? Note the brassiere part of the costume, if it may be referred to as such, doesn't have any halter going around her neck or over her shoulders? A. Well, apparently some way they know how to keep those things up. I saw a picture in the Post yesterday of the pin-up girls in the same sort of thing.

Q. You would judge that from the slightly leaning posture of the upper part of the body there, that there might be some glue or something under there holding them to the

1925 breasts? A. It is not falling off.

Q. You wouldn't say that is a bathing costume, would you, Doctor? A. I don't know.

Q. And have you ever seen a costume cut like that, that the ladies wear—I don't think they call them chemise any more—they call them combinations or something, whatever they wear close to their bodies.

Have you ever seen anything cut in that shape? A. I can't remember.

Q. Have you ever seen anything like that without shoulder straps? A. I can't remember.

Q. Doctor, wouldn't you agree that this figure is more or less a figment of the imagination of the artist who drew

1926 it and not related to anything that is actually worn by the feminine sex? A. Oh, course, the artist has the privilege of using his imagination.

Q. Maybe so, but we are not discussing that. A. I don't know. I am not too familiar with women's bathing suits. I have glanced at them. I don't remember if I have ever seen anything like this. There may be some on the beaches —I don't know.

Q. You have never seen one as revealing as that? A. I have seen them like this, just a little strap over the shoulder, just about the same. 1927

Q. But here we don't have a strap over the shoulder? A. No.

Q. And if she went on the beach with that thing on the men in sight would look and watch to see the thing fall off? A. Oh, I imagine they have a lot of other things to do.

Q. You mean a young woman shaped like this one with this red hair and blue eyes and enticing smile, wouldn't create a disturbance if she went on the beach? A. I can remember in Asbury Park when I was a youngster, a crowd following the first woman to take off her stockings with a bathing suit. 1928

Q. And that might happen here with this party? A. I can't say that.

Q. If she went on the beach with that costume? A. I think there would be a lot of things that it would depend upon. One is her attitude as she walks along the beach. Is she trying to attract attention or what not?

Q. We have here her attitude of a coy person peering through her fingers, the enticing smile, we have that here, don't we? A. That doesn't mean very much to me.

Q. Not coupled with this extremely scanty costume? A. No. 1929

Q. Would you call those over-sized breasts, Doctor? A. Not necessarily. Some women have them that large.

Q. They are quite large, aren't they? A. They are not necessarily over-sized. Some women have hardly any breasts, flat-breasted girls. Some individuals like them that way.

Q. This young woman really has quite large breasts? A. Oh, yes.

Q. Would you say there is no indecent suggestion or

1930 suggestive connotation to be derived from this picture in a magazine such as Esquire? A. No.

Q. Now, referring to page 48. Here we have one of the air raid warden, or maybe this is an airplane spotter. In the other picture you recall the air raid wardens were on top of a building looking through the studio skylight? A. Yes.

Q. You could tell by the insignia on the arm that they were air raid wardens, do you recall that? A. Yes, I think so.

Q. This one you can't; you can't see what that symbol is. A. Well, they have a sort of symbol, I don't know what it is.

Q. You can't see the color of the symbol on this one? A.

1931 No.

Q. Would you say that he is looking down, the man looking through the binoculars? A. Yes.

Q. And that he is looking down into a congested section of the city? A. I wouldn't say for sure.

Q. Buildings all around, as near as you can tell, or as can be shown? A. Yes.

Q. And it is night time? A. Yes.

Q. And apparently there is an air field in the far distance to the left top of the picture? A. Yes.

Q. With searchlights coming from it? A. Yes.

Q. So, with those things in mind, would you say the legend

1932 underneath, "She looks more like a B-17 than a P-40," would refer to the size of a woman being looked at by the man with the binoculars through a lighted window in a building which is not shown in the picture? A. Either a lighted window or it may be just a shadow, it may be a silhouette.

Q. But you would get the idea that this man is seeing something? A. Yes.

Q. That attracted his attention? A. Yes.

Q. Would you derive any sexual connotation from that?

Is there any sexual connection? A. I wish you would use sexual in a little different way. If it is in terms of yes, he is looking at a woman, he is making some reference apparently to a shadow, a form, and comparing it to airplanes. Now, that goes back to the fact that maybe she is fat and doesn't appeal to him and the other one is that she is slim. I don't know what B-17 looks like. 1933

Q. And whether she is clothed or unclothed, you wouldn't draw any— A. Not from that caption there, no.

Q. Do you think there would be any interest to the readers of Esquire by devoting a full page and some color here to a cartoon of this sort simply to look at a woman fully clothed? A. I didn't say fully clothed, did I? 1934

Q. Well, however you want to describe her, to make her apparently respectable. A. I don't know. It only refers here, to my mind, to her body form in terms of size. Maybe in terms of trimness, I don't know.

Q. You didn't get any picture of nudity from that? A. No, I honestly did not.

Q. Now let us refer to pages 86 and 87. Now here we have a strip of cartoons with the legend underneath, across these pages, from 86 across 87, "The Exploits of Esky." A. Yes, sir.

Q. And would you understand Esky to typify the publication Esquire? Is that sort of a symbol? A. I don't know. 1935

Q. You never heard that that was the fact? A. No.

Q. That that was the intent? A. No. Except he is the same figure on the front?

Q. Yes, the same as drawn on the front and referred to in "The Sound and Fury" column and so forth. I believe you said that you would not describe him due to the bulge eyes. I believe described by Dr. Tillotson, as all-seeing, or some-

1936 thing of that sort, or maybe it was Mr. Smith. You wouldn't get any off-color sexual connotation from this figure of Esky as he appears? A. No.

Q. In this magazine. A. No, I wouldn't.

Q. By reason of his bulging eyes? A. By reason of his bulging eyes, no, I wouldn't.

Q. Now, Doctor, let us read the text, beginning at the bottom so we can have the full sentence, in cartoon 28, the last line:

"The lady dislikes men but wants a baby, so I sold her a ticket for the time when women can become pregnant by

1937 taking an electric shock. What do you want?

"I want to see the red headed dancer.

"You won't need a ticket for that, just go upstairs and down the path.

"Down the path was a brook and Esky saw the red headed dancer in swimming.

"Hooray, he shouted, at last a pretty girl to look at.

"Esky, you darling, won't you join me?"

Now that refers to the cartoon apparently just above this language? A. Yes.

Q. Showing Esky peeping from behind the bush at a girl in the nude, in bathing, and she asks if he won't join her.

1938 Do you see any indecent sexual connotation in that language and the picture? A. Not necessarily indecent. It is the usual Rabelaisian thing, again going back to the Thorne Smith type of thing, I would assume.

Q. But you say there wouldn't be anything indecent in a man such as Esky peeping from behind a bush at a young lady nude in swimming and then being invited to come in and join her? Is that the common accepted practice? A. No.

Q. In the mores of today? A. No, I don't think it is. 1939

Q. It not being such, would you say there is anything indecent in connection with it? A. I don't think it is indecent, no. I think it is indelicate and I think—

Q. You don't like the word "indecent". Would you supply some other word? A. I think it is rather indelicate and it is one that has Rabelaisian humor.

Q. Yes. A. And if you take, again—you pick these things out all the time and put them in one little setting.

Q. All right, we will go right through this thing in the cartoon:

"But before he could, a Western-Postal girl tapped him on 1940
the shoulder. 'Follow me. You are to be judge of beauty in Finneagan's Dell.' Esky followed and so did the red head, dressing as she walked."

She was apparently in the nude when she invited him to join her in the pool and without shame entirely she walks along with him as she dresses, is that right? A. Yes.

Q. Continuing: "The Western-Postal girl started to sing singing telegrams.

"'Happy birthday, Auntie Bess, every time I like you less.'

"But Esky wasn't listening. To one side of the path Esky saw the most perfect creatures disporting themselves in a 1941
corot-like clearing."

"The Red Head explained. That is the abode of the Libidos. Where they gather when they are not on men's minds.'"

What does libido mean? A. Libido?

Q. Yes. A. It is a Freudian term used in a very broad sense in terms of sex. It has not a narrow sex connotation at all. It does not refer to intercourse, it does not refer to sex

1942 feelings. It takes in the whole love-life of the individual in a very broad sense and it takes in the question of the inner drive of a man from the sex angle, and it is broader than the lay people think it is. That is the way we use the term.

In other words, it has to do with the whole love-life in relation of man and his total drive and going into the question of taking into account the whole matter of birth, the drive for children, and so forth; the pleasure of sex, the fulfillment of the whole thing and the love-life itself.

Q. That is the technical meaning? A. That is right.

Q. The Freudian definition? A. That is right.

1943 Q. But you say that is not the usual accepted lay definition? A. The lay individual has misunderstood Freud a great deal, yes. They always feel that psycho-analysis, for instance, means sex.

Q. What would you say would be the common lay acceptance? What definition would be accepted? A. Well, I think the lay definition uses that. He is not familiar with the Freudian thing.

Q. He uses it as referring to sex gratification, doesn't he? A. Sex, it may perhaps be gratification. It may be stimulation and so forth. You see, after all a lot of people in terms of this sex, Americans, a great many of them don't go very

1944 far with sex in their libidinal drive. If you want to call it that it is just a Freudian type of thing. That is, they get a libidinal kick and that is all, nothing happens, because they feel they can't go any further than that.

Q. Would you say that is descriptive of the average ordinary individual? A. No, but I would say a lot of people.

Q. A lot? A. Yes.

Q. Would you say those individuals are sub-normal or abnormal? A. No, they are people whose mores have been

built up. Their cultural background has been built up in such a way that they find that they cannot allow themselves to get any kind of kick out of sex. Sex to them is not connected with the thing. For instance, you know in certain homes that great emphasis is laid on purity and the importance of it and perhaps it is over-emphasized in one sense of the word. Now, those individuals are not abnormal; it is their culture in giving them this viewpoint. 1945

Q. The upbringing and environment has a lot to do with the individual's outlook and his accepting or not accepting these matters, does it not? A. Oh, I would say so, yes.

Q. Now, are you able to divide the population between such individuals as you refer to and others who do such things of this sort? A. As to whether they are nice people or not? 1946

Q. No. I say, would you say fifty per cent of the population is as you describe them and the other not, or couldn't you give a figure? A. I couldn't give a figure, no.

Q. Now, we go ahead after libidos in 30. The cartoon or drawing over the matters as read under 30. It shows Esky with two girls, one of them has a cap on. She is apparently the Western Postal girl, but Esky has his back partly to them and is peeping around a bush, which seems to be a favorite pose of his, at some absolute nudes on the other side of the bush. You noted that, didn't you? Probably that is Finneagan's Dell. 1947

Then we go ahead with the text under 31:

"Where they gather when they are not on men's minds.

"Esky watched them play gracefully or loll indolently by a tinkling fountain."

You see the tinkling fountain here, Doctor? A. Yes.

Q. Can you see that? A. Yes.

1948 Q. There is some white water shooting up in that cartoon 31. Whether it is a fountain or not, I don't know. Do you think that is a fountain? A. Yes, I do.

Q. By the black-haired girl? A. Yes.

Q. No water shows underneath. Let us go ahead:

"The sound of their mellow voices lured Esky towards them like a magnet, but the Red Head grabbed and held him. The libidos joined in a ballet while leaves rustled an accompaniment. 'Why do so many look like movie stars?', asked Esky.

1949 " 'Oh, they belong to men who are too lazy to imagine their own perfect woman so they adopt the likeness of a star and if you'll look close you'll see one old hag—the libido of a man who just don't give a damn."

And in cartoon 31 Esky is looking over a bush or something which you would think is the old hag because she has a sharp nose. She has a rather prominent breast, though, doesn't she, Doctor? A. Yes.

Q. Continuing with the reading: "Esky saw a mess drift by. 'Come', said the Red Head, 'if you don't get to Finnegan's Dell in time I'll be attending Esky's wake.' And the three of them hurried to the amphitheater.

1950 "The Western Postal girl explained 'This contest is the result of an argument between Hollywood big shots as to which studio has the star with the best shape. Each has its queen garbed in a bathing suit and all you do is pick the prettiest.' " and so forth.

Doctor, would you say that these cartoons with the matter underneath which I have read are entirely proper and decent? A. I think so. I think they are depicting what men's attitudes and ideas are towards women. What he thinks he wants, a well-formed individual with plenty of sex drive

and so forth and an individual that has some get-up and go about her in comparison with this scrawny-like individual in the other picture. 1951

Q. Doctor, what do you think of the practice, if such it may be called, of a man peeping over bushes at a woman in the nude in bathing? Do you think that is indecent? A. It is not a common thing; it is not looked upon as the proper thing to do. It may be abnormal. For instance, I spoke to you about sex peepers. There are a lot of individuals who do a lot of peeping and so on and get quite a kick out of looking.

Q. So Esky may be an abnormal character, Doctor? A. No, I say that that is what happened. 1952

Q. In the other picture where he is peeping around a bush at a bevy of six or more entirely nude women dancing or disporting themselves. You would say that is entirely a decent and proper thing and that is entirely decent and the proper sentiment to depict and describe in a magazine of this sort? A. It is according to what the total article is trying to convey. The idea that I got out of this was apparently they are trying to convey in one sense of the word what the libido is and what man's libido is, what he likes from the sex standpoint. He likes these well-built girls. We have the Follies girls, we have the burlesque, we have this sort of thing all through life where we are showing the women with a good figure and what not, a semi-nude and so forth. Perhaps that is what they are doing. These are the ideas man has on his mind. He doesn't like this type of thing. 1953

Q. Now, if Esky is a symbol of the Esquire magazine and this strip truthfully depicts his exploits as it purports to do, would you get any different notion from what you had before as to the risque character of Esquire? A. Would you state that a little differently?

1954 Q. Do you want the question read, Doctor? A. I would like to have it read.

Mr. Hassell: Read the question, Mr. Reporter.

(Question read.)

The Witness: No, I don't believe so. Again, if what I see is correct, and this is my interpretation of the particular strip, I am trying to get out of the strip why are they using the term "libido" and so forth? What is the meaning?

1955

By Mr. Hassell:

Q. In other words, Doctor, you have applied your professional view to an analysis— A. That is right.

Q. Your professional ability to an analysis of it. A. That is right.

Q. That is the way it strikes you? A. That is right.

Q. Now, page 93, the last item we have in this May issue, the color photograph on page 92, and the descriptive matter boxed in at the lower left-hand corner of page 93: "Broadway for the Boys. The juke joint scene from 'The Eve of

1956 St. Mark' ". And this descriptive matter under that:

"These soldiers have just come from a discussion of a hygiene lecture in which it was estimated that in the Army 20 per cent don't, 20 per cent do and 60 per cent might. They are Quizz West (played by William Prince) and Francis Marion (James Monks) and they have already made considerable progress with the Bird sisters, Lill (Joan Dolan) and Sal (Toni Favor) perched on Quizz's lap.

"Lill tells how dull it was in town before the Army moved in but hints that there can be too much of a good thing. 'This is practically inflation, what we've got now', she

complains. 1957

"One thing leads to another, and another leads straight back to barracks when Quizz decides he belongs to the first 20 per cent. 'I have a hell of a hankering' says Marion. 'But you're the strong, solid man and you bear the purse, I bow to your judgment and follow' ".

Now, Doctor, the picture of the girl seated in the man's lap, each of them holding a glass, in the girl's glass there can be seen the remains of a drink of some sort. Note in the description which I have read, these soldiers have just come from a discussion of a hygiene lecture in which it was estimated that in the Army 20 per cent don't, 20 per cent do, 1958
and 60 per cent might. Do you say, Doctor, that this picture and the descriptive matter connected with it doesn't refer to the sex and the sex relations between the girls shown in the picture and these men? A Oh, I wouldn't say it does refer to sex, no I wouldn't say that.

Q. Would you say that it does refer to illicit sex relationship? A. According to this, 20 per cent—I mean this chap says "I belong to the first 20 per cent", doesn't it? That is, the one that doesn't.

Q. Well, what does that discussion mean? A. Well, I should think that 20 per cent of the boys in the Army don't, 20 per cent do and 60 per cent might. 1959

Q. 20 per cent don't, don't do what? A. Don't have intercourse, extra-curricular activities.

Q. Don't have illicit intercourse? A. Outside of the marital phase.

Q. The not permissible? A. That is right.

Q. And 20 per cent do and 60 per cent, what is the other? A. 20 per cent do.

Q. 60 per cent might? A. 60 per cent might.

1960 Q. Now, the descriptive matter connected with the picture. Would you say there is any indecent connotation to be derived from this? A. I wouldn't say it is indecent. I would say it is again a given fact, according to this thing, when they are stating that 20 per cent of those boys do, 20 per cent don't and 60 per cent might.

Q. Now, you think it is an entirely decent matter to divide the armed forces of the United States into such a percentage as this? A. Yes, it is—

Q. And make it the subject of conversation in a magazine of this sort? A. If it is a scientific fact, I don't know

1961 whether it is a scientific fact or not, but if it is just a general opinion of the boys, that this is a general opinion of the boys that they are talking about, I don't see why it can't be in this magazine.

Q. Aside from its truthfulness or falsity, Doctor, do you think it is a decent subject of conversation? A. Yes, I do. I don't think sex is indecent by any means.

Q. Now, we are talking about something more than sex, Doctor; we are talking about illicit sex relations. A. I see.

Q. And dividing the Army into these percentages. A. That is right.

Q. And you know also that this imputes to 60 per cent,

1962 which is considerably over half— A. Yes.

Q. (Continuing): —of the boys whom we owe so much, the fact that they would have illicit sexual relations if they had the opportunity. A. Not necessarily if they had the opportunity. There again there are a lot of factors that come into this situation as far as they are concerned. After all, man is driving in the sense of the sex standpoint towards woman; woman is driving towards man from the standpoint of their sex life. Society says that man and woman in order

to consummate any sex act ought to be married. We know 1963
that in the growth of this thing as they move towards that so-called ideal which I think is a good physiological ideal, that people go through various phases of their lives.

For instance, we know as physicians that youngsters, very young, have a curiosity about sex, and get into all kinds of little difficulties in terms of their sex lives. Children, that happens to be a given fact. As they come up towards puberty and their glands begin to work and so on, again they have this sex drive to meet. It is said that most boys towards puberty masturbate. That is the way they answer that urge. I am not sure that they all do. I have seen quite a few boys 1964
and they seem to be perfectly honest, and they apparently haven't gone through that stage, but they have had to fight with it.

Then, as you come up and pass through puberty they are trying to establish some attitude towards it. Should they or shouldn't they? What should their attitude be? And as they come up towards 18 and so on, they do a little kissing, some of them, some of them do have intercourse. Some of them with bad results to their whole make-up and others get by with it. Then you come to a stage in their life when they do a lot of what we call heavy petting. There is a lot of heavy petting, I don't know the percentage, but there are certain 1965
groups of people, as I put it, they prefer not to have intercourse, they prefer not to masturbate, so they move towards this heavy petting and do a certain amount of stimulation of themselves by this and stop at that point.

A lot of those youngsters are boys, of course, who are actually afraid to do anything else, and it might be a very good thing if they are afraid to carry on further than that. It is a saving grace for them, apparently.

1966 Then, the next step, of course, is the intercourse, and according to society, the only time you are supposed to have intercourse is when you are married, and you are performing an act for a purpose, and society condones it, but we know we have variations, we know we have all these sex things going on. We know that the boys are up against this scrap of how they are going to orient themselves and get a good attitude towards their sex life.

What are they going to do about it? How are they going to act? Now, in my experience, putting it on the side of all these things, of saying it is indecent and so on, puts it 1967 into the boy's mind that factor about sex and that he is going about it in an indecent way or that it is an indecent thing. He gets ashamed of it and is bothered about it, and it seems to me when you present him with the biological facts, the sociological, the psychological facts of what he is up against, he goes along and establishes his sex life in a much better manner than he will be able to do with a lot of emphasis placed upon the fact that all his thoughts are sexual thoughts. That is why I can't use the term "indecent" that you want to have me use. It is because of that attitude that I have expressed to these fellows. Surely we meet with a lot of tragedy in these kids, but I don't think these pictures or these stories 1968 or anything in this case stimulates them to the impure act itself at all.

Q. You think, Doctor, speaking of the population of the United States as a whole that it is an accepted thing in the mores of today to discuss a thing of this sort, divide the Army of the United States into these or any percentages with respect to whether or not they have illicit relations and make that a subject or topic of conversation A. Not all over

Q. Say at our tables, at our firesides, with our friends in

church or out of church or at the movies or wherever we may happen to be? A. Oh, no; we haven't got that far in our civilization. It is too bad, but we haven't. 1969

Mr. Bromley: This play is touring the country and has been or will come to Washington and has never been banned anywhere, and it is one of the great plays now on the stage. It is just a report of what happens on the stage, what the actors say on the stage.

Before we adjourn, Mr. Chairman, I would like to make a statement along the line of what I understood to be my friend's comment this morning.

I have another psychiatrist, Doctor Richard Hoffman, very well-known and prominent psychiatrist of the city of New York. 1970

I should like to know now whether Mr. Hassell will be willing to stipulate with me as to this gentleman's qualifications and then to stipulate in substance that he will testify along substantially the same lines as the other two psychiatrists, that this matter has no immoral effect upon those classes of the community with which he comes in contact generally, that is, in the city of New York where he practices.

Mr. Hassell: Well, of course, I am not going to stipulate the conclusion that counsel is stating here as to the impression or result or effect of the testimony of these two witnesses. I don't think that is proper for me to stipulate that. 1971

I might stipulate that, if I had the chance to examine the qualifications of this psychiatrist as to his testimony being substantially similar to the other two.

Chairman Myers: Why don't we do this? Let Mr.

1972 Hassell and Mr. Bromley get together during the noon hour and see if we can agree on a stipulation and then if we can't, all right.

Mr. Hassell: I wish you would let it go until two o'clock.

Chairman Myers: I would like to start at one-thirty.

Mr. Hassell: I have other things to do.

Chairman Myers: So have we all.

We will adjourn until one-thirty.

1973 (Whereupon, at 12:05 o'clock p. m., the hearing was adjourned until 1:30 o'clock p. m.)

AFTERNOON SESSION.

(The hearing was resumed, pursuant to the adjournment, at 1:30 o'clock p. m.)

Chairman Myers: Proceed, gentlemen.

CLEMENTS C. FRY resumed the stand and testified further

1974 as follows:

Cross Examination by Mr. Hassell (Continued):

Q. Doctor, refer to the June, 1943, issue of Esquire, page 34. That is a two-page size Varga girl in a semi-recumbent pose. She is leaning back on one hand and has her legs folded up under her thighs. This is entitled "Something for the Boys."

What sort of a costume would you describe that as, Doctor? A. I suppose it is a ballet dancer's costume, practice costume. 1975

Q. You would get that from the ballet shoes shown here, a toe dancer's shoes? A. I think so, somewhat.

Q. They look like toe-dancer's shoes with the padded toes? A. Yes.

Q. Is not the customary toe dancer's costume a short ruffled skirt that hangs down half way to the thighs? A. You mean when they are performing?

Q. Yes. A. I think so, yes.

Q. Then, this costume here would not be customary and ordinary for a toe dancer's costume, would it? A. Not as I understand it, no. 1976

Q. You would say, Doctor, that that material of which this costume is constructed, is quite sheer and tight-fitting? A. Yes, it is tight fitting.

Q. And that it does not conceal any of the lines of the model's body. We have a side view here, of course. A. I would say it does not conceal any of the lines from the side view.

Q. Do you see the depression down the middle of the stomach, ending up at what appears to be the umbilicus? A. Yes.

Q. About where the page folds? A. Yes. 1977

Q. Do you note the manner in which the lower end of the costume is cut at the top of the hips? A. Yes.

Q. So as to come up possibly a little on the torso? A. Yes.

Q. Doctor, do you think this picture would be calculated to be sexually stimulating to the opposite sex? A. To some people, I suppose it would yes; not to the average person. And again it would vary with the times, depending upon what thought he had in mind.

1978 Q. You say it would to the ordinary person at various times? A. It would not. But at various times a fellow might look at this with a thought in his mind and have some thought of the sex connotation. Whether that would be improper or not, I don't know.

Q. So that the average impressionable young man will get some sex stimulation from this drawing? A. It might help.

Q. Now, referring to page 134, Doctor. That is the matter at the lower part of this page, the textual matter, the first column of which reads:

"Social items on the first page included such as these:

1979 "'Two weddings are on dit for next week. This weather kind of suggests two in a bed, spoon fashion.'"

What sort of weather would you think the writer of that had in mind? Hot weather or cold weather? A. Cold weather, I suppose.

Q. Cold weather? A. Yes.

Q. In other words, they lie very close together? A. That is right.

Q. Two persons of the opposite sex lying very close together as indicated by "spoon fashion" does not indicate any sexual connotation or doesn't have any sexual connotation? A. It doesn't to me, spoon fashion. I couldn't quite

1980 get that unless back to front.

Q. How would you think spoon fashion meant? A. Well, I should think they might be lying as you would place a spoon; one front is up against the other's back.

Q. One's front up against the other's back and I suppose as closely as possible together? A. That is right.

Q. You don't think that has any indecent— A. No, I don't

Q. (Continuing):—sexual connotation? A. No.

Q. Now; coming to the next sentence, an epitaph:

"Here lies the body of poor old Charlotte,
Born a virgin, died a harlot.
For 18 years she kept her virginity,
An all-time record in this vicinity."

1981

Do you think there is anything nasty or filthy or indecent in that? A. Not to my mind. It is an old time thing. I have heard that for years.

Q. Its antiquity would lend purity to it, would it? A. Not necessarily, or not impurity either.

Q. You think its antiquity would clean up the smut that would have been in it had it been novel? A. No, I think it shows that a great many people have recited that poem as a great many other poems like it that are always recited, a number of them.

1982

Q. Doctor, do you hear that type of poem or ditty or whatever you want to call it recited in mixed, polite society? A. I have heard it, yes.

Q. That is, in the circles in which you move that type of poem is recited without blushing? A. Not in all the circles I move, some of them.

Q. I mean, decent ordinary polite society. A. Well, I try to keep to that.

Q. You said not in all the circles. A. No.

1983

Q. What other kind of circles do you move in? A. Decent people with different viewpoints on life and so forth.

Q. Well, some of those people are more sophisticated than others? A. That is right; some of them are not, as a matter of fact.

Q. Well, the more sophisticated that you refer to, would that be where you would hear this sort of thing recited? A. I would hear it, I believe, in some unsophisticated groups.

1984 and I can't quote you the poems, but I have heard youngsters telling stories similar to that. Not exactly like it, but a similar type of poem, and letting it go in mixed society.

Q. You think that this accurately and truthfully represents the mores of today, do you, in the average society, American society? A. Again, different groups have different mores and different moral behavior that they condone or condemn.

I don't think that in all groups you can say that the same thing would go on. In certain groups people know they could not and would not be able to recite a poem of that nature.

1985 In other groups I think it would be perfectly all right and nobody would be excited about it.

Q. Doctor, does your testimony with respect to Esquire reflect your opinion as your own or as you judge the matters called to your attention here would be regarded by the average normal individual? A. Both. I consider myself an average, normal individual.

Q. And you don't consider by reason of your profession, your daily duties requiring the going into of sexual life histories of hundreds of individuals, that you would have, shall we say, a more sophisticated or broader outlook on these matters than the average normal person? A. I would

1986 have a broader outlook, maybe.

Q. And these opinions you are expressing are your own opinions as to the effect this type of matter would have on you? A. On me?

Q. Yes. A. No, not at all.

Q. Well, on who? A. On the youngsters that I feel that I know. I know their psychology and know what they are up against.

Q. Now, on all of these youngsters or on what portion

of them? A. I couldn't give you a percentage, but there 1987
are certain groups here, as I say, that wouldn't listen to these things. Other groups listen to them and recite them and let it go at that.

Q. All of these youngsters that you deal with are post adolescent, aren't they? A. No, I see them from the age of about fourteen up. I see more from the age of sixteen or seventeen.

The average freshman age at Yale, I think in the past, has been about 18, but with a large number of 17 year old youngsters, and, of course, my practice is not confined to Yale alone. But I would say the groups that I see would 1988
lie between the age of 18 up to about 23.

Q. Doctor, are you in a position to define the average normal adult, whether the sex be male or female, so that we will have some normal average that we are talking about? A. No, I think that is one of the most difficult questions anyone could ask.

I don't think anyone can define what the normal adult is. Is it in terms of physique or temperament or religious beliefs or reactions to various things.

I don't think anyone can define what a normal adult is. We use that term rather loosely and I don't think any of us know what it is. I think normal is the people we 1989
like and abnormal is the people we don't like, usually.

Q. So we can't get a definite basis or standard by which we can judge what is the average normal individual? A. No, I don't think so. For instance, in terms of patients that I have seen, as I have stated before, most of their friends consider them as very normal and average run people. Where do you draw the line?

The boy who gets into a sex difficulty of some type, is

1990 he abnormal or is he normal? That is a very difficult thing to know.

Now, the youngster who does a little stealing, is he abnormal or is it normal to steal? Is he an abnormal individual because he steals?

Q. Well, we will narrow it down this way: Is this normal or average individual you have in mind when you are testifying here about this material, the same sort of person who is allowed to roam at large, walk the streets, buy magazines from newsstands, and has nobody restraining him? He may be very young, he may be adolescent, he may be
1991 post-adolescent, he may be male or female.

Is that the average normal individual who is at large that you have in mind in this testimony? A. It is what the outside world considers an average normal person. For instance, I see a great many people that I put down as psycho-neurotics, but their parents come to me and say "This has been a normal girl" or possibly "This has been a normal boy", and they say "We can't see how this thing has ever happened to him."

Maybe this person has a slight depression or slight fear state. Again, she may be troubled about what she should do in her relation with boys and girls and so on.

1992 When I see them I might put down on my folder that this is a psycho-neurotic depression, we will say, in this individual.

But, I don't lay any emphasis on that in terms of abnormality. I don't think we can put people in two groups and say "This is a psychopathic individual" and this is a normal individual." We all have these little things in our lives.

Q. In your schizophrenia cases, is that the right way to pronounce it? A. Schizophrenia, yes.

Q. In those cases did the parents usually tell you that the young man or young woman has shown peculiar behavior over most of his life? A. In most cases I think that would be true. 1993

Q. Where in a good many cases they indicate their surprise? A. That is right.

Q. That anything of that sort would or should develop? A. That is right.

Q. Doctor, referring further to these items, we have the next item on the next column, page 134, which reads:

"Or: 'In future, all communications to the Muldoon will be marked with an asterisk to show that the editor disclaims responsibility. Each correspondent will have his own*.'" 1994

Do you understand what that means? A. No.

Q. If emphasis was laid on the symbol at the end of the sentence, the asterisk, and you paused in saying that word. as-ter-isk? A. Now I understand, as-ter-isk.

Q. That hadn't occurred to you before, Doctor? A. No, it hadn't.

Q. How many times have you gone over this? A. I think I read it two or three times before.

Q. But that never hit you before? A. No.

Q. You say that that has no filthy, dirty, improper connotation? A. No, it is quite usual for people to say their behind or ass. Again, that term is being a little more used than we realize. 1995

Q. You think it is pretty generally used in polite society? A. No.

Q. But the fact that that sort of a thing is included in a magazine of this sort circulating among men does not lead you to believe it has any filthy or indecent connotation? A. No, not to me.

1996 Q. Now, Doctor, take the next item:

"When Chipeta, queen of the Utes, went to Washington, Day pretended that she had been seduced there by an eminent gold standard statesman. He followed the case for nine months, announced the birth of a boy, named by Day for the statesman, and chronicled the alleged boy's growth for years by that name".

Doctor, do you think there is anything indecent in the reference to a seduction? A. No, I don't.

Q. That is the ordinary usual thing occurring in our newspapers and magazines circulating among the average
1997 American citizens? A. Well, I think when the Flynn case was on it was in every paper. I don't remember whether the word "seduction" was used or not, but certainly it was inferred.

Q. You think there is nothing indecent or filthy in that reference? A. I don't recommend seduction. I personally don't think it is necessary. I don't think the statement there is necessarily filthy.

Q. Now, referring to the July issue, Doctor, and to the item under "The Sound and the Fury", page 10. You will note there reproduced a letter by some man who signs himself "Sincerely yours, Fred Appel," and is addressed
1998 "Paradise, Pa."

In the last line he says: "So, I'm willing to pay my half buck for just a peek at the Hurrells and Vargas."

Do you think that represents the manner in which Esquire magazine is regarded by the young men you come in contact with? A. No, not necessarily. I suppose some of them would be willing to pay just for a peek, I don't know.

Q. But this indicates that this young man is largely in

terested in the Hurrells and the Vargas. A. That is right.

1999

Q. The pictures of scantily clad women? A. That is right.

Q. Would you say that that was an exceptional thing or that is the usual thing? A. I wouldn't say either, I don't think it is exceptional and I don't think it is the usual thing. I think you will find again, a lot of the so-called ordinary normal youngsters, some of them would like that, some of them wouldn't, some of them would buy it to look at it and some of them would buy it for other reasons.

Q. As I understand it, Doctor, some of these ordinary young men would get quite a sexual kick out of these pictures and others would not? A. Take the word "quite" out, and I think they would get a sexual kick. It is according to what you are trying to imply by sexual kick.

2000

Q. Now, referring to the matter on page 76. That is the picture with the simple figure in the foreground showing a rather buxom woman with large breasts and her skirts pulled up, kneeling.

Do you think there is anything objectionable— A. No, I don't.

Q. (Continuing): in a magazine of this sort to carry a picture of that kind? A. No, I don't.

Q. Doctor, this magazine does not purport to be a theatrical magazine, does it, from your understanding? A. No. It has play reviews and so forth, but not a theatrical magazine.

2001

Q. Look at page 87. Here we have again Exploits of Esky. Doctor, when you were looking this material over preparing to testify had you been told that Esky was a figure that was supposed to represent the spirit of Esquire? A. No, I hadn't.

Q. That had not occurred to you until you and I discussed

2002 it before? Until we discussed the prior exploits of Esky comics? A. That is right.

Q. That is correct, isn't it? A. That is correct.

Q. Now, look at cartoons 55 and 56. These cartoons showing the mermaids and Esky and a character in a sailor's cap and uniform, Verne. In the first cartoon, 55, Esky has quite a handful of money. As a matter of fact, it takes both hands to hold it apparently. He is looking rather goggle-eyed in the direction of the mermaids. Verne seems to be talking to him or whispering in his ear. Then this legend underneath: "You see—women are women the
2003 world over." Esky turns to Verne saying "there's something I have always wondered about mermaids."

"I wouldn't know", replied Verne.

What do you think Esky means, "always wondered about mermaids". A. I don't know.

Q. You couldn't guess, could you, Doctor? A. If you put it into my head, I can.

Q. Would you guess that he had been wondering always whether mermaids could walk around on land without feet? A. Now, that you bring it to my mind, I remember a statement that is always used. People wonder about Chinese women. That is a common term used. That may be what
2004 he is implying. I don't know.

Q. But here, you wouldn't say that this referred to how mermaids were equipped sexually? A. It may be. I didn't take it that way when I read it.

Q. Now, in the cartoon numbered 56, the mermaids' breasts are very prominently displayed? A. That is right.

Q. And Esky still has his hands full of money. And you see nothing indecent or objectional from a morality standpoint in these cartoons? A. No, I don't.

Q. And the text underneath? A. No, I don't. I suppose

like a lot of things, if I let my imagination go I might do it, but I could do that with anything if I were determined, to make it sexy. 2005

Q. Well, Doctor, considering the nudity of the mermaids in those cartoons, and the text underneath, the whole thing would have very little meaning if you didn't imply some such sex connotation, would it? A. As a matter of fact, this whole thing has very little meaning to me as I read it.

Mr. Bromley: Did you ever see a mermaid dressed, Mr. Hassell? Just yes or no.

2006

By Mr. Hassell:

Q. Doctor, turn to page 141. Did you read this boxed in material? A. Yes.

Q. How many times did you read that? A. I don't recall.

Q. Now, would you say that this is apparently written by a dog crank? A. A dog crank?

Q. Crank. A. I don't know.

Q. Maybe we had better read it and refresh our recollection of it. A. All right.

Q. "Dog's Worst Friend", is the title. It reads:

2007

"People
who have dogs
who shouldn't have dogs
I hate them.

People
who have dogs
and a mink coat
and think they are doing their dogs a favor
by taking them out for a walk

and walk very fast
and pull at the leash
so that the dog gets no chance to smell a hydrant
or a tree
or another dog
I hate them.
Who the hell ever asked them to
have a dog?

People
who have dogs
French poodles
wise and sapient dogs
and clip them fore and aft
so that they look
and feel
like Goddam fools
I hate them.
Who the hell are they to make
dogs foolish?
People
who have dogs
Pomeranians
Pekineses (except one)
Chihuahuas;
Who carry dogs like muffs
who train dogs to carry packages in their teeth
put sweaters on them
bows on them
polish on their toe-nails (they do, so help me).
I would like to plant them in
Central Park
in a long row
and introduce a lot of dogs to them."

Now, Doctor, how do you think he would like to plant them in Central Park? A. I suppose under a tree. 2011

Q. You mean like a tree; their legs in the ground and they would be upright like a tree? A. I didn't think of that. I thought he meant just planted there and he hoped the dogs would come and urinate upon them.

Q. Do you mean buried? A. That is the first way I took it.

Q. Central Park isn't a burial ground? A. No.

Q. And he is referring to hydrants and trees, things that dogs use? A. Yes.

Q. So, would it be natural to think that they would be planted half way up and arranged in rows so that the dogs could come along and make use of them as they come along? A. You are putting that idea in my head. 2012

Q. If that is a reasonable interpretation of what the language means, do you think this is a filthy article? A. No, I don't think it is filthy. It may be in bad taste; I don't know.

Q. You don't think it is a filthy subject of conversation to go into the habits of dogs in this way? A. No, I don't think so.

Q. You think the mores of the times permit that sort of talk in polite mixed society? A. I don't think very many people would mention it. Some might. I don't think it would be an ordinary topic of conversation. We teach children to say "wee wee" or some other term, and it means the same thing, and there is the common expression that kids use, another thing that kids do. 2013

I had a case a few days ago of a kid who had been urinated on by his friends. Kids do it. That isn't a nice thing to do, I suppose, but it happens.

Q. And a discussion of that sort of thing in a magazine

2014 that would be found on the newsstands, and circulates through the mails, you don't consider is filthy or indecent? A. I don't think it is filthy or indecent. I will say a great many people wouldn't like it. It would sort of offend their delicacy.

Q. Do you think that would apply to the average normal person? A. I think the average normal person would perhaps read it and let it go at that. Some would laugh at it and some wouldn't like it.

Q. Turn to page 146. There we have the advertisement of the Esky buy-products. In the center of this page to
2015 the left there is a picture of a young woman with red hair, lying on her stomach.

Doctor, would you say this model is clothed? A. No, I don't think she is.

Q. Entirely unclothed, save for the transparent hat? A. Yes.

Q. That lies across her thighs and buttocks? A. That is right.

Q. And that doesn't conceal anything, does it? A. It doesn't conceal the crease between her two muscles. It conceals something, however.

Q. Do you think that sort of an illustration in a magazine
2016 of this sort is entirely acceptable to the average individual? A. I don't know how many people buy that. I have no idea of how many people would send for that. I couldn't say.

Q. You don't know how many people might be shocked by it? A. I don't know how many people might be shocked by it.

Q. I see. Now, refer to page 148, Doctor, at the bottom of the last two columns on this page where there is a cartoon drawing showing a perfume counter, a young lady behind the counter, a placard or card on the counter reading

"Burning Desire" and another placard reading "Baby's Breath", and in front of the counter an elderly gentleman with sparse white hair who apparently is the floor-walker, and he is saying to the clerk the legend underneath there: "I think, Miss Hill, it might be advisable to display those a little farther apart." 2017

Doctor, do you see the point of that joke, if it can be so called? A. Yes, I do.

A. Well, following the "Burning Desire" there is "Baby's Breath" which means if you have a burning desire, why, then you must take the consequences of perhaps a baby's breath. Now it may be warning married people, or it may be warning unmarried people by, here is the consequence you have to follow. 2018

Q. And this cartoon is designed to make light of the relation which results in the birth of a baby? A. I don't know whether it makes light, no. It also gives you a little warning. It gives you some warning. Yes, I guess it makes light of it a little because it gives you a little warning.

Q. You think it is this sort of thing that is entirely decent to be made the subject of conversation among the average mixed group of individuals and to be carried in a magazine of this sort? A. I would say a lot of good. 2019 average normal people would recognize that as a fact, and there are people you know that won't have anything to do about it, about the thing.

Q. There are a lot of good, average normal people who would take that to be an obscene joke, wouldn't they? A. Yes, I wish they wouldn't.

Q. Referring to the August issue, Doctor. Page 10. "The Sound and the Fury." We have in the first column "Con-

2020 sidered Opinion", which adverts to the 20 percent do, 20 percent don't, et cetera, opinion of the prior issue. This reference "In your May issue (this year, too!) page 93, article entitled 'Broadway for the Boys,' it is said '20 percent *don't*, 20 percent *do*, and 60 percent *might*.'

"While in no way representing the opinion of the Navy Department, it is the considered opinion of this patrol squadron that 20 percent *don't*, 20 percent *do*, and 60 percent *don't get the opportunity*. Now you guess which category we fall in!"

Do you think the writer of that letter to Esquire got the
2021 illicit sexual relation inference from the "Broadway for the Boys" article in the May issue in Esquire, page 93? A. Yes.

Q. And would you say that is a normal reaction to be obtained from that article by the average normal individual? A. Some people wouldn't react to it that way, no. Some people would react to it entirely differently.

Q. I am now speaking, Doctor, of people who are capable of some intelligent thought. A. Yes, but you can't say that a so-called normal individual is going to react to everything in this world in the same way as his friend who is considered a normal individual. There are a lot of different
2022 elements that enter into this thing.

Q. And that applies to all of this material in Esquire? A. Yes, I think so.

Q. Now, referring to page 30, the article "Many Wives Too Many" with the Rx prescription symbol underneath the name of the author. Did you read that article, Doctor? A. Yes, I did.

Q. How many times did you read that? A. I read that

one only once because I was familiar with it and knew the story. 2023

Q. Are you familiar with Kretschmer? A. Kretschmer's book?

Q. Yes. A. Very. In fact, I wrote an article on it.

Q. You wrote an article on it? A. Yes.

Q. Doctor, do you think the arrangement of the sex life in a situation where a man had six wives is a subject of decent, every-day conversation, or in a magazine of this sort? A. I didn't take the article from that standpoint. I thought these women portrayed to this individual the various needs that a man has in his life. In other words, he needs various types of women to more or less help him get through life. 2024 It is an old story that many people have stated before, that the only thing to do is have so many wives. Some people say four, one in the kitchen, one in the bedroom, a secretary who really does things for you, and a smart woman around you. This is an old type of story. I have heard that, and, in fact, one of your judges, not a Supreme Court Judge, but one of the judges used to tell this as his philosophy of life, and in polite company and to nice people.

Q. In other words, he was in favor of polygamy? A. No. I mean he stated it in a joking manner.

2025

Mr. Bromley: I think you gentlemen are discussing two different things. This story has to do with Dr. Joad's proposal of plural marriage.

The Witness: Yes.

Mr. Bromley: Kretschmer's article had to do with the physical characteristics of Pyknic and Leptosome.

The Witness: Yes, I knew that. I let it go.

2026 *By Mr. Hassell:*

Q. Now, let us see, Doctor. Beginning in the second column at the top of page 30 "In figuring out a schedule for a six-wife batting order—which is something that should be done before it's too late—the team probably would go on a weekly timetable about like this:

"Amaryllis, the wife to go out to dinner with—four times a week. Unless Amaryllis knows the places that have made arrangements with the black market and unless Dr. Joad is lush with shillings, she can count on one of the four ses-

2027 sions being at a fish-and-chip coop where she will have to perch her fanny on a peg or stool."

Do you think that is a decent reference to that part of a woman's anatomy? A. It is a common reference, yes. What do you want to call it? Do you want to call it her gluteus maximus? What is it you want to call it?

Q. Couldn't you say she sat on a stool? A. You could say that.

Q. Why do you have to say "perch her fanny." A. You don't have to say it, but a lot of people do say it.

Q. As a matter of fact, that sort of language doesn't ordinarily go in polite society, does it? A. Oh, "fanny" is

2028 referred to a great deal.

Q. But isn't that the language of the gutter, Doctor? A. No, oh, no, I can't say that.

Q. That isn't the sort of expression, "hurt your fanny" that is an everyday occurrence in polite society? A. I have heard fathers say to their children, "I will spank your little fanny if you do that again."

Q. Let us go ahead with the reading of it, Doctor.

"She will have to try to turn on her charm where there are no soft flattering lights. A great risk in one of those

places is that Amaryllis may see in them a soldier, sailor, marine, or shipbuilder who looks like he would be good to go out with after going out to dinner." 2029

What does that mean, Doctor? A. That she would like to go out with the soldier.

Q. That a married woman would like to step out with a soldier for a good time? A. Yes.

Q. Is that ordinarily a commonly accepted practice? A. Society doesn't like it, but it is done a great deal I hear.

Q. Society doesn't like it, but I am asking you whether it is an accepted practice. A. It is a practice, yes.

Q. I see. Then, reading: "That would leave Dr. Joad with a check for a souvenir. 2030

"Priscilla, the wife to go to church with—twice a week. Sunday and prayer meeting night. Every time the parson referred to the Seventh Commandment, Priscilla probably would nudge her gentleman friend and whisper 'What are you, a man or a louse, letting him make that crack at us.'"

What is the Seventh Commandment, Doctor, do you know? A. Let us see if I can recite that. I am repeating it to myself.

Mr. Bromley: Count on your fingers.

The Witness: You got me there. I will have to ask you. 2031

By Mr. Hassell:

Q. Is it "Thou shalt not commit adultery"? A. I think it is, yes. I am trying to think whether it is covet another man's wife or commit adultery.

Q. That is what is indicated here in the text, isn't it? A. Yes.

2032 Q. The wife Priscilla takes umbrage at some statement of the parson's and she applied it to herself. Then it goes on, over in the first column of page 31:

"Rosamund—the wife to make love to. Something seems to indicate that when the roster includes five other wives, Rosamund will have plenty of time for keeping up with the latest books and movies."

What would you say that has reference to? There wouldn't be much time for lovemaking, is that right? A. That is right, yes.

Q. Going ahead with the reading:

2033 "It is chivalrous, however, of Dr. Joad, who was born in 1891"—by the way, Doctor, when were you born? A. 1892.

Q. 1892? A. Yes.

Mr. Bromley: I was born in 1893, Mr. Hassell.

By Mr. Hassell:

Q. —"to have the assortment include a wife for loving. This can be on a high spiritual plane if both of the loving couple get in that mood at the same time.

"Experience of many who have run some test heats on the six-wife idea, is that each woman is apt to get the notion

2034 that she is the wife to make love to."

Would you say that sentence has reference to men who have had six wives at one time or in succession? A. No. it is this man who has six wives at one time.

Q. And there is no such animal out of jail in this country? A. No, that is right.

Q. Going ahead with the reading:

"The cook-stove wife may consider as part of the deal.

her loving six-time poppa giving her at least an adoring pat on the sunny south." 2035

What part of the anatomy does that refer to? A. I suppose that is our old fanny back again.

Q. That is a commonly accepted reference, Doctor, is it, to that part of the anatomy in polite society? A. You mean the sunny south?

Q. Yes. A. I never heard it before.

Q. But you didn't have any trouble in gathering what it meant? A. Not a bit, no.

Q. "Sunny south as she's bending over the cook-stove and letting her pores drip onto the skillet.

"The game-playing wife while gazing at a map of the Lake district in deep study and thinking of the jolly times Coleridge, Southey, and Wordsworth spent in that territory, might get in the frame of mind for a little loving herself. 2036

"In fact about the only wife of the stable who might not rate herself as a competitor of the wife-to-be-made-love-to possibly would be the wife-to-go-out-to-dinner-with. That woman would be no dummy in calling her shots on the menu and elsewhere. When it came to time for the over-sexed spouse to get around to his loving assignment, the feeding female might also have other arrangements in mind, and out of the entire sextette she might be the one least inclined to cause any loving trouble. As long as the six-timing boy chum would show up in time for her to tuck her bib up she would be easy to get along with." 2037

Doctor, do you think this article is in keeping with the mores of the day as to the discussion of the marital relations and decent behavior between married people? A. Well, the only way to make marriage go is not to have six wives and not to have this idea that you need that many women in your life.

2038 After all, if you want to keep the family intact, you have to consider that you have an aim and that you can't go here and there to get various phases of your life satisfied. That is, your wife may not be very intelligent, but you can't be going out with some intelligent woman all the time because you are going to get into trouble later on.

Q. You think this advocates or does not advocate stepping out and two-timing so-called? A. I don't think it advocates it. I think it gives a description of some men's thoughts about what they like in life.

2039 Mr. Bromley: It ridicules Dr. Joad's proposal, seriously made, for multiple marriage, doesn't it?

Mr. Hassell: I object to counsel—

Mr. Bromley: Why do you misrepresent it? You know what it is.

Mr. Hassell: I am not misrepresenting it. The witness testified he read it twice. He is an intelligent man and he knows what it means.

By Mr. Hassell:

Q. Doctor, you say there is no immoral or indecent connotation to be derived from this article? A. No, I don't so
2040 consider it.

Q. The various references therein, some of which I pointed out to you, are not filthy? A. No, they are not.

Q. Now, refer to page 38. There we have another of the page-size Varga pictures. This model, done in flesh tints, has on a red costume of the same scanty variety as some of the others we have seen. But in this instance this model has one silk shoulder strap in her left hand as if she is in the act of removing it. A. Or putting it on.

Q. Well, she is not standing in a position, nor is her hand in a position, to indicate she is putting it on, is it? A. I can't see her move yet. 2041

Q. You would say she is either in the act of dressing or undressing? A. I don't know.

Q. So far as this shows? A. Oh, I wouldn't know.

Q. You know of the way stripteasers operate, don't you, Doctor? A. Yes.

Q. That they will take down a shoulder strap like that and tease their audience. Would you associate that gesture in this picture with the smile on this girl's face? A. No, I would not.

Q. Would you admit that that is quite a scanty costume? A. It is a scanty costume. To me it is the bathing suit again. 2042

Q. The bathing suit? A. Yes.

Q. Would you say that it emphasizes quite markedly the the breasts? A. The breasts are large.

Q. And they stand out. The costume fits quite snugly underneath them, doesn't it? A. That is right.

Q. Would you say that this costume does not conceal very much of the body of the model? A. Well, I don't know what to say about that. No, it doesn't conceal very much.

You know a woman has breasts and you know a woman, when she is walking along the street in her clothes—some clothes emphasize her breasts. You don't pay much attention to it. 2043

Q. Have you ever seen breasts emphasized as much as they are emphasized here? A. In some clothes, evening gowns, and a sweater girl as she walks along.

Q. If this girl had on a sweater it would not fit quite so snug under the breasts? A. I can't quite visualize, but

2044 I know that factor is that the breasts seem to be emphasized.

Q. It shows the outline of the breasts to a certain point and then the sweater falls off or stretches to the abdomen down below. But here we have a very close and snug fit underneath, as though it is almost a part of the body, don't we? A. Yes, it fits snugly.

Q. Doctor, would you say that any of these young men that you have referred to as your patients, or that you had occasion to observe, would or might get a sexual k out of this picture? A. They might.

Q. They might be sexually stimulated? A. They might.

2045 Q. Now, on page 73, there we have a color photograph showing the body of the model who is in a recumbent position, is she not? A. Yes.

Q. In natural colors, natural body colors. This material thrown across her breasts, covering one arm and crossing the upper part of the left arm, and the material across the middle of her body, is rather sheer material, isn't it, thin? You can see portions of the body through it. Is that right? A. Yes, you can see some portions of the body through it. In some places it is doubled up, I guess.

Q. Would you get the idea that this model is clothed in this way to facilitate the mental undressing of her

2046 by readers of Esquire? A. No, no, I would not.

Q. She does not appear to have any clothing on underneath this covering, does she? A. No, but people who do this mental undressing don't need a half clad person. They just do it in their heads without any encouragement.

Q. But isn't it a fact that the less clothing a woman has on, up to a certain point, the more some people are liable to do that? A. And vice versa.

Q. You would say there is nothing morally objectionable

about a model posed in this posture— A. I don't believe so.

2047

Q. And with as little clothing on as this? A. I don't believe so.

Q. Now, refer to the picture at page 89. This is the "Paste Your Face Here" picture.

Doctor, would you say that, looking at the stage of that picture, that this was posed probably in a studio? A. Yes, I guess so. I would say so. I don't know; I should say so.

Q. The backdrop is not a very good representation of the ocean, or water, is it? A. No, I guess not.

Q. This model is seated on the shoulders, astride of a sailor whose face has been blanked out, and the legend printed there 'Paste Your Face Here."

2048

Do you think that is a decent studio pose that is entirely accepted in the mores of the day? A. It is the type of thing you see on the beach a lot, people posing in that way.

Q. But apparently this is not on the beach. It appears to be a posed picture in a studio. Do you advocate young men, who seek your advice, having such close contact with young persons of the opposite sex? A. I never advise them as to what they should do along these lines. I will discuss it with them and talk with them about what they are doing. I don't say "I think you better sit on the shoulder of some one."

2049

Q. But suppose in taking the case history of one of your patients, he or she, as the case might be, has related that he or she had done this sort of thing. A. Well, I would ask why she emphasizes that to me, why does she bring that up.

Q. Do you think this pose is an entirely moral and decent one for widespread distribution throughout the country in magazines of this sort? A. Yes, I think so.

2050 Q. You see nothing objectionable in it at all? A. No. I don't see anything objectionable.

Q. Now, refer to the cartoon on page 90, the next page, upper left-hand corner.

It shows what appears to be a factory scene, or possibly a lathe on a bench, and two females in working costume in the background, and in the foreground a female in a wedding dress with veil on. Underneath it it says: "She came directly from the wedding—boy! that's patriotism."

What do you think that has reference to, Doctor? A. I can't see anything—

2051 Q. You can't see anything in it? A. —except that she came directly from the wedding and is now working on some machine.

Q. Wouldn't it be most unusual for a young woman to come to a factory, possibly a war plant, to work with machinery, dressed in the costume that this one is dressed in? A. Yes.

Q. And would you consider there is any part of this joke, if it may be called such that she was so patriotic that she wouldn't even remain at home to take her wedding gown off, wouldn't remain with her husband for sweet moments, but came to the factory instead? A. Now that you put

2052 that into my head, I can see that is the way some people would look at it. I happen not to have interpreted it that way.

Q. You would not have taken it that way at all? A. No.

Q. Taking it that way, Doctor, would you say there is anything morally bad or objectionable or indecent— A. I think it is quite silly of her.

Q. Do you think there is anything morally bad or indecent in such an alleged joke? A. No, I do not.

Q. This would be one of the wedding night jokes that are passed around in stag parties and that sort of thing? A. I don't know. 2053

Q. That sort of joke, Doctor, isn't commonly told and accepted in polite society, mixed company, is it? A. I never heard this one before. I think jokes like that are told, yes. Everyone with those thoughts—I don't think it makes much difference whether they are polite or not.

Q. Now, at page 105 there is a cartoon or drawing showing what appears to be sort of a worked-out individual clinging to what looks like a palm, a cocoanut palm, on the shore, and in back of him are four grinning buxom South Sea Island women, and approaching in what looks like a canoe is a man in sailor costume, and underneath is the legend "Thank God—help at last." 2054

Do you see any sexual connotation in this cartoon, Doctor? A. Yes, I think there is.

Q. Do you get the inference that the man on shore needs help to fulfill his sexual obligations to the females shown? A. I don't know what he has been doing. He may have just been loving them up or he may have been chasing them around or it may be that he has been fulfilling his sex life. I think there is a double meaning to this.

Q. Would you think that the sailor in the canoe is coming to take him away, to rescue him? A. You could interpret it as that. 2055

Q. It is a rather small boat for two men, isn't it? A. I don't see the back part of it, so I can't tell you.

Q. So, since it is so small, you wouldn't entirely get that connotation from it, would you? A. Well, there have been an awful lot of people on rafts lately, and they are small.

2056 Q. In other words, he would rescue the other fellow by letting him come along in the water and take hold of that thing to keep him up? A. You could interpret it that way.

Q. But the natural interpretation is the one of sexual relief, isn't it? A. That would also be sex relief if he took him away, relief from being attacked.

Q. But the individual in the canoe, would you say he has an anxious, lead-me-ashore look? A. No, he has sort of a dumb look, as a matter of fact.

Q. Doctor, you would not infer any objectionable, immoral or indecent sexual connotations from that cartoon

2057 joke? A. I would say that some people could very readily say that this fellow has been up against it, that the girls have been after him quite a little from the sex standpoint, and that is most likely what they were inferring.

Q. I see.

Now, look at page 110, Doctor, and there we have a cartoon showing in the far background a man with a walrus mustache and rather large eyes, looking at the nurse who has just passed him and his hat has blown up off his head. In front of the elevator appear to be a doctor, he has a satchel in his hand, and possibly an interne standing beside him. They are eyeing the woman.

2058 And in the close foreground another man with goggle-eyed backward look at this nurse who is minding her business, walking down the hall with a tray in her hand.

Note the nurse has rather prominent breasts and, this legend underneath:

"That's Miss Blimpton, our special nurse for low blood pressure patients."

Do you associate the name given to this female character in this cartoon with the size of her breasts, and that, in

turn, with the reference to the low blood pressure patients? A. No, I don't, not the name, no. 2059

Q. How about the breasts? A. I can see the whole figure is that of a girl who might have some effect on these low blood pressure fellows. It is a typical nurse's joke where the fellow says "Be sure to get me a good-looking nurse," and he kids his wife about a good-looking nurse.

Q. You wouldn't say this is a good-looking nurse, would you, Doctor, as far as the face is concerned? A. Well, it is that moon face that some people like.

Q. A moon face. And what sort of eyes would you call those? A. They are sort of closed. 2060

Q. And you can't see her nose except for a tiny speck. There is nothing to recommend itself in any of her features, is there? A. No.

Q. Well, isn't the point of that joke the name and the size of the woman's breasts and the stares of the men? A. No, I think the emphasis is on the fact that she is a nurse. It is the old story.

Q. It appears to be in a hospital, doesn't it? A. Yes.

Q. That would not be a strange thing, to see a nurse in a hospital, Doctor? A. No.

Q. And you think that no objectionable or immoral or indecent connotation can be derived from that cartoon whatsoever? A. That is right. 2061

Q. Would you say that if these men are discussing the size of these women's breasts particularly that that is the thing that is ordinarily done in polite society? A. No, I don't think so.

Q. Page 127, Doctor. Here we have a drawing in color showing a young lady prone on the ground with pillows under the upper part of her body, having her legs painted, and one leg is high in the air and the girl who is doing

2062 the painting is pencilling a line to indicate the seam of the hose down her leg, and the stocking extending well up midway or beyond her thigh.

Doctor, would you say that the costume, that the prone model has on is underwear? A. I would assume that.

Q. That is the bra and the panties? A. That is right.

Q. Underneath that is this legend: "Hew to the line, Bertha, let the skirts fall where they may". The skirts, would you think, would refer to the skirts of the panties, the panty legs? A. No, I wouldn't. What I would feel that was or what they are trying to infer is to get the painting on
2063 the legs, get the line up and let the skirts fall where they may, let her wear short skirts.

Q. After she gets the legs painted? A. Yes.

Q. You say there is nothing immoral or objectionable or indecent in a cartoon of this sort in a men's magazine? A. I do.

Q. You say you do? A. I do.

Q. Now, page 144. This has a reference to an article: "Offensive on the Home Front", which starts on page 56 and is continued on this page, third column from the bottom of the next to the last paragraph:

"Once he had slapped a prostitute in Bordeaux who had
2064 persisted in keeping his cap, but that didn't count. He was amazed to find himself slapping his second woman. Dorothy began to cry loudly and headed out of the room. Dizzy and with the taste of blood in his mouth he noticed how large the uniform made her behind look".

Doctor, did you read the whole of that article or story? A. No, I didn't.

Q. You just read part of it? A. I don't think I did. Let

me get back and look at page 56. I'm afraid I didn't read that whole article. 2065

Q. But taking that item do you think it is entirely decent to refer to the anatomy of a female in a publication of this sort in that fashion? A. I do, yes.

Q. You think there is no filthy connotation to be had from it? A. No.

Q. That that sort of thing is ordinarily accepted by the average individual— A. I think so.

Q. (Continuing): —in society today? A. I think so. Some people do object to the word "behind".

Chairman Myers: This is a good point to take a recess for a few minutes. 2066

(Whereupon, a brief recess was taken.)

Chairman Myers: We will proceed.

By Mr. Hassell:

Q. Doctor, referring to the September issue of Esquire, page 10, third column under the heading: "Conservative suggestion", what appears to be a letter or an excerpt from a letter reading: "Recently I have read that Varga paints all his models in the nude and after that puts their clothes on. (I mean the pictures, of course.) 2067

"Why doesn't he leave them as they are, thereby cooperating in this national emergency by conserving paint?". And signed " height of expectation".

Doctor, do you think that is the normal reaction the average young man looking at the Varga girl picture might get? A. No, I don't think so.

2068 Q. Do you have any idea why this is printed in Esquire? A. No, I haven't.

Q. You wouldn't think it was designed to indicate what the average young man interested in the Varga girl pictures wants? A. No, I don't think so.

Q. Now, if these Varga girls were pictured in accordance with this man's suggestions— I say man's; I correct that, this person's suggestion—do you think that would be any more indecent? A. Not necessarily, so.

Mr. Bromley: I object to the characterization
2069 more indecent. I don't think counsel ought to phrase his question that way. It is not fair.

Mr. Hassell: I will be glad to rephrase it.

By Mr. Hassell:

Q. Doctor, would you think if this Varga girl picture or pictures were painted without any clothing or any semblance of clothing on, they would be indecent, immoral and objectionable from a sex stimulating standpoint? A. I don't think so. I don't think it would make much difference. It might be to some people. Again, I can't say that.

Q. Now, referring to the Varga girl picture at page 38.
2070 The clothing this model has on is not concealing, is it, Doctor? A. No.

Q. It doesn't conceal a single thing about the model, does it? A. The shoes conceal part of her feet.

Q. You can see her painted toe-nails? A. Yes.

Q. You can see her foot down to the instep or the heels? A. That is right.

Q. But the garment, if you can call it that, the filmy gossamer affair painted over the small part of the back

and down on her thighs, up over her breasts, doesn't conceal or doesn't render her less naked, does it, than if it had been left off entirely? A. Not much. 2071

Q. You say not much. What does it conceal? A. Well, it symbolizes that she has something on. To some people that has great meaning.

Q. To some people that would lend piquancy, would it not? It would lend zest or assist in the kick to be derived from it? A. You mean to have it on or off?

Q. To have this filmy affair on. A. Yes, I suppose it would.

Q. She looks a little less undressed, but as a matter of fact the garment doesn't conceal anything? A. Anything in terms of the side view, that is right. 2072

Q. Doctor, did you notice it is entitled "Military Secrets" and if you have read the verse it refers to a boy she has in the Army, one in the Navy, and one in the Marine Corps. She has in her hand a diary, and she has an expression on her face with her mouth puckered up, indicating that possibly she anticipates being caught or something, or having these military secrets revealed.

Would you say that this cartoon is not calculated to incite sexual desires on the part of young readers, young men readers of Esquire? A. It might stimulate them to some sex desire, yes. 2073

Q. But you say that this picture painted in natural colors or what seems to be natural colors is in no wise morally objectionable or indecent? A. I say that, yes.

Q. On page 43, here we have two slave girls on a stand and a sheik-like person with a bag in his hand, waving his hand out to what looks like an American soldier in the foreground, who is standing among persons dressed in Near East costumes, a tank in the background, and the legend: "Sold American".

2074 In examining these slave girls, Doctor, would you say that they appear to have nothing on the upper part of their bodies except a jacket affair open in the front? A. That is right.

Q. Would you say that these hair-do's on their heads are Egyptian or Moroccan or Near Eastern or American? A. I don't know. They may be French.

Q. They may be French? A. I don't know.

Q. Is it common to vend slave girls among the French? A. I believe so.

Q. Do you see any difference in the shape of the face,
2075 the features, the hair-do's on these two figures, from what you might expect to find on perfectly respectable American girls? A. Yes, I think so.

Q. You say you do see something different? A. I don't see anything different, no.

Q. Now, Doctor, what do you think a soldier, an American soldier, in North Africa, if that is where this setting is supposed to be, would do with two slave girls if he bought them? A. I don't know.

Q. Do you notice he has money in his hand that he is holding up? What would he do with them? A. A lot of things, I suppose.

2076 Q. What would be implied by this cartoon, reasonably implied? A. I don't think that it necessarily implies that he is buying them for immoral purposes.

Q. What else would he do with them? A. He might have a good time in lots of ways. It may be sort of symbolic of the fact that "here is a guy with money". They are his and he is going to take them out.

Q. This American soldier would not expect that these North African slave girls, if such they be, might be good dancing companions? A. They might be very good dancers like the Geisha girls.

Q. Do they dance our dances? A. The Geisha girls? 2077

Q. These North African slave girls. A. I have been told that the boys have been teaching them.

Q. And you think he is buying them to give them dancing lessons? A. I don't think so.

Q. You don't think he would buy them for the conversational entertainment he could have with them? A. He might. As a matter of fact, I would have to know more about this boy.

Q. The ordinary American soldier does not speak French or Arabic, or whatever the natives speak over there, does he? A. Perhaps not. 2078

Q. So, he would not get much entertainment, as far as conversation is concerned, from them. What other connotation do you attach to that? How could he make use of them? A. Do you mean this particular thing?

Q. Yes. A. Thinking in a rather broad manner, after all, these are rather lonesome soldiers and they want women for various purposes.

Some of them want women for definite sex purposes. The Army has to warn the boys about venereal diseases, they have to take up the question of sex with them, knowing that might help it. He might want them for companionship or to show off to his friends, to boast and so forth. 2079

Q. What companionship could he have with them in an Army camp in a theater of action, Doctor? A. He couldn't bring them into the Army camp even if he bought them.

Q. He would have to farm them out some place? A. Yes.

Q. You don't think the natural assumption to be attached to this cartoon and the purpose for which it was included in Esquire, was the immoral connotation to be derived from it? A. Not necessarily, I don't. It could be taken as such.

2080 Q. Now, Doctor, let's refer to page 65. Here we have the husband dressed in red checkered apron with ruffles on it, leaning part way out of the kitchen door, talking to the milk maid who is dressed in a rather form-revealing slack suit, showing prominent hips and breasts, and she is red-headed, and underneath appears this legend: "Come back later, sweet—my wife hasn't left for the factory yet."

This is apparently what the man leaning out the kitchen door is saying to the milk delivery maid. A. That is right.

Q. And why do you think he wants her to come back later? A. He is having some sort of an affair with her, I suppose.

2081 It is the reversal of the old ice man story that went around for years.

Q. And you think there is implied a sexual point or a meeting outside or beyond the knowledge of the wife between the husband and the milk delivery girl? A. I don't know if it is a sexual thing. They may be having some affair. It is the usual story you hear, or little remarks made about the ice man and the milk man and so on having an affair with the housefrau. That is a common type of thing.

Q. I see. And those stories were smutty, weren't they? A. I don't know. They are referred to due to the fact

2082 that these affairs go on. I don't know if you would call that smutty or not.

Q. Do you think that those stories such as you advert to are perfectly normal, common stories? A. Lots of people refer to them, very nice normal common people.

Q. And the fact that such trysts or affairs is a common every-day accepted thing in our society? A. A lot of people believe so. For instance, the man who kids his wife about his good-looking stenographer or going back to that nurse story, who kids his wife about the good-looking nurse, or does take his stenographer out unknown to his wife.

Those things are going on all the time. Some of those affairs lead to sex relations and some don't. An awful lot of people don't really have intercourse, although they go out with each other. They think they are having some sort of an affair, but they are not. 2083

And, as I said, they may be just petting or a lot of other things.

Q. These incidents are encountered in divorce cases, aren't they? A. Yes.

Q. But you wouldn't say that is the common every-day accepted conduct of the husband and wife, for the husband on the one hand and the wife on the other hand, to have affairs with the milk man or iceman or fuel dealer, or what not? A. It is not a common thing, but it is a common joke? 2084

Q. A common joke? A. Yes.

Q. By reason of the fact that it has been told so many times you figure that makes it decent? A. It doesn't make it decent or indecent. It just gets into the whole culture and, of course, part of the things that we begin to accept.

Q. Now, page 66. There we have a cartoon showing what has been described, I believe, as a heavy love scene, a light haired girl in a red dress, seated across a man's lap. She has her arms around his neck and he has his arms around her body. Underneath this appears: "It is the only time daughter and her young man have for courting. They both work nights in a war plant." 2085

Doctor, do you think that scene is a common every-day scene and is accepted in most average homes today? A. I don't know whether it is accepted. A lot of people don't want to see it. They prefer not to see it, but they know it goes on.

2086 They know boys and girls kiss a lot and hug a lot. The term "petting" again is in our culture. We know it goes on a lot.

Q. And here one of the parents, and the mother at that—who is usually more strict about that—isn't that right? A. Some mothers are.

Q. And the mother herself is making light of this. Do you think that is a common every-day accepted thing in the light of the mores today? A. A lot of people accept it. A lot of families encourage their girls to have romances. They know that sort of thing goes on. We know petting
2087 goes on but we prefer not to see it, perhaps. We try to blind ourselves to these things.

Q. I see. You say there is no morally objectionable or indecent connotation to be derived from that cartoon? A. Not from my standpoint, no.

Q. Page 84. Here we have a full-page cartoon in colors dealing with the same thing, a heavy love scene and theme, and note, Doctor, the female's mouth appears to be open. A. Yes.

Q. And it looks like a part of the boy's face or mouth is inside the female's. A. Yes.

Q. The female has her arms around the man who is in a
2088 sailor's uniform, and he has his arm around her waist.

Now, around the corner, apparently in the hall, looking through the cased opening, are the parents of this young girl. And underneath is the legend: "Every night he tells her he is sailing tomorrow."

Apparently the mother is telling the father here, and he has somewhat of a look of surprise on his face.

Would you say that this scene depicted in this cartoon is the usually accepted moral standard in the ordinary average

American home today? A. A lot of people accept it. Again, I would say that a lot of people see that it goes on, they know it goes on, and they accept it. 2089

Again, in certain cultures, no. Certain racial groups wouldn't stand for that. They warn their daughters about it and don't want it to go on. They feel it leads to something and they just won't put up with it.

With other groups, they say: "There it is", and they accept it and know it does go on.

Q. But in most families today that wouldn't be accepted? A. I don't know. A lot of families wouldn't accept it. I don't know whether it is most, a lot would not. 2090

Q. Would you say that that would—and the preceding scene we have called attention to—be in accord with the mores of the day? A. I think so, yes.

Q. As showing the ordinary conduct of young people in the presence of their parents in the average American home? A. Oh, well, you are pinning me down there to what you define as an average American home. In a lot of average American homes this would happen, in others it wouldn't happen. It is according to what the so-called economic life might be. It might happen with some very rich people who would stand for it. Some very poor people might stand for it, some middle class people might stand for it. Now, what is the average class? Are you speaking of the middle class or the poor class, or what? 2091

Now, I don't feel that these youngsters are getting anywhere by their petting and they are not getting a good healthy attitude towards sex questions. On the other hand, it may be saving them from a lot of other stuff, as I said some of them would prefer to pet than go further.

Q. Well, a lot of times the so-called petting leads rather

2092 rapidly and inevitably to sex union, doesn't it?" A. Sometimes it does, after a long period of time. I mean, not always. Sometimes the youngsters—for instance, the American girl has a reputation with foreign people that she would pet but she won't go any further, but she certainly likes petting.

Q. Now, when you consider these last two classes we have discussed here in a magazine such as Esquire where sexy matters in the form of pictures like Varga girls and others, and off-color jokes and cartoons are regular features, would you have any different view on this? A. No, I wouldn't.

Q. You would say there is nothing indecent, nothing
2093 calculated to shock the average ordinary parent in those scenes? A. It would shock some average ordinary parents and it won't shock others.

Q. Now, Doctor, page 86: "Goldbricking with Esquire", first column at the bottom of the page reads:

"A sergeant was home on emergency furlough to be with his wife who was expecting a baby. One morning on his way to her room he passed the babies' ward and stopped to have a look at the recently arrived children; in one corner he noticed two of them in a serious conversation. He reports it went something like this:

"First: 'I'm a girl, what are you?'

2094 "Second: 'I'm a boy.'

"First: 'You look like a girl to me.'

"Second: 'Well, I'm a boy. Wait till the nurse leaves and I'll show you.'

"The nurse did leave and the boy lifted the covers: 'See. blue booties' ".

Do you think, Doctor, that that joke or alleged joke refers to the average person reading it as assuming that that is

what is meant, that the boy is going to show his sex organ to the girl? A. That is what it led me to believe. 2095

Q. You say that is in accord with the mores of the day, nothing indecent or morally objectionable about it? A. I don't believe so. Again, that is an old-timer. It has been told a lot and I have heard it a lot in very many places, and it certainly has not affected the morals of the people I have heard tell that same story.

Q. Of course, the joke is over-distorted, isn't it? This is apparently the nursery of a hospital and newly arrived babies are talking to each other. A. That is right.

Q. So it is a sort of a strained situation to arrive at the point of the joke and that is the displaying of the sex organs, isn't it? Do you think that that is entirely decent and moral and not objectionable in a thing like this? A. For what? 2096

Q. For this. A. For this story?

Q. Yes. A. I think it is all right. I don't think it is indecent.

Q. You don't think it is objectionable at all? A. No.

Q. Now, page 87, the same "Goldbricking with Esquire", at the bottom of the third column: "She: 'Would you like to see where I was operated on for appendicitis?'

"He: 'No, I hate hospitals.'"

That is dealing with the same subject matter, isn't it, Doctor? A. Somewhat. I mean, it is again the same type of a joke. 2097

Q. Do you think it is a perfectly accepted thing in ordinary every day normal society for a young girl to indicate or a man to think that she is indicating that she wants to display her body to him A. This type of thing would happen in terms of the sense of humor. You see, there are a lot of youngsters that tell these things, and they are all right,

2098 they are perfectly decent youngsters. They just happen to have a little Rabelaisian sense in their souls, or something.

Q. On page 102. Here we have a color cartoon, full page size, showing a man on a beach with tattered shorts and nothing else, a tropical scene in the background, apparently a small tropic island, and lying on the beach with her legs cocked up, one leg across the other partly, a young lady with a brassiere and panties. Under this appears:

"Ain't it a damn shame? Plenty of water on this island, plenty of food, and now I get hallucinations."

What do you think his hallucinations are about? A.
2099 About finding a girl on the beach.

Q. Referring to food and water and the other desire, desire of man, is that referred to here as hallucinations? A. I don't think so. I didn't think of it in those terms. You are talking about self-preservation, that we have various instincts, I suppose. Self-preservation of the sex instinct.

Q. That is what I am referring to. A. I wouldn't take it that way.

Q. You wouldn't so understand it? A. No. It means that he wants a woman and that is a rather normal and natural thing.

Q. You say this cartoon would mean that he wants a
2100 woman? A. I don't know whether it would or not, but he is having hallucinations, and we always feel that hallucinations perhaps show your desires.

Q. So it might be that he wants a woman? A. Yes.

Q. And if that were so, would you see anything morally objectionable or indecent in that connotation? A. No, I wouldn't.

Q. Now, referring to the October issue of Esquire, Doctor, there is on page 10, column 3, a reproduction of what pur-

ports to be a letter headed "The case of the classy chassis", which reads: 2101

"As a member of the armed forces and away from home, I, too, am an ardent admirer of a classy 'chassis' such as presented in Esquire by the talented Varga."

What does he mean by chassis there, Doctor? A. The body.

Q. The body? A. Yes.

Q. (Continuing): "My passion for Varga girls goes almost to the extreme; they occupy my walls, ceilings, and even space on my luggage is given up to these shapely damsels.

"However, I am inclined to sympathize with the mysterious miss whose 'chassis' appears on page 10 of the August '43 issue. Though my liking for the Varga wenches is supreme I would not replace the chassis on page 10 for a Varga dame. It is too bad you could not provide a larger of such photos so that we, who appreciate shapely forms, could pin up. A spot has been reserved on my wall to deposit such a dish. Why not give us the face?" 2102

Do you agree with the reference made in this letter to the Varga girl pictures as the Varga wenches? A. I never thought of them in those terms, no.

Q. What is a wench? A, A wench?

Q. Yes. A. I don't know the real definition of wench. We refer to them quite often in a rather disparaging manner. I don't believe it necessarily has any sex connotation, if that is what you mean. 2103

Q. You don't think ordinarily when a woman is referred to as a wench that there is an immoral thought to be conveyed? A. No, I don't.

Q. By that term? A. No.

Q. He says: "We who appreciate shapely forms", and he refers to such a dish and he wants to put it up on his wall. Referring to the form of a woman as dish indicates that

2104 he wants to enjoy it, doesn't he? A. Not necessarily. Again it is a slang expression.

Q. It is a slimy expression? A. Slang.

Q. Slang? A. Yes.

Q. You speak of food as a dish, don't you? Various articles of food as a dish? A. Yes.

Q. When you speak of a woman as a dish what do you have in mind there? A. What do I have in mind or what do the boys have in mind? Well, I think just as I expressed it here, I mean, here is a boy who is rather inclined to like shapely women and he enjoys having the physique part of
2105 them stand out or their physique stand out, and there it is.

Q. Would you say that the writer of this letter indicates by his expression and phrases therein that he gets an extreme kick out of the Varga girl?. A. Yes. He may get an extreme kick. According again to how you define the extreme kick. He gets quite a kick out of it, he enjoys it.

Q. He says: "Though my liking for the Varga wenches is supreme". Do you think he is referring to a perfectly normal and average reaction to the Varga pictures? A. Oh, I think so, for certain people.

Q. Now, Doctor, coming to page 37. Here we have in the lower right-hand corner the man on the beach with
2106 trousers on only, and an identification tag around his neck, and a hula girl tattooed on his arm, and, by the lines adjacent to his biceps, indicating that he is flexing his biceps, to make the figure tattooed on his biceps move. A. That is right.

Q. And a native girl in what appears to be a grass skirt and nothing more on is gazing at the scene depicted on the man's biceps. Notice the way this girl's hair is done. A. Yes.

Q. Her features might indicate that she is an American girl so far as her features and hair are concerned; isn't that right? A. I don't know. I don't know anything about how the natives wear their hair. 2107

Q. A tropical scene maybe in Polynesia. Would you say there is anything objectionable, immoral or indecent or having any sexual connotation to be derived from that picture? A. No.

Q. One appearing in a magazine like Esquire? A. No.

Q. Page 38. Here we come to the article: "Wise Men Pick Pyknic Girls". How many times did you read this, Doctor? A. I read it once. 2108

Q. You are familiar with this scientist Kretschmer? A. Kretschmer, yes.

Q. K-r-e-t-s-c-h-m-e-r? A. That is right.

Q. From whom the article herein purports to be derived? A. Yes.

Q. Would you agree, Doctor, with the generalizations with respect to the women described as types in this article reads something like the generalization to be found in the so-called horoscope? A. In a horoscope?

Q. Yes. A. No, I wouldn't agree with that.

Q. Have you ever read a horoscope, Doctor? A. No. Years ago, I guess, but I haven't lately. 2109

Q. It has been so long? A. Yes.

Q. Since that you have forgotten about it? A. Yes.

Q. If Dr. Tillotson did testify that Kretschmer had been accused of getting some of his verbiage from horoscopes, you would disagree with him, would you? A. Would I disagree?

Q. Yes. A. I think so. At least, I don't know about it. The basis of Kretschmer's work is that he tried to determine two types of people, rather four types of people, in

2110 terms of mental illness, and he described the Pyknic type. That the Pyknic physique showed that these individuals were prone to come down with manic pressure types of insanity when they became ill. The short, sort of square-faced people with the shield-like or round face and short neck, thick body, short arms, and so on. That when they became ill they went into a certain disorder which had to do with a disturbance. These people either became very, very sleepy or very, very stupid. Very vivacious type of individuals and they are very attractive individuals when they come out of their illnesses. Those are the different
2111 types.

Q. Did he recommend them as good life companions for marriage? A. I can't recall seeing that. His work is purely on the basis of trying to say that if you have this type of build you will have a manic depressive type of insanity if you become ill.

If you are a leptosome, a flat-chested individual with a long neck and sort of egg-shaped face, then you will be a schizophrenic.

Then, he had two other classes, a dysplastic, which threw everything out of the ordinary—one was too tall or one thing or another—and the other was the asthenic build.
2112 and he went on to show that these two types when they became ill became definitely ill and they did have a certain given personality.

Q. Doctor, when you read this article, of course you drew on your store of knowledge of Kretschmer and his work, didn't you? A. Yes.

Q. And would you say that that prior knowledge of that work prevented you from appraising this article as an ordinary, average normal individual every day would appraise it, who reads it in "Esquire"? A. Well, I know more about it than the ordinary individual.

Q. It would naturally have a different effect on you, wouldn't it, Doctor? A. Oh yes, sure. 2113

Q. Now, page 44, Doctor, here we have the Varga girl in the well-known recumbent Varga pose, portrayed in what approximates natural colors, red hair, possibly hazel eyes, entitled "Torches at Midnight."

Doctor, what would you say this garment is that this model has on? A. I really don't know. I suppose it is one of those under things that women wear.

Q. Something like a teddy? A. Yes.

Q. Quite thin, you can see the ribs through it and the umbilicus? A. I can see the ribs. I don't know whether I see the umbilicus or not. 2114

Q. You say you can't see the umbilicus or you are not sure? A. No, I am not sure.

Q. Just turn to the white of the fold where it folds under the page. A. There is a shading there. It is not a very accurate looking umbilicus.

Q. You see the tip of the nipple of the right breast? A. I do. I wondered why he didn't put one on the other.

Q. Maybe he thought he could get by with the one and not the other, Doctor. A. Maybe.

Q. Doctor, would you say that this picture and this pose in a magazine such as this, would be calculated to sexually stimulate young men to whose attention it came? A. It might slightly sexually stimulate them, yes. Again, it varies with the individual. A lot of them might like it and others might be sexually stimulated by it. 2115

Q. Doctor, the average boy would not like to see his sister or his mother in such a costume, would he? A. Oh, I don't know. I have been thinking about your statement along that line and I am not so sure about that.

It is the custom in homes for women not to appear before

2116 their children in this kind of thing and for brothers and sisters not to appear that way.

Q. Doctor, do you say this would or might be sexually stimulating to the average normal individual? A. Some of them; others not at all.

Q. Now, refer to the cartoon on page 49. Here we have a reversal of the milk delivery. A. That is right.

Q. And the henpecked or home body husband motif, with the big brawny red-headed man seated on the couch—he is in overalls, apparently, and the young woman seated in his lap with her arm around his neck and the man with—would

2117 you say that is a satisfied look on his face? A. I think it caricatures that, yes.

Q. And you see the woman's breasts are rather over-emphasized? A. They are prominent.

Q. And in front of them is a coffee table with a cocktail shaker and two glasses, indicating they had been imbibing intoxicants? A. Yes.

Q. And standing to one side is a man in topcoat, spats, hat, muffler around his neck, cane in his hand, glaring at the scene. And under this appears this legend: "Hello, dear —this is the gentleman who sells us our fuel oil."

Do you think there is any morally objectionable or inde-

2118 cent connotation to be attached to this cartoon, Doctor? A. No, I don't, in its—

Q. Is it an every-day customary happening for a wife to be caught in the embrace of a workman or service man after they have both had drinks, by the husband? A. No.

Q. You would say that this situation or scene depicted here is not a common, ordinary every-day scene, accepted in the mores of the day? A. That is right. This is a joke. This is again a joke that has been going on for a long time.

Q. Page 56-128, Doctor.

Did you read that story, the "Portrait Above the Fireplace"? A. Yes, I did. 2119

Q. How many times did you read that? A. Twice.

Q. And this tells a story of a man who did not know his mother. A. Yes.

Q. Who found a picture of a lady, or a woman, framed and all, and he bought the picture and cleaned it up and hung it in his room and looked upon it as an ideal, and as his mother, and he so comported himself with respect to it, and in fact, told his friends that this was a picture of his mother.

And on one occasion a friend of his, after he had attained some success in life, a friend of his in his cups, tells John, the hero, this: 2120

"Of course, you don't know, John. I hate to think of anyone ever laughing at you. But that is a portrait of Mabel Haynes. She was the madam of the highest class house in the old district."

Does that mean to you, Doctor, that this picture was the portrait of a bawdy house keeper? A. Yes.

Q. In the red light district? A. Yes.

Q. And do you say that such a story as this in such a magazine as this would not have a filthy or indecent connotation? A. I don't believe so. It is a story which may have been an actual fact. The orphan child is often looking for his mother, has a desire to have one. This is a story that may have happened; I don't know. 2121

Q. And, Doctor, even though it did happen, even though the facts were absolutely true, would that make the recitals in this and the point of the story a common, every-day accepted situation in society? A. No, but on the other hand, this may be a very good story. I kind of think it is a good story, well written and well told, showing again the life of the individual.

2122 Q. From a psychiatrist's standpoint, does it have any moral or illustrate any moral? A. No. About the only thing I can think of is that even a prostitute may answer a good purpose once in a while.

Q. You wouldn't say this was a good example of the so-called Oedipus complex? A. No.

Q. The Oedipus complex has reference, does it not, or is applied largely to the female in the absence of external organs? Isn't that a fact? A. What is that?

Q. Isn't that associated with that? A. The Oedipus complex?

2123 Q. Yes. A. No. What the Oedipus complex means is that all of us are certain to have a certain love attachment to our mothers and that is something that is very difficult for men to throw off.

In his psychology he is sort of hounded by that all through his life. In some senses it relates to an almost sexual desire for that individual. A child is supposed to be broken free of that by the time it reaches—I have forgotten the exact age, but it is four or something of that nature.

Q. It is an attachment to the parent of the opposite sex of the child? A. Yes. They used the Electra complex where the girl is attached to the father. The psycho-analytical

2124 school is a school that brought that out and uses it in their treatment of cases.

Q. And you wouldn't say that this story is a good illustration of that type of complex? A. I can't quite see it that way. I don't see him in any way in terms of any sex relationship with his mother. Here is a mother who has had a great effect on this man's life. He can always look up to her and he is being helped in his life by this symbol, although it is a picture. And then it turns out to be a prostitute.

Q. And you say there is nothing indecent or filthy or shocking to morals in that sort of situation? A. Not to me, no. 2125

Q. Now, Doctor, refer to the November picture, the Varga girl picture and verse on page 46. There we have a girl seated cross-legged, and what is she dressed in, Doctor? Do you know what that garment is? A. It is one of those corset affairs, I suppose—Spencer corset or something.

Q. A Spencer corset. Is that a medical corset? A. I really don't know.

Q. You wouldn't know whether this is a girdle or a corset? A. No, I would not.

Q. Note the startled expression on her face and the verse: "Virtue triumphs," the verse reading: 2126

"The look of alarm
On this bundle of charm
May set up some foolish illusion.
Her state of attire
May also inspire
Some rather ignoble conclusions.
Perhaps you've surmised
That the gal's been surprised
By a villainous sort of a louse—
But, brother, you're wrong, 2127
You've been wrong right along—
It wasn't a wolf . . . but a mouse!"

A. Yes.

Q. Doctor, would you say that this picture of this girl in what purports to be lifelike colors, coupled with her scanty attire and the expression on her face, and the wording of the verse, would be calculated to sexually stimulate readers of this magazine? A. It might; I don't know.

2128 Q. The verse calls attention to her scanty attire? A. That is right, but it isn't always scanty attire or bosoms or what not—some people go crazy about hair.

Q. But this is pointing to her scanty attire and the fact that she has only one garment on her body— A. That is right.

Q. And intimates you are to gather, or the reader is to gather, when it gets to the last three words, that she is being spied upon by a wolf or a male individual who wants to make use of her. Do you say that is right? A. I don't know whether you want to call it "make use of her." You use terms that I wouldn't quite use.

2129 Q. Well, you change them if they don't suit you, Doctor. I don't want to put words in your mouth. I wouldn't do that. A. It leads you to believe that something is going to happen, and all of a sudden you are disappointed. But I don't believe that just the fact that reference is made to possibilities means that it is obscene or immoral.

Q. This model is what you might call a fulsome model, fully developed breasts and legs, is she not? A. Yes.

Q. You don't think that readers of this magazine, or some readers of it, might get a special kick out of looking at that and reading that verse? A. Some of them might. An awful lot wouldn't. I think they would take it for

2130 what it is worth and let it go at that.

Q. And to you, Doctor, it is not worth very much, is it,—I mean sexually? A. It wouldn't bother me.

Q. It wouldn't bother you? A. No.

Q. Look at page 52. Here we have a full sized, full page cartoon, in colors, showing a sheik-like person with three females, rather scantily clad on the upper parts of their bodies, with loose jackets which do not fully cover the breasts of the model to the right, and trousers that are

sheer—their legs can be seen through them—and the man in the foreground is talking to two girls beside him, and in the background, with their backs turned, going away, are a moorish gentleman—a man with his arms about similarly clad girls—and underneath is the legend—"Such a neighbor, always borrowing." 2131

Doctor, do you think that the idea sought to be conveyed here is that one sheik has borrowed a couple of slave girls for use sexually from this sheik who is talking in the foreground? A. It may do that.

Q. Now, look at the hair styles of these five women models in this picture. Do you see that they are very much different to the hair styles you see every day on American girls? A. No, I see all kinds of hair styles. 2132

Q. Now, these models, the two in the background, are red-headed, the one in the foreground is red-headed, the one nearest the sheik in the foreground appears to be auburn or dark haired, and the one to the right appears to be a blonde. Would you say that those are the types of women found in the Near East? A. I don't know. I don't know enough about physical anthropology to tell you that they may be, or the social anthropology. They may bring these people in and import them for all I know. I don't know.

Q. But, so far as you know, the heads of the models might be American girls? A. Well, it might be. 2133

Q. From the appearance of the hair, the color, the hair-do, and the expression and so forth, is that right? A. Or they might be influenced by the American girl in appearance and dress and so on.

Q. Doctor, would you say there is any sexual connotation to be derived from this cartoon when found in a magazine such as Esquire? A. I suppose there is some sex connotation, yes. You see a lot of people don't carry the joke any

2134 farther than that; they don't allow their mind to run riot and get to thinking about it, or the details about it. It is just the fact that you see these things and you think it is amusing and you let it go at that.

Q. In this country women are not ordinarily borrowed, are they, Doctor? A. No. In that country they may be.

Q. But this magazine is an American magazine? A. That is right.

Q. Circulating in the U. S. A.? A. That is right.

Q. Don't you think that this cartoon is designed to convey just that inference and connotation? A. That they

2135 are being borrowed?

Q. Yes, for sexual purposes. A. Yes, I suppose so.

Q. Now, Doctor, let us refer to page 60. There we have, on page 60, the full page color photograph, and on page 61 the legend:

"The Esquire Canteen. The girls from the Folies Bergere."

And the first sentence under it reads: "Here are five perfectly good reasons why service men and mere civilians pause for laughs, libation, and libido at the Folies Bergere."

Now what does "libido" mean here, Doctor? A. Well, I suppose, again going back to my original—

Q. Your original definition of it? A. My original defini-

2136 tion of it. I don't know how it is used in this particular circle, the stage play and so on. I don't know.

Q. You don't know? A. Whether that means sex alone or whether it is in a broad sense. For instance, in one of these magazines someone used the word "Amgot". I don't know whether he knew what he meant.

Q. Doctor, that language I called your attention to, in connection with the scanty costumes and the models and the color photograph on the opposite page, do you think the readers of this magazine would get any sexual stimulation

from those things? A. The same as they would get, the men who go to the shows and the Follies and Rose's girls and so on. A man always wants to go to these things; he does get some stimulation. Whether he gets anything after that, I don't know; it is a stimulation. 2137

Q. Now, Doctor, referring to the cartoon on page 66. Here we have at the top of the page, in color, a cartoon showing two soldiers, apparently American soldiers, with guns on the ground, their hands in the air, broad smiles on their faces, surrounded by five females, possibly South Sea Islanders, dressed in some covering merely around the hips, and underneath it says: "It's no use, Sarge, we're outnumbered—Yippppeeee!" 2138

What would you say that these soldiers are delighted at? Would you say these soldiers are delighted at being outnumbered by the five buxom, rather attractive looking almost nude native women? A. Yes. They certainly have an expression of joy. I would say yes, they are very delighted.

Q. Would you say that that implies that they anticipate rather anxiously some sexual enjoyment of these— A. No, I don't.

Q. —of these native girls? A. No, I don't.

Q. Wouldn't get anything of that sort from it? A. No, not necessarily. 2139

Q. I don't mean not necessarily, Doctor, but would you get that? A. If I wanted to let my imagination go on and on, perhaps yes, but after all they haven't seen anything of females and there are a lot of other relations that man has with woman that is not sexual. His eye glistens and so forth, but it doesn't imply intercourse. Whether it is a South Sea Island girl or whatever it is.

Q. These girls are not very dark, are they? They don't

2140 have kinky hair. A. Well, now, I am not sure about that. There is one here that looks a little bit kinky here in the corner.

Q. Look at the girl in the foreground, at the right, with her back to us. A. Yes.

Q. She apparently has straight hair, and also the girl whose head is seen over her, isn't that true? A. Perhaps.

Q. In other words, so far as the hair styles of these models are concerned they are not very different from those you see ordinarily on American women, are they? A. Well, this one looks different than the other ones you have been
2141 citing all along. It is a little different type of hair cut.

Q. Take the woman who is facing here (indicating). A. Yes.

Q. She doesn't look like a Polynesian, does she? A. I don't know. I don't know anything about the Polynesians. I should say not, I don't know.

Q. Now you say there is no improper, immoral, or indecent sexual connotation to be derived— A. No.

Q. —from this cartoon? A. No.

Q. Look at the cartoon on the opposite page, page 67. Here we have three soldiers apparently smoking bubble or water pipes. The servant girl has a red cap on her head.
2142 very greatly over-sized breasts, a diaphanous costume that reveals her entire body, in the center of the picture, and underneath it the legend: "At the U.S.O. in New York they just gave us cigarettes."

Do you think that any sexual connotation is to be derived from this cartoon? A. I think there is a double meaning there. You can see what they are trying to say.

Q. But if we accept the off-color meaning, would you say there is nothing immoral or objectionably immoral, or indecent in that picture? A. I would.

Q. Now look at page 73. Here we have the color photo- 2143
graph of the girl reclining and she is covered with a very sheer silk-like or wet material which clings to her body. Would you say, Doctor, that it is fair to assume that this model has nothing on underneath this silk covering thrown loosely over her body? A. So far as I know I suppose she has.

Q. And the umbilicus is apparent in this? A. Not very prominent.

Q. You can see where it is? A. Yes, I think so.

Q. Would you say that the shadow down near the pubic region is overly dark? A. No, I wouldn't.

Q. Would you say it was fair to assume that this model 2144
was posed in this way to facilitate the mental undressing of her by the readers of Esquire? A. No, I wouldn't.

Q. You think there is no sex stimulation to be derived by any of the readers of Esquire by looking at this picture? A. Not necessarily so, no. It might be.

Q. You think there is nothing immoral about it? A. A rather nice picture, as a matter of fact, the way I reacted to it.

Q. Nothing immoral, indecent, or objectionable in it? A. No.

Q. Page 77, we have the article "First Nights and Passing 2145
Judgments." Notice, Doctor, a reference in paragraph 1 to "an old-time St. Louis sporting house."

No doubt about what that means, is there? A. No.

Q. Now paragraph 10: "Young floozie characters wearing short skirts that tightly embrace their hinterparts and who interpret their roles by crossing their legs three inches above the knees and dangling red handbags big enough to hold the books of the Corn Exchange Bank."

2146 Paragraph fifteen, the reference to "a bawdy house." No doubt about what that means?

Paragraph twenty-one, the following:

"Den don't gimme any a dat crap! What da hell did yuh tink I wuz gonna do? Hang around dis dump waitin' fer Santa Claus tuh take care a me, fer Chris' sake. Looka you! What a yuh got? Six years yuh went tuh college an' what da hell a yuh got? A lousy handout a thoity bucks a week! Not fer me! Yeah, I got mine, but I took it!"

Q. How many times did you read this article, Doctor? A. I read this twice. I beg your pardon.

2147 Q. Or did you read the whole article? A. Yes, I read the whole article.

Q. How many times did you read it, did you say? A. I read it twice.

Q. Do you testify that there is no objectionable or indecent language in this article? A. If you take it out of its contents the way you have, that is one thing. When you think of it in terms of the whole article, then it is a good article, in my mind. Now we put an emphasis—I don't know whether you are allowed to say "Jesus Christ" in a magazine or not, I don't know whether it is permissible or not.

2148 Q. How about this twenty-one: "Den don't gimme any a dat crap."

Do you think that is a decent, everyday word? A. Well crap has lost its original meaning.

Q. It used to be considered nasty, didn't it? A. It used to be considered nasty, but it has lost its meaning.

Q. You mean it has lost it in New England or all over? A. Oh, I wish I had one of Mencken's dictionaries here. I imagine it has lost it all over. I know it has in New England.

Q. You say there is nothing objectionable or filthy or indecent in this article? A. No. 2149

Q. Page 83. Here we have a cartoon in the upper left hand corner in color showing two females in the foreground, one with her mouth wide open, apparently talking to the female seated, through the door in the background you see people dancing, and underneath: "My date's at the awkward age—all hands and no dough."

Do you think by the reference to "all hands" this talking female in this cartoon means to indicate that her date has done some exploring or is inclined to explore with his hands various parts of her body? A. I should think that is what it implies. 2150

Q. Would you say that is a commonly accepted topic of conversation in the average American society? A. A lot of girls have to fight that off. That is a practice that a lot of the kids have. I mean, it is according to how far they go. Some kids just let them maul them a little bit, but the girls don't like it, but it happens.

Q. You don't think there is anything indecent in making that a subject of a cartoon in an American magazine such as this? A. No, I don't think so.

Q. Nothing objectionable? A. No.

Q. Either moral or immoral? A. No. 2151

Q. Page 89, the color photograph of "Stage Door Esquire." Apparently a scene in colors from a show or circus, the clown in the background and in the lower right-hand corner a scantily clad female. Do you think the picture of that woman would be calculated to stimulate sexual desires in the readers of Esquire? A. I don't think it was calculated to do that at all, no.

Q. You don't think it would have that effect? A. Some people, again, might be stimulated by that.

2152 Q. Page 94, "Goldbricking With Esquire."

We have there the first item, fourth column, down at the bottom of the page:

"The corporal was going home on a furlough and was lucky enough to have a Pullman reservation. When he got ready to retire and pulled back the curtain to climb in his berth, he was astonished to find two luscious blondes reposing there. He carefully checked his ticket, reservation, and berth number to make sure he wasn't wrong, then said:

"'I'm deeply sorry ladies, I'm a married man, a man of respect and standing in my community. I cannot
2153 afford to have a breath of scandal touch me. I'm sorry, one of you girls will have to leave.'"

Doctor, do you think that portrays the ordinary moral conduct of the ordinary individual reflected in that joke? A. As to his personal morals?

Q. Yes. A. No. I think, it seems to me, it is one of those jokes, again. Here is something that is a little absurd about it. Here is a married man and he starts off to say, it looks as if he is going to kick one of them out, and then he says, "One of you gets out." It is a typical risque story type.

Q. It is a risque story? A. Yes.

2154 Q. It implies that he is going to get into the Pullman berth with the remaining luscious blonde, doesn't it? A. That, I don't think, is the important part of it. I think the humor is the important part of it. You are led up to one thing and suddenly you find another. It is more or less typical humor.

Q. Although you say it is a risque joke you think it is perfectly proper and moral— A. Yes.

Q. —and perfectly decent? A. Yes.

Q. In a magazine of this sort? A. Yes.

Q. Now, item 15, which is the next to the last item in the last column of page 94: 2155

"He: I see your husband has been promoted to a master sergeant. I suppose he's brilliant and knows everything.

"She: Don't fool yourself. He doesn't suspect a thing."

Do you think that applies to any not-to-be-talked-of affair between the He and the She, or is that an extra-marital affair? A. No. Again that is one of those stories. Apparently the soldiers like these stories; these fellows who are doing all this work enjoy it.

Q. You think they get some sex stimulation by stories of this sort? A. No, I don't think these stories really give people sex stimulation at all. I think they give a sense of humor. You can't get very sex stimulated from laughing. I don't believe. Sex is a serious thing with most of those fellows. 2156

Q. You think you can't whet the sexual appetite by ribald jokes? A. Not this type of thing, I don't believe.

Q. Now, Doctor, referring to item 24. This is the one at the top of column two, page 95:

"Home on furlough the soldier was surveying his sweetie whom he hadn't seen in months.

"'Slimmer, aren't you?' he asked?

"'Yes, she replied, 'I've lost so much weight you can count my ribs.' 2157

"'Where,' asked the G.I., with a gleam in his eye, 'do I start?'"

Does that imply the manual handling of the body of this girl by this soldier home on furlough? A. It implies some petting, yes. To begin with, these are stories that the boys seem to like.

Q. Well, why do they like the type of story particularly dealing with sex and being risque? A. They always have. It has been handed down for years and years.

2158 Q. You think that makes them any different from a morally decent— A. It is according to how you view them.

Q. —point of view? A. It is according to how one wants to view them. There are a lot of people, as I said, that don't like to hear these stories. To people who like these stories, it doesn't bother them very much, it doesn't stimulate them, as far as I can see. They don't go off in a corner and tell these things; they seem to enjoy them and let it go at that. A lot of nice people tell these stories.

Q. Now item 27, the last item in the column you are looking at:

2159 "The beautiful Army hostess, newly arrived in camp, thought she would take a nude dip in the clear blue lake while the men were out on drill and no one was nearby. It so happened that a rookie K.P. was sent down to the lake for a bucket of water and, seeing her pink clothes on the bank, sat down to watch. The beautiful Army hostess remained submerged up to her neck until she could no longer stand the chilling water, whereupon she scampered up the bank and found an old dishpan half buried in the mud. Hurriedly digging the pan out she held it in front of her like a shield and came ashore.

"'You wouldn't have such a look on your face if you
2160 knew what I'm thinking', she said.

"'Oh, I know what you're thinking of all right,' said the K.P. 'you're thinking that pan's got a bottom in it.'"

What portion of the anatomy of this nude female does the joke point to, Doctor? A. Most likely to the mons pubis, and I don't know whether he could see the vagina. After all, in that position it is pretty hard to see.

Q. But it points to her pubic area, does it not, Doctor? A. Yes.

Q. That she thought she had covered? A. That is right.

2161 Q. You think that is a perfectly proper subject for conversation in polite society today? A. Polite society tells those stories.

Q. You think there is nothing objectionable from a moral standpoint or moral decency in connection with something like that? A. No, I don't. I mean it is in your mores, it is in your culture. It is here.

Q. Now item 28, the one that I just finished:

"Have a good time at the party, daughter, dear, and be a good girl.

"Make up your mind, Mother."

2162 Does that infer or imply that the girl might not have a good time unless she was involved in a sexual way, possibly? A. It may well be in a petting way, if you want to call that sex, sure.

Q. Now, the one down below, the next to the last one in that column:

"Buck Private: I'm afraid we can't have much fun tonight. All I have left of my pay is some small change.

"Sweet Young Thing: Well, how much do you think it takes to send my kid brother to the movies—a five dollar bill?"

You think that has an objectionable or indecent connotation? A. No. That is the old story of the young brother holding up the boy or lover while he does a little petting, or something like that, courting, or whatever you want to call it. 2163

Q. The one underneath that:

"'Pardon me, Miss,' said the sentry, 'but it's against regulations to swim in this lake.'

"'Well, for heaven's sake,' exclaimed the maiden, 'why didn't you tell me before I undressed.'"

2164 "'It ain't against regulations to undress, lady.'"

Would you say there is anything morally objectionable or indecent in that alleged joke? A. No, I wouldn't.

Q. It implies that the young lady undressed before the sentry? A. That is right, it is humor.

Q. You think it is perfectly proper, that sort of an implication? A. Oh, I think it is in a joke.

Q. But you wouldn't go in for nudity? A. No, I am not built that way. I would hate to, at this age, go in for it.

Q. You wouldn't show off so well at a nudist camp? A. That is right.

2165 Q. Now, referring to the cartoon, last column on page 95, the picture of the soldiers in the camouflaged tree in the background, and in the foreground some young ladies in the water, undressed, with the title underneath:

"You're sure there are no soldiers around here?"

Does that convey any immoral, objectionable, or indecent thoughts, Doctor? A. No. Again, it seems to me all these things show the type of humor that our American soldiers are going in for.

Q. But this Esquire circulates all over the United States, doesn't it, Doctor? A. That is right.

Q. Some seven hundred thousand copies are sold on newsstands and are passing through the mails. It doesn't

2166 necessarily go to soldiers? A. No.

Q. They wouldn't print jokes in here that were only interesting to soldiers, would they? A. No, but it might be interesting to a lot of us to find out what type of humor soldiers are accustomed to. For instance, it is common for the soldier from New Zealand to write a letter asking to send him some stories; they have run out of stories.

Q. You don't think they would put anything in here that the average ordinary reader of Esquire would get a sexual connotation from, do you? A. No, I don't think so.

Q. Now, the one underneath that:

"A beautiful young lady went for a swim in a secluded spot but forgot to take a towel. She had a swell swim, then came out on the bank and was allowing nature's balmy breezes to dry her when she heard a rustling in some nearby bushes. 2167

'Who's there,' she cried in alarm.

'It's Willie,' answered a rather high-pitched voice.

'How old are you, Willie?', asked the girl.

The answer came quickly, '79, darn it.'".

Do you think there is any objectionable, immoral or indecent sexual connotation to be applied to that? A. Again it applies to the stories. I don't think so. It is just one of the typical stories. 2168

Q. I see, Doctor. Now, Doctor, have you defined for us or will you define or undertake to define for us the normal mind? A. I wouldn't attempt it, no. I just wouldn't attempt to define the normal mind.

Q. You wouldn't attempt to do that? A. No, I wouldn't. I don't think anyone can do it, any one man. It is according to what you want to call mind.

Q. Well, let us see, Doctor. Would you say that is the normal average man, woman or child who is allowed to walk the streets and buy magazines from the newsstand? A. Are they normal? 2169

Q. I say, would it be fair to say that that is the type of person meant by the normal mind? A. I don't know. I don't think you can define normal. There are too many psychiatrists and psychologists and everybody else spending time trying to define what normal is, and I am not going to try to define it in a few words. I never came out with it.

Q. You can't divide the population numerically into normal and subnormal on mental status? A. From the standpoint of their personality I. Q.?

2170 Q. Their mental status, as to the effect this material would have on them we are dealing with here? A. That is not clear to me, it is a confusing term first. You see, it connotes to me the question of whether you are thinking of the term of their I. Q. or their personality or what.

Q. About how they react to sexual stimulation? A. I think people vary and also a lot.

Q. It is hard to say what the normal is in that regard, isn't it? A. Yes, it is hard because some people are stimulated from a sex standpoint by perfume, some through the various senses, it may be through smell, it may be through

2171 voice, it may be just through their own thoughts.

Q. Doctor, have you attempted to classify the several hundred thousand readers of "Esquire" as normal, sub normal or abnormal? A. No, I have never done that.

Q. You have not had an opportunity to examine them, have you? A. No, I should say not.

Q. Now, have we been talking about the normal individual and his reactions to these things here, Doctor? A. Have we?

Q. Yes. A. I assumed we were talking about the average normal individual.

Q. Now, what is this average normal individual—can you define him—so far as he may be affected by sexual stimuli

2172 such as are found in Esquire? A. Well, I don't think the question of sexual stimulation has anything to do with whether a person is normal or abnormal.

For instance, a great many people who have no sex drive at all, could look through anything and yet they are so-called normal people except in this one phase, that they have no sex drive because of glandular disturbance or so on, and they may have no sex stimulation because they have very strong religious convictions or what not, or they may be dominated by parents who look upon sex as a very terrible thing. They are afraid of it.

Q. And it may depend largely upon the age of the individual, whether his age or her age—the age and sex of the individual—as to what, if any, sex stimulation he or she will get— A. From anything. 2173

Q. From matter of this sort? A. From anything.

Q. Including matter of this sort? A. Yes, including matter of this sort. There are so many variables.

Q. As a person grows older his or her sex urge diminishes, doesn't it, with his body processes? A. It is supposed to. A great many people get more active. They hate to lose their former activities and they think they are more active. They think more about sex.

Q. But there ordinarily is a slacking off, a diminishing of the sexual activity of the individual due to the age? A. That is right. 2174

Q. Now, in answering the questions of counsel on direct with respect to this matter in Esquire, what age person did you have in mind? A. In answering?

Q. Yes. A. All through here?

Q. Yes. A. I was thinking mostly of the college youth and the pre-adolescent group and going over into those individuals who were—my patients run up to about 38 or so—the college group, graduate students.

I also see a lot of professors and their wives and relatives and so on. But in the main I was thinking of the adolescent and college group, including the professional schools. 2175

Q. I see. Doctor, are you stimulated in sex desires by things you see pictured, pictures and matter in print? A. I think that is a little personal.

Chairman Myers: I think so, too.

Mr. Hassell: I wanted to inquire whether there

2176 is any difference between his view of this matter personally, now, and when he was a young man.

The Witness: I still feel that is personal.

Mr. Hassell: The other witness answered that.

Chairman Myers: I know he did and I thought it was impudent at that time.

Mr. Hassell: I submit it is rather difficult here—I would argue that it is rather difficult—for a witness such as this gentleman and the others who preceded him, to separate themselves entirely from their own personality, from their age and time of life, their

2177 environment and education, and all their experiences, and I think that is a matter that is entirely proper for this Board to inquire into.

The Witness: I object to having my personal life investigated from that standpoint.

Chairman Myers: And the objection will be sustained.

By Mr. Hassell:

Q. Being mindful of the fact that Esquire is humorous and is written in down-to-earth plain language so that the ordinary person, undeveloped as to education and character,

2178 can read it and understand it, that it is profusely illustrated by cartoons and photographs, and that it readily comes into the hands of the immature, do you think it meets a standard of morality that society has a right to demand of publications reaching such readers? A. Yes, I do.

Q. Doctor, do you disseminate Esquire among the patients that you come in contact with? A. No, I don't object to their reading it. If I know about it, I don't object to it.

Q. Do you bring it to the attention of the students in the

college that you are connected with? A. No, but I would find certain articles—perhaps certain articles in here I would bring to the attention of certain students if they were interested in sociological factors and wanted to know about certain things. 2179

Q. But you have never brought it to the attention of the students? A. No.

Q. Do you keep this magazine in your home? A. I happen to have a couple in my home. There were a couple of good articles years ago.

Q. You are not a subscriber to it? A. No.

Q. You are not an ordinary reader of it, are you? A. No. I have gotten it now and then. 2180

Q. Ordinarily, I understand, you don't advise patients who come to you for advice as a psychiatrist to read Esquire? A. No; I don't tell them not to, either. I have never seen it have any effect on any of my patients, so far as I know.

Q. As a matter of fact, have you ever questioned your patients as to whether they have been affected by reading Esquire, Doctor? A. I never have. I never even thought of that possibility.

Q. They might have been affected, some of them, and you would not know anything about it. Isn't that true? A. Not if it was on a sex question. I question them a little more thoroughly than you have been questioning me when it comes to questions of sex. 2181

Q. You inquire into every publication they read? A. No.

Q. You think you would know about it, but you are not sure? A. No, sir; not sure at all.

Q. And, Doctor, do you think the same standard as to what is obscene, which prevails for the text book designed for the use of physicians, or a scientific book on anthropology, should be the norm in a magazine of general circulation

2182 available to and readily understood by young people? A. I don't think they are able to accept it now. I wish we were able to. I wish we were a little more forward-minded and could take the scientific facts.

I wish youngsters understood a great many more scientific facts. The boys I see who get into sex difficulties are the ones who are very ignorant about what they are up against.

Q. Do you think that the same things which can be published with impunity in a text book designed for physicians, or a scientific book on anthropology, may be properly—

2183 A. A lot of it.

Q. —distributed among young people in a magazine of this sort? A. I think so. This is a little off your point, but that article on prostitution is a sociological article, and if I were teaching a class in sociology I would use it as an example for the beginner.

Q. I believe some reference was made to Dr. Margaret Meade's "Coming To Age and Some More" here. A. I believe so.

Q. Are you familiar with this book? A. No, I am not; I have not read it.

Q. But, would you say that there is a prevalence of sexual

2184 disorders today? A. That there is a prevalence of sexual disorders?

Q. Yes. A. I hear there is quite a little let-down in terms of the whole Army situation, and you see certain indications. I don't know what the real facts are. I haven't seen any more in my patients than I have ever seen before.

Q. You could not be able to state the reasons for the prevalence of sexual disorders today, could you? A. No, I could not.

Q. Are young men affected very much by environment in

this matter of sexual relation? A. Yes. There has always been an interplay between environment and the personality of the given individual. You can't pick sex out as an isolated thing. 2185

Q. Are not those things which appeal to prurience contributing factors in this regard? A. Well, everything is sort of a contributing factor. You see, after all, one has an urge within the body which is made up as a resultant of the glands, the reaction of those glands, and there is a certain drive.

Then, we feel there is a psychological sex drive of that type. It is hard to know what it is. 2186

All those things are influenced by outside affairs.

I think, if you want to solve this sex problem, you should get after the family and teach not that these things are dirty, and so on, but teach the kids something about these things.

Q. You would start when he is quite young and bring him into it quite gradually? A. Yes, I would, in a natural way. I wouldn't emphasize it, over-emphasize it.

Q. You wouldn't bring him in contact with such things as we have been discussing here in this magazine, when he hasn't had some prior education on the subject? A. I wouldn't bring certain kids in contact with a lot of things. It is according to what age you are thinking about. Some 8 or 12-year old kids look at these magazines and say "phooey," and throw it aside. They mean nothing at all to them. 2187

Q. Until they arrive at the age of puberty, but after they arrive at the adolescent age they might be affected by things of this type? A. They might be. They search it out in lots of ways.

2188 For instance, the doctor's son who takes the book out and shows all the kids in town what a woman looks like and w' at a man looks like and instructs half the kids in town. I don't believe these things are as dangerous as a lot of personal contact. Get after the parents and teach them something. Then you will be doing something.

Q. Has it been your experience, if you have heard Esquire discussed, that it is referred in such a way that it depicts the ideas of prurience? A. I don't think so. I have never heard it.

Q. Doctor, would you agree with this definition of "ob-
2189 scene" from the Century Dictionary:

"Offensive to the senses; repulsive; disgusting; foul, filthy"? A. I can't dispute the dictionary.

Q. "Offensive to modesty and decency; impure; unchaste; indecent; lewd: As, obscene actions or language; obscene pictures." A. I will have to accept that.

Q. Now the definition of "obscene" from Funk and Wagnalls New Standard Dictionary. Would you agree with this?

"Offensive to chastity, delicacy, or decency; expressing or presenting to the mind or view something that decency, delicacy and purity forbid to be exposed." A. To the mind or what?

2190 Q. "Presenting to the mind or view something that decency, delicacy, and purity forbid to be exposed." A. I suppose again I will have to accept that. These are definitions. I can't dispute them.

Q. I see. Now, would you accept this second definition of "obscene" from Funk and Wagnalls New Standard?

"Offensive to the senses, foul; disgusting. Obscene publication and indecent publication which, whether true or false, tends to degrade and corrupt." A. I will accept that, but I won't accept the interpretation of a lot of people of what is disgusting and indecent.

Q. Also "offensive to morals; indecent; impure."

Do you accept that as a part of the definition of "obscene"? A. Yes. 2191

Q. Now, in the Century Dictionary, if the Century Dictionary defines "indecent" as follows, would you accept this? "Unbecomingly, unseemly; violating propriety in language, behavior, etc."

Mr. Bromley: I object to that question as immaterial unless counsel contends that is what the obscenity statute means, unseemly—

Chairman Myers: It is better for your own purpose, I submit. 2192

Mr. Hassell: We are dealing with the English language and I submit a definition from a standard unabridged dictionary—

Chairman Myers: The Board will take judicial notice of that.

Mr. Hassell: But we want it in the record.

Chairman Myers: You don't need it in the record if we take judicial notice of it.

Mr. Hassell: Dictionaries may vary a little.

Chairman Myers: We will take judicial notice of that.

Mr. Bromley: I object to it as immaterial. He has already done it twice. 2193

By Mr. Hassell:

Q. You would not object to definitions from Funk and Wagnalls and the Standard Dictionary of the words "filthy, indecent, lewd and obscene"—

2194 Mr. Bromley: I object to it as immaterial whether he accepts it or not.

Chairman Myers: The objection is sustained.

Mr. Hassell: I submit—

Chairman Myers: The objection is sustained.

Mr. Hassell: Then I won't be heard at all?

Chairman Myers: You have already been heard.

Mr. Hassell: You have not heard me at all. This witness has been testifying for two days, trying to tell the Board what he means by these very things and I think we have a right to get into the record

2195 what his idea is.

Chairman Myers: I think he has told that numerous times.

Mr. Hassell: If he doesn't agree with these ideas, I think it is perfectly competent and proper for the Board to hear it.

Chairman Myers: The Board will take judicial notice of those definitions and if he doesn't agree they will examine that in the light of those definitions.

Mr. Hassell: That's all.

Redirect Examination by Mr. Bromley:

2196 Q. In connection with the "Paste-Your-Face" picture, did you notice that on page 88, under the heading "Afternoon of a sailor," there was a description of what should be done with the picture as intended by the editor? A. Yes.

Q. Are you able to see in that picture any lascivious, lewd, or indecent connotation whatsoever in the light of this part of the text material which I quote:

"This stream-lined tintype is genuine Coney Island, boys, complete with papier-mache waves, calendar-blue sky and

water baby. To be a Don Juan for a day, you need only paste your own likeness in the indicated blank space. A half teaspoon of flour from the cook's galley and a drop of water will do the trick. And the nymph in question, incidentally, is Peggy Cordrey, currently playing in 'Early to Bed.' She confesses a passion for the principles of navigation, is dying to learn how to brace the main splice, batten down the hatches and all the other fascinating lore that only a sailor knows. So don't hesitate to introduce yourself. What you eventually decide to do with the seascape is your own problem. If you go in for whimsy, you might air mail it to your family and tell them you're engaged." 2197

In the light of that textual matter, do you see any possible filthy, indecent or lascivious connotation from that cartoon or drawing? A. I do not. 2198

Q. In the May issue in connection with Paul Gallico's article on burlesque, wouldn't you say that article as a whole does not paint an attractive picture of burlesque? A. I think that is true, yes.

Q. And finally, after this cross examination, do you still believe that the material complained of is not obscene, filthy, lewd or indecent? A. I do.

Q. And have you changed your opinion in any respect as to any of it? A. No, I have not. 2199

Mr. Bromley: That is all.

Mr. Hassell: That is all.

Chairman Myers: We will adjourn at this time until 9:30 tomorrow morning.

(Whereupon, at 5 o'clock p. m., the hearing was adjourned until 9:30 o'clock a. m., Tuesday, October 26, 1943.)

HEARING OF OCTOBER 26, 1943.

2200

PROCEEDINGS RESUMED.

Chairman Myers: Proceed, gentlemen.
Mr. Bromley: Mr. Channing Pollock.

CHANNING POLLOCK a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

2201 *Direct Examination by Mr. Bromley:*

Q. What is your full name, Mr. Pollock, please? A. Channing Pollock.

Q. And where do you reside? A. Shoreham, Long Island and New York City.

Q. And what is your profession or business? A. I am an author, dramatist, and lecturer; rather more an author than the other two, I should say.

Q. And how long have you been engaged as an author, dramatist, and lecturer? A. More nearly 50 years than 45.

Q. Where were you born? A. In this city, on March 4, 2202 1880.

Q. And will you tell me something of your educational background and something of your degrees, if you have any? A. I was educated in the public schools of Washington, at Bethel Military Academy at Warrenton, the Polytechnique at Prague, Austria, and private tutors in Central America where my father was United States Consul General.

I have honorary degrees of Doctor of Letters from Colgate University, and Doctor of Laws from Northwestern Univer-

sity, and I don't know if it is proper to say, but in both citations it is specifically mentioned that the degrees were given on account of my service to character and morals in the United States. 2203

Q. Will you tell us something of the professional work in which you have been engaged over your long and varied life? A. I have written and produced 31 plays, including the "Sign on the Door", "The Fool", and "The House Beautiful", most of them done in most European capitals, and many done in every country in the world.

I have written, four, five or six novels, a dozen books of essays, an autobiography called "The Harvest of My Years", published last May, I believe. 2204

I have written for nearly every magazine in America, except Esquire, and continue to write for magazines.

I publish an editorial every second or third week by contract with the magazine called This Week, published by 21 newspapers, including The Washington Star. I write my head off.

I have lectured for 22 years, covering about 45,000 miles of the United States every year, delivering about 2500 lectures in all.

I have occupied the pulpit many times of every denomination in America except the Catholic, which does not have lay preachers, although I have spoken in a great many Catholic schools, and by invitation before the Quakers and Mormons. 2205

I am, I believe, a life member of the Clergy Club in New York.

I have engaged in a great many so-called extra-curricular activities because from my father I inherited a certain tendency towards crusading.

2206 Just after the last war we had the so-called usual ante-bellum decline of, let us say, delicacy, in our literature, and for three years I lectured almost exclusively in universities and elsewhere on that tendency in literature, opposing it bitterly, saying that it was a dangerous and decadent tendency.

I was closely associated with the late Cardinal Hayes in the move to clean up the stage in New York after the last war. The Cardinal and I agreed that the best way to do it was from inside. The Cardinal was very much opposed to censorship; and together we worked on it; we worked with
2207 the Author's League. As chairman of the Author's League I was working very hard to clean it up from within, if that phrase is sufficiently explanatory.

I think if any clergyman or layman is interested in asking who has been the most active man among laymen for decency in literature and drama, the answer would be Channing Pollock. I do not say that with any conceit, but because I have worked very hard along that line.

Q. Now, how broad has your coverage in this country been on your literature tours? A. Well, there is no town or city of 5,000 population that I have not visited. I question whether there is any man of importance in the United States
2208 with whom I haven't met or talked. That intimacy was so great that during the last years of prohibition I was asked to Washington by the Congress of the United States specifically to report to Congress what I had learned about the workings of prohibition throughout the country.

Q. Would you say that you were familiar with current standards of morality so far as they relate to the magazine field in this country today? A. I should say without conceit that no one is more familiar. Part of my business, of course, is a writer for magazines and I must be careful and scrupu-

lous in reading nearly all the magazines published. You have to know what your market is. 2209

Q. Would you say that your familiarity has extended back over 25 or more years so that you are familiar with our changing standards of morals if they changed? A. They have changed radically, and I should say that 25 years was a very conservative estimate.

Q. Now, have you been concerned with the production not only of the kind of plays you have mentioned but with shows like the Ziegfeld Follies? A. I wrote 10 musical comedies. Two of them were Ziegfeld Follies. I collaborated with Victor Herbert and other notable composers in a series of plays. Two Ziegfeld Follies shows I devoted all my time to and I devoted a whole chapter to Ziegfeld in my autobiography because of my intimate knowledge of him. 2210

Q. Have you ever been a dramatic critic? A. Yes; I have been a dramatic critic in this city. I was a dramatic critic for the Washington Post and for the Washington Times. I was also a dramatic critic for several magazines, including Smart Set.

Q. Have you ever been engaged as a press agent for the theatrical business? A. I was engaged as a press agent for William A. Brady and for the Shuberts for many years.

Q. Now, at my request have you examined the material which has been objected to by the Department in the eleven issues of Esquire for 1943? A. I examined it very carefully and when I found myself completely mystified I decided I was probably what is called too hard-boiled, so I took it to my mid-Victorian wife, who is an invalid, and she professed at being mystified, and I took it to my daughter and asked her to examine it and her reaction was one of disgust that the charges should have been brought. 2211

2212 **Q. On the basis of your knowledge and your experience during the past 45 years, are you able to give an opinion as to what relation the material objected to bears to the current standards of morality and decency in this country at the present time? A. I should say it reflects them. I think it is an admitted fact that almost all contemporary literature must reflect the spirit of the times. James Hunecker, the great critic, wrote a very learned essay on that. Of course, I don't know whether—you can stop me if I am wrong in saying this—but all the, let us call it morality, all printed or like matter must be judged entirely in relation to the width—**

2213 **is it right to say this?**

Q. Yes. A. In relation to the width of the gulf between current opinion and what is the prevailing code in printed or active matter. It can't be judged any other way. The literature of the Restoration would seem very coarse in our day, and the Victorian literature would seem very prudish in our day, now. Neither one would seem as prudish or coarse in our day at this time. You have to judge according to the morals. I am using morals in a special sense, which I will explain in detail a little later.

For instance, by a great many people Nietsche is considered coarse; people who have never read Nietsche. Nietsche

2214 **has a very extraordinary essay in which he speaks of the changing code of morals, and then he goes on to explain that he uses morals in the correct sense. He says:**

"I do not refer to fundamental morals which never change", and he goes on to say that fundamental morality is that sort of morality which has not changed in four or five thousand years of recorded history; that you cannot call fundamental moralities those things which change every ten years or so.

A few years ago a woman who smoked a cigarette was

immediately judged a dreadful woman, and no one pays attention to a woman smoking a cigarette now. 2215

I recall one play presented in Washington when I was dramatic critic here. The general agreement was that the fact she smoked that cigarette established her character. Today anyone would call that absurd.

The same is true of most things printed and published taken in connection with the customs and morals of the times.

In 1904 I produced a play and Harry Powers of Powers Theatre said he would not let the curtain be rung up unless I cut out one word that had never been spoken on his stage and never would be. That word was "mistress." Today that would be called the height of absurdity. 2216

I remember distinctly the first time I ever saw a woman without stockings on the beach. She was the sister of Harriett Stanton Blatch, the noted suffragette. Her name was Margaret Stanton and everybody in the village called her "bare-legged Mag."

I know a woman on the beach today with stockings would be followed by a crowd. If you do not wear stockings, or if you do wear stockings, is not important. It is a reflection of the views of the times.

Q. What about your views whether it accords with current day standards for a magazine to print, no matter how spelled, the word "son-of-a-bitch"? 2217

Mr. Hassell: I object; the same objection.

Chairman Myers: Overruled.

The Witness: I can't think of a better example of what we have been talking about, the reflection of current morals and customs. Of course, the evil of "son-of-a-bitch" is purely one of connotation. "Son-

2218 of-a-bitch" is son of a dog. The phrase "son-of-a dog" is one of the commonest phrases in all Oriental countries, and it is not an insulting phrase.

A few years ago it was taboo, and now it is so current that every night and three matinees a week it is spoken by a child on the stage.

Q. Where is that? A. "Kiss and Tell."

Q. Spoken by a twelve year old child? A. A 12 or 14 year old girl, a child.

In certain company I wouldn't use the word. I think all
2219 of us have used the word and have not been corrupted or corrupted the company.

Q. What about its acceptance on the printed page of magazines of general circulation? Has it come to be accepted and not to be considered obscene? A. Ralph Waldo Emerson wrote the best definition of obscenity ever written when he spoke of a matter of intention. I have seen it very, very frequently in magazines. It occurs almost continually in our books, in our modern books, and when some board of censorship, the Motion Picture Board of Review, cut it out of Noel Coward's recent motion picture the chorus of ridicule that flooded the country was one of the loudest choruses I have
2220 ever heard, because the word was spoken by a British sailor clinging to a life raft, covered with burning oil and so forth, and it was so obviously the only thing he could say that from press and public all over the country there came a chorus of ridicule.

I don't think the word was ever restored, but it certainly is a very commonplace word these days.

Q. Do you remember in Mr. George Jean Nathan's theatrical column in one of these issues, among things he objects to on the American stage were the words spoken by one of

the Dead End boys in "Dead End," who uses the words "crap" and "Jesus Christ," and a lot of slang of that sort. A. After all, the word "obscene" is from the Greek "obscena", that which must not be spoken on the stage. 2221

Q. Is that where the word derives? A. Yes, "obscena," that which must not be spoken on the stage.

I should say that on the word of Aristotle—I don't want to be academic—but that which is heard is ten times as powerful as that which is read. If it can be spoken for years, then the report of it must be justifiable.

Moreover, that is a question of times.

All of these words are good Anglo-Saxon words. "Crap" and "crapulous" occur constantly in Shakespeare. It is a perfectly good English word. I shouldn't call it a delicate word, but there is a wide gulf between indelicacy and obscenity. 2222

Q. What do you say about Mr. Nathan's use, in the same article, of such words as "St. Louis sporting house," "bawdy," and the words "whore," "narlot," and "prostitute"? A. That leads to interesting reflections. We have ears that are attuned to delicate euphemisms. There are probably a hundred synonyms for the word "whore." I think "whore" is the most decent of all because that is an Anglo-Saxon word, justified by English literature whereas the others are bastard words, in a sense, but, if it is decent to express it at all, I have never been able to understand why you must choose a word that means the same thing but has a better sound. Why should you say "prostitute"? Everybody agrees that is a respectable word, but why should you say it instead of "whore"? 2223

When I was a boy the only way you could print "damn" in a book was to print "d - - -". That deceived no one. Everyone knew what it meant. What was the difference?

2224 Unless you are going to rule that none of these institutional persons and things in the United States must ever be mentioned, which would be to rule out all printed material of every kind from newspapers to books, unless you agree that there must never be a reference to those things, there must be a conspiracy about them, you must use such words.

I believe the latest word is "brothel" or probably "bagnio" —maybe that's the best word because almost no one knows the meaning of it, and, therefore, it ought to be a good word.

There is a complete page of synonyms in Roget's Thesau-
2225 rus. You must use one of them unless you say "None of these things must ever be referred to," and that conspiracy of silence has been outlawed by our generation, and I think rightly so.

For example, a magazine that printed articles on syphilis a few years ago would have been in trouble, and today I think it is agreed that the Reader's Digest crusade against syphilis is one of the greatest things ever undertaken in America.

If you want to read many of the words to which objection is taken now, you should read these articles in the Reader's Digest.

2226 The Reader's Digest is a magazine of far more general circulation than Esquire, with the circulation certainly in excess of eighteen million, the biggest circulation any magazine has ever had in the history of the world.

Q. Will you state, if you can, generally, to the Board, whether or not the objected-to items in the magazine are or are not in accord with current standards of morals and decency in this country. A. They are so in accord that I venture to say that any one hundred normal average persons selected from the persons who walk up and down these lob-

bies and the street would read these magazines from cover to cover without noticing anything extraordinary unless his attention had been called to it. 2227

Q. Is there any item whatever in any of that material which conflicts with or violates or runs contrary to current statutes of decency and morals in this country? A. I should say not.

Q. Will you please state the basis of your opinion with respect to the Varga drawings, first, and particularly? A. My mid-Victorian wife makes a point which I should like to defend, that nothing can be, at the same time, beautiful and obscene, that only what is ugly and offensive can be obscene. 2228

For instance, the totally unclothed figures in the Corcoran Gallery and the Metropolitan in New York are not obscene, but, on the other hand, a very fine work, Rodin's "Aged Courtesan" is ugly.

But just as laughter is produced by that which creates surprise, and only surprise, I should say that which causes impure desire is caused by lust.

I saw a magazine once that was barred from all the mails as obscene, because of a cover. I was a little annoyed when I first heard of it because it seemed to me an unwarranted exhibition of censorship and, when I saw the cover, I agreed with the Post Office Department. 2229

The woman was drawn with all the imperfections that create lust.

The Varga drawings, I think, are very attractive. They are pinned up in the dormitories of perfectly decent young women throughout the country. They are very attractive young women, far more clothed than a great many of the girls on our beaches or in our ballrooms.

I should say a view of that sort of thing is a state of mind. I was in the Louvre in Paris one day when a Frenchman

2230 reached up and pinched the bosom of Venus de Milo. The Frenchman was obscene. The Venus de Milo was not obscene.

And Grant Allen wrote a story about a vicious man who mentally undressed a woman dressed in the fashion of the 80's in the street. That doesn't mean that the woman was not properly clothed. It meant the man was a candidate for a lunatic asylum.

Many years ago the editors of really pornographic magazines like Sourir in Paris and the German weekly "Fliegende Blatter" practically abandoned resorting to women as partially unclothed as the Varga women. They went in for
2231 ladies in dirty, high black stockings and so forth and so on.

There is nothing in the Varga drawings that is not familiar to anybody who ever went on the beach in the United States, and I should say it must be a very strange man who found anything in them other than very attractive femininity.

Q. Do you remember the poem in the January issue called "Benedicts, Awake!"? A. I remember it very well because I think it is one of the finest poems I have read in any modern magazine. I think it compares favorably with any poem that has been written since the beginning of this war. Was it Alan Seegar who wrote "Rendezvous with Death"? And "Rendezvous with Death" certainly goes a great deal
2232 further in an erotic sense than this poem does.

A great many of the poems that are most celebrated in our literature, Shelley's "Good Night", and certain lines in Keat's "Ode to a Grecian Urn", make this poem look like Sunday School stuff.

There is nothing pornographic in that poem. It is a very fine poem. I think it is likely to be included in the anthologies and remembered a great many more years than you think.

Q. I call your attention specifically to the three times

repetition of the opening stanzas of each verse, "Men sleeping besides your wives, awake!" A. Is there anything wrong about men sleeping besides their wives, and if there is nothing wrong about men sleeping beside their wives, what is wrong about mentioning it? I believe divorces are granted because men don't. 2233

Q. Do you remember the review by Seldes of those "Star and Garter Blues" in this same issue? A. Yes, quite well.

Q. Do you find anything which is indecent or goes beyond the current day standards in any part of that review of the show by that name? A. I should say roughly that there is nothing in that review that has not been printed by every critic in New York in his review—I don't mean in each review, but all of them—it is a legitimate report of a musical comedy about which I can say nothing more than that I celebrated my 39th wedding anniversary by taking my wife and daughter to see it. Later, I took Mrs. Will Irwin, the wife of the celebrated war correspondent, to celebrate her 30th anniversary. We all found it amusing. 2234

Q. What is the basis of your opinion as expressed, with specific regard to the column at page 123 of the January issue which begins: "Dear Doctor Diddle"? Do you find any obscene or indecent connotation in the use of the word "diddle"? A. There is a nursery rhyme "High diddle diddle, the cat and the fiddle". What about that? Another nursery rhyme "Johnny diddle diddle", and so on. All children know them. 2235

The Oxford Dictionary says: "Diddle" means to confuse, to obfuscate.

You can take almost any slang word and attribute another meaning to it, but I should say it would be an extraordinary man that would do so.

Q. Do you remember the Sultan cartoons that appeared

2236 with some regularity throughout the eleven issues? A. I should say from memory there are about three.

Q. What is the basis of your opinion with respect to them, having regard to the fact that the charge has been made that they seek to import into our civilization an immoral practice, i. e., the practice of selling slave women or concubines or dealing with them? A. I see nothing in the pictures to show that these women are concubines. If so, what of it? I think we indulged in selling slave women up to 1865, and there is an excellent picture of the sale of slave women in the Chicago Institute that I have never

2237 heard cited as obscene.

I divide things into naughty but nice and naughty but not nice.

Q. Did you read the story of "The Unsinkable Sailor"? A. Yes.

Q. That occurs in the February issue. Do you remember the references there to the episode of the fruit jar of urine and the episode of the new secretary in the union hall who became frightened? A. As to references to the jar, I might say it was rather coarse, but not obscene. Of course, the same story is told by the Harvard anthropologist, Dr. Hooton, who tells a story about the cholera scare in China. It is

2238 certainly not going to raise any lascivious desire.

As to the story about the boom, I had to have the evil meaning called to my attention before I knew it was there. It is common marine slang.

Q. Do you see any evil connotation about writing an article in which the new woman secretary at the union hall misinterprets the phrase? Remember, she ran screaming from the room saying, "That man wants to do something terrible to me." A. That is merely funny.

Q. What is the basis of your opinion with respect to the article by Gilligan entitled "The Court of Lost Ladies"? A. I was a police reporter for the Washington Post before I became a drama critic. Maybe they thought the two professions were closely allied. 2239

I don't think a good reporter could write a story about night courts without writing very much of that sort, and it has been written time and time again by sound papers, and Will Irwin wrote a report of the same type for the Evening Sun a good many years ago which, if the Pulitzer prize had existed then, probably would have won the Pulitzer prize. 2240

It is cited in many anthologies.

I should say the predominate feeling in this article is one of pity and solicitude and regret that there should be such things.

As a matter of fact, all through these magazines, reading them carefully, I got the feeling that most of this stuff is the very reverse of that which excites desire to commit evil acts; that it rather says continually "This is absurd, these things are for evil children", for what Eugene O'Neill calls "half-witted children". Sophisticated, intelligent people don't indulge in those things; there is a tongue-in-the-cheek attitude in all these articles that is the very reverse of concupiscence. 2241

Q. You think the last article to which I called your attention, "The Court of Lost Ladies" would have any tendency to teach these women how to avoid being arrested or how to avoid conviction of the charges of prostitution? A. I should think it would have a much greater tendency to teach them to avoid prostitution and to steer clear of it. If anything about prostitution is made attractive in that article, then I really ought to be committed to a home for

2242 morons. I can point out in modern literature fifty, seventy-five books which give more latitude and make that thing more desirable and glamorous certainly than this article does.

Q. As bearing upon the change in American standards of morality, would you mind telling the Board briefly your experience with George Bernard Shaw's play "Mrs. Warren's Profession"? A. Yes. I can't think of a better example of changing *mores*. "Mrs. Warren's Profession" was produced twice. The first time was its performance in the United States in the Garrick Theatre. While the per-
2243 formance was on the theatre was raided and the audience was turned out in the streets. The second time was when it was given before 1600 clergymen at a private performance and these clergymen saw nothing wrong in the play at all.

Q. After a lapse of how many years was it, Mr. Pollock? A. After eight years. The first time it was produced at the Garrick Theatre and the second time at the Manhattan Theatre.

Q. With what subject does "Mrs. Warren's Profession" deal? A. "Mrs. Warren's Profession" deals with a bawdy house and the characters therein. The leading character
2244 is the Madam of the bawdy house. There is no question in the world that from a superficial aspect Shaw rather celebrates the ancient and honorable profession. He says so emphatically and Mrs. Warren in the play says to her daughter: "If you don't think my profession is more honorable than scrubbing floors" and so forth and so on, and yet I don't think that any first-rate critic in the world would not say that "Mrs. Warren's Profession" was not a deeply moving outcry against social conditions that the play was attempting to correct. It is a moving outcry

against social conditions that could make it possible to say that to be the madam of a bawdy house is not as bad as scrubbing floors. Scrubbing floors was done at an average of twelve hours a day at wages that I hate to think about, and Mr. Shaw's entire purpose was to attack that social system and not to praise bawdy houses. 2245

Q. About what year was it that the police raided and closed the opening night of the show? A. I have a very bad memory, but I should say it was about 1902, at the turn of the century. May I add that "Mrs. Warren's Profession" was until three years ago barred by the censors of the Lord Chamberlain in England. It could not be produced in England. On Mondays, Tuesdays, Wednesdays, Thursdays, Fridays and Saturdays it could not be produced, but on Sundays it could be produced by amateur groups. That is one of the anomalies of the thing, but until three years ago "Mrs. Warren's Profession" could not be produced in England, and three years ago the Lord Chamberlain reversed himself with the statement that it could be produced and it has been produced in England, where, by the way, it failed dismally, because the time has passed; it is no longer either sensational or cogent. 2246

Q. Have you examined all of the comic strips in two of the issues entitled "Exploits of Esky"? A. I have. They are intensely stupid, but I can't see that they are obscene. 2247

Q. Do you think the drawings, particularly the one of the woman standing in water up to her waist and naked from there on up, and Esky looking at her over a bush, and four or five nude women depicted in one of the cartoons, some with their backs to the beholder, have any element of indecency in them? A. No, because girls don't usually have clothes on in the water. "September Morn" was cleared by I think a dozen courts in the United States.

2248 and if you object to the idea that a man was looking at her, I should say that that idea is absurd. Take the picture "Susanna and the Elders" in the Corcoran Gallery, and another picture of "Susanna and the Elders" in the Chicago Institute of Art, and the third in the Metropolitan Museum, and numerous other like pictures in all the famous galleries in Europe. The subject matter of a man spying on a naked woman was very common in religious pictures in the Middle Ages. You will find it in many galleries all over the world, and many pictures were painted under the direction of the Church. The fact that a man looks at a lady without any
2249 clothing does not convey any indecent idea.

Q. Now, what is the basis of your opinion with respect to "The Eve of St. Mark" picture and text which occurs in the May, 1943, issue, and with particular reference to the 20 per cent do, 20 per cent don't? A. In the first place, "The Eve of St. Mark" is a play by a man who is probably our most distinguished dramatist at the moment. I am one who does not believe that our distinguished authors write filthy material or are willing to do so at any price.

"The Eve of St. Mark" ran roughly about 700 performances in New York and was acclaimed by every critic in town. Mr. Maxwell Anderson, who wrote it, in a spirit
2250 of generosity made the rights free to amateur groups, and I should say it has been presented in some scores of churches and in many hundreds of universities throughout the country.

There was a little row recently because it was performed before an altar in St. Louis. The contention was not that it was performed, but that any play should be performed before an altar, with which I agree.

When the play was produced in Copenhagen, the best of the European critics said it was the most sensational

play and it had the best conception of the war of any play that had ever come out of the war. I have never heard anybody say that there was anything indecent or obscene about it, although I should not be surprised if anyone used the word "son-of-a-bitch" in the soldier conversation, and I never heard any one criticise the play on that account, and I cannot conceive of anyone objecting to the play on that score. 2251

As to the 20 per cent do and 20 per cent do not, well some do and some do not. If there are glasses on the table that might refer to drinking and if there are not I don't think it is important. It is obvious that some do and some do not; in fact, I think it is very generally acknowledged. 2252

Q. You see, do you not, that the text refers to the fact that the soldiers have come from a discussion of a hygiene lecture in which it was estimated that 20 per cent do and 20 per cent do not? A. Yes. I do not see that there is any indecency in that. It was all right when it was in the play.

Q. And certainly this is a true report of that which was mentioned on the stage? A. Oh, yes.

Q. You saw the play? A. I saw the play repeatedly and I must say that there has not been produced in several seasons in New York a play so utterly without objection to it. I don't know of my own knowledge whether "The Eve of St. Mark" was on the Catholic White List, but I should say it is very peculiar if it was not. It was certainly urged upon congregations in the best churches in New York. 2253

Q. What is the Catholic White List? A. There are two Catholic White Lists, I think. I can't be too sure on this. There is a board, I believe, headed by one or more cardinals which passes on all the books published in the course of a

2254 year and makes a list of those which are recommended reading to Catholics and other decent people. The Catholic Church takes the extremely sane view that it is better to recommend a book you should read than just condemn the books that you should not.

Then there is another one headed by the former drama critic of The Christian Science Monitor. I don't know whether that board has any ecclesiasts in its composition, but it regularly issues a so-called White List of plays that may be seen by people of the Catholic faith. Those two lists are I think rather commonly accepted, certainly among
2255 authors, publishers, managers, and by people in general as the most definite award of merit for decency. They have been by and large I think the most liberal, sane, and generally wise lists of books and plays to be read and seen that has been published in this country.

Q. Have ever any of your plays been barred from this list or has any of them ever been contained on that list? A. Since there has been a Catholic White List I have never written a book or play which has not been on the Catholic White List. My recent book "Harvest of My Years" by sheer accident, like Abou Ben Adhem, headed the Catholic White List.

2256 Q. Now what is the basis of your opinion with respect to this article contained in the June issue entitled "Libel Suits Were As Wine To That Hell-firin' Editor of the Old West, Dave Day", and particularly the three references near the bottom of page 134, the one about two-in-a-bed spoon fashion, the other about the 18-year record of virginity and the other about the asterisk. A. Well, beginning in the middle, the one about the eighteen years of virginity, that becomes an American classic. I heard it in the early 80's in my boyhood. It is one of those things that have been

bruited about for many years and there is certainly no obscenity about it. It is a coarse, good-humored jest that has no social significance. 2257

As to the one about the asterisk, I will say that until my attention was called to it last night I did not get the meaning. Probably because I have a clean mind. I have tried to overcome that without much success, and I did not know what it meant until someone told me, and I think, if it means what this man said, it is just an extremely amusing pun. I don't know what is wrong with it.

You see, if you adopt it as universal, the claims made in this case, all art and literature would be absolutely impossible. It would be absolutely impossible. There could not be a writer or artist in the United States. You cannot have art and literature on the terms of removing all references to sex, to marital relations, to prostitution, and all these things. I mean you gentlemen know as well as I do that there isn't a great book in the literature of the world that would not be an offense in some way. 2258

I read the other night—because I have happened to have written two articles on the subject in the last week—Dickens' "A Christmas Carol." It was written a hundred years ago next Christmas and, therefore, the article is very timely, and I read it after I read these magazines, and I can point out a dozen passages in "A Christmas Carol" which William Makepeace Thackeray said was the finest contribution to literature ever made, and I can point out a dozen passages in "A Christmas Carol" which, under this heading, could be said to be objectionable. You can read anything into anything. 2259

A few years ago a book was published, a copy of which the Congressional Library here has, called "Mother Goose Unexpurgated", and it gives all the Mother Goose rhymes

2260 without the addition of a single word. I have tried to obtain a copy and I have not been successful. It does not add a single word except where the word could give another meaning to the sentence, then the original word was taken out and a blank left there so you could substitute for yourself. It was perfectly obvious that you could not read very long before it became objectionable, but that was not the fault of Mother Goose, it was the fault of the person who read it.

I admit that I read it; every one of those dashes and asterisks meant something else, and it meant nothing to me
2261 but just a mild joke, and I dare say the average man wouldn't suspect a thing and, if he did, what of it?

Q. This Mother Goose to which you refer, who wrote it, do you remember? A. I haven't the faintest idea. It was first called to my attention in the censorship case in Philadelphia, a motion picture censorship case in which I was a witness, and I tried to buy one and could not for the excellent reason that they were sold out months in advance of going to press. I know it is in the Congressional Library because it was copyrighted. There isn't a word in it that is not in the Mother Goose rhymes.

Q. It has never been banned, so far as you know? A. Oh,
2262 no.

Q. I wonder if you could not give us an example by reciting a line or two? A. I am afraid I could not because, as is true with this, if I read anything having a normal view of things I remember it, but if I read anything that is conspicuously obscene I should think I should remember it, but I cannot. I remember when I was in Czechoslovakia for some time I only learned two words in Czech and both of them are obscene, and they are the only two words that cling to my mind, but I don't remember anything in Mother

Goose, I don't remember anything in these magazines and did not, until it was called to my attention. 2263

Chairman Myers: That was not the Mother Goose Rhymes that appeared in the Bodley Library at Oxford?

The Witness: Yes, sir, the same book.

By Mr. Bromley:

Q. What I am trying to do is to see if we cannot illustrate this thing like "Mary had a little lamb, its ———— was white as snow" is that what you mean? A. That is what they did. 2264

Q. What they did was take out a word? A. That is right, and any human being reading that book would substitute a word. After all, you can't change human nature by doing these things; after all, if you did otherwise you would just divide male and female and have nothing else, but you cannot alter or change people by making a secret of it.

Q. Now what is the basis of your opinion with respect to this article "Many Wives Too Many", which discusses somewhat satirically Dr. Joad's theory of plural marriage. A. I think its one tendency would be to discourage plural marriage which, I think, reasonably ought to be discouraged. I don't see any other significance in it than an obvious satire and very dissuasive of the scientific phases of plural marriage, which may be necessary in these times. The statement that is made is made so continually now that it is almost alarming. It has been raised in the House of Commons in England. Sokolsky, in last night's Evening Sun, treated it as a possibility if this war goes on. 2265

2266 I should think it would be unfortunate from many angles, including the economic. Good heavens, that gets me right back to the statement that if you ban these things it would be impossible to write. If this sort of thing was crystalized in our law or in the force of public opinion, after fifty years of writing, and in spite of it, if that day should ever come about, I would lay down my pen and say "That is all. I can't write with fetters." And I have never written anything that anybody said was indecent or obscene.

I can take any play or any novel that I have written and pick out something that someone would say is objectionable.

2267 That does not mean that it is objectionable.

Q. Do you remember the story of "Offensive on the Home Front" in the August issue of Esquire, with particular reference to the man slapping a prostitute and the statement that he noticed how large the uniform made his wife's behind look? A. That gets us back to what I said. You have got to use some word. I take it that it is justifiable to admit that a woman's anatomy includes a posterior. If she has an anterior she certainly has a posterior and you certainly have to call it something. Now all of our early writers used to call it "arse" which is the true word.

2268 Chairman Myers: I believe Chaucer used it, did he not?

The Witness: Chaucer uses it and uses it so continually and so frequently that it gets to be monotonous. Chaucer used it in what today is very vulgar and filthy puns. You remember the one about the lady sitting on the particular thing? You have to call it something. What do you want to call it? Arse, buttocks, posterior? The English used to call it "bum". You have to call it something or just ignore it.

By Mr. Bromley:

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Q. Why don't you call it a seat and be satisfied? A. It gets back to "damn" and spelling it with a "d" and some dashes and an "n". I don't see the use of equivocation; there is no use or sense to it.

Years ago I used the line in which I said "the bullet left a little purple mark above the boy's nipple" and the editor refused to print it, but he let me say "the bullet left a little pink mark just above the center of the boy's breast."

What is the use? What is the difference? After all, all reading is a matter of image. What you read produces a mental image if you are an intelligent person and the mental image is pretty largely up to you. I should say that outside of the kind of obscenity that any kind of policeman knows about that the obscenity is purely that which is in the reader or beholder; that it entirely depends on the one who reads or sees.

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Q. What is the basis of your opinion of the article in the October issue "Wise Men Pick Pyknic Girls"? A. That is a pseudo-scientific article. It is one of the oldest scientific theories in the world. You remember the great scientist Jung, I think you are familiar with Jung's argument that the degeneracy of the race began when it cast off the flat-chested type of women. When he uses the words "play girls" that is but in contra-distinction to the type of women whose build makes for potential mothers. He said the degeneracy of the race began when men wanted to have women to play with, to have fun with, in contrast to the great period of virility when there was the broad ample bosom woman. It is an old scientific theory. It is almost as old as science itself. It occurs every now and then. This is simply a very temperate theory that involves a little

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2272 amusement. After all, I can't understand the view that the fact that woman is a mammal is supposed to be a secret between the woman and God. We must suspect it, mustn't we?

Q. What do you mean by your reference to "women to play with"? A. That was the reference that I had to Greek history where the young men wanted to play games, to throw the discus around. I certainly did not mean the sexual thing; that was not it at all.

Q. What is the basis of your opinion on the story entitled "Portrait Above The Fireplace" in the October issue of
2273 Esquire? A. I think it is one of the finest short stories which I ever read. It is an extremely familiar fiction pattern. As you know, it has been done again and again and again. After all, it is the story that counts. If you accept the fact that the portrait was a portrait of a shoplifter the story would not be altered in the least. The story is the story of a man who owed his regeneration to his idea of the character of the woman. It is a very familiar pattern. It doesn't make any difference whether the woman was a shoplifter or a prostitute or a three-card monte dealer.

Q. Or a murderess? A. Or a murderess. To select that single paragraph is extraordinary. Marcel Provost's story
2274 —incidentally I'm not sure whether it is a story or not—Marcel writes about a man who looked over the entire world for a perfect face to depict in a painting of the Madonna and then discovers that the face that he had pictured was the face of a prostitute. It is one of the most famous stories in literature. It is the same pattern.

I should have been proud to have written that story and I think that any editor in America would have been proud to print it. There isn't any doubt on earth that any magazine in the United States would have bought and published that story if it had been offered.

Q. Would you say, Mr. Pollock, in great works of history and biography the element of sex has been basic, and will you give us some examples? A. Yes. Since the element of sex is basic in life, without it we should not be here, then any reflection or representation of life must use the element of sex basically. It is certainly the element of not only history and biography, but of everything. 2275

You will find in Plutarch's Lives an enormous number of statements which would certainly be barred from the mails. There are a couple of paragraphs of homosexuality in Greece which would not go through the United States mails, properly not. That was another time. 2276

There are, of course, probably five thousand, I am guessing, biographies of Cleopatra, and most of them are saturnalian and dealing with sexual excesses. The net result of them all is to discourage the behavior of Mark Anthony who did not participate very much in it, let me say, in this connection. Going back to Ralph Waldo Emerson's definition of "intent", that one of the standards must be of the intent of the beholder to distinguish concupiscence or the reverse. For instance, in a book like Louis Bromfield's "A Good Woman" which in its very title sneers at the domestic virtues, I think you have an evil book, a dangerous book, and there probably is not a sentence that you could object to in the book, but most of these biographies do not encourage that sort of thing. Most of us would not be encouraged to do that sort of thing. 2277

Obviously it would be impossible to write any literature which is under those terms; obviously it is impossible and must be impossible to write biography or history under those terms because you would have to ignore everybody who made our history. After all, how can you write of the story of the French people leading up to the French

2278 revolution without writing about harlotry and concupiscence?

Chairman Myers: Or the Comedies of Aristophanes.

The Witness: Yes, certainly.

By Mr. Bromley:

Q. Now I have been specifically directing your attention as to the individual issues of Esquire. Did you find anything in these eleven issues which, in your opinion, was indecent, obscene, lewd, lascivious or filthy or which in any 2279 way went beyond the current standards of morality in this country? A. I can only repeat by referring to my wife of forty years who is essentially a mid-Victorian, and to my daughter who is the best girl whom I have ever known in my long life generally, and neither of them found any such things.

Mr. Bromley: That is all.

Chairman Myers: Suppose we take a recess for a few minutes.

(Thereupon, a short recess was taken.)

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Chairman Myers: All right.

Cross Examination by Mr. Hassell:

Q. Mr. Pollock, a large part of your activity has been in connection with the stage, has it not? A. Yes. I should say the major part.

Q. You founded and edited a stage publication at one time? A. I beg your pardon?

Q. You founded and edited a stage publication at one time? A. Yes, called "The Show". 2281

Q. You have produced written works in collaboration with Avery Hopwood? A. Yes, one in particular.

Q. What was it? A. A play called "Clothes" produced in 1906 at the Manhattan Theater in New York. The play was really written by Avery Hopwood and professionalized by me.

Q. Did you write "The Fool"? A. I was one of two men who wrote it, yes.

Q. You wrote it with some one else? A. Reynold Wolf.

Q. And another play called "Hell"? A. Yes, with Reynold Wolf. 2282

Q. You produced the Folies Bergère in New York? A. Well, that was the name of the theater, it wasn't the name of the show. The show was called "Hell".

Q. Produced at the Folies Bergere? A. Produced at the Folies Bergere and now called the Fulton Theatre.

Q. I believe you said that you produced two of the Ziegfeld Follies? A. Yes, if I remember rightly, in 1915 and 1921.

Q. Are you, in examining matter and pictures and so forth, having in mind the liberality with respect to the lack of clothes that was notarized in the Ziegfeld Follies? A. I do not agree that it was notarized in the Ziegfeld Follies. There never were more decent productions of musical comedies in America than Ziegfeld. If anything, Ziegfeld over-dressed his girls. I never knew a man that was more determined that an objectionable line should not be spoken on his stage. The Ziegfeld Follies was eminently a decent entertainment. 2283

Q. You contend, then, that those shows and the women were more fully clothed than these Varga girls? A. No, I

2284 shouldn't say more fully clothed. I should say as fully clothed. There was a scene from one of the Follies which was called "The March of the Nations" in which the girls were so clothed that they found it difficult to walk and they had to subtract some of the clothing. On the other hand, five or six or seven years after, nudity became very common in every theatre in New York and Ziegfeld put on a Follies on the roof of the Amsterdam, and in it was a scene that we used to call "Living Pictures", staged by Ben Allen, in which the girls wore practically nothing, but that was five years after and that became very common in every musical comedy

2285 in New York.

Q. Mr. Pollock, hasn't the theatre been notorious as a pioneer in obscenity? A. It certainly has not. It has not even been notorious as a follower.

Q. Would you agree that in times past most women parading upon the stage were looked upon as low and having an immoral character? A. Yes, there was a time. I recently gave the Library of Congress a diary written by my wife's great, great, great grandfather in which he alludes continually to the fact that even then in the early part of the 18th century he and his companions were regarded as rogues and vagabonds. They were not rogues and vaga-

2286 bonds, and the standard of morality on the stage is much higher than in ordinary life.

An aunt of mine used to keep a scrapbook as to the misconduct of actors and one as to the misconduct of clergymen, and the one as to the misconduct of clergymen was much thicker.

Q. You wouldn't think that that would be accounted for by reason of the fact that the misconduct of clergymen would have more news value than that of actors? A. I wouldn't think it would. For instance, when a woman is caught

soliciting on the street and is asked her profession she usually says that she is an actress and the newspapers set her down as an actress. Some of the finest and most honorable people I know are in the theatre and some of them happen to be chorus girls. 2287

My wife's family is one of the oldest theatrical families in America, and her standards are so Comstockian that sometimes it leaves me aghast.

Q. Would you say that the trend in obscenity now is backward and downward or upward? A. I am not quite certain as to your definition of obscenity. I should say that the trend toward frankness is very great and the reason I stopped participating in a crusade that was put out of existence, not by censorship, was because suddenly I awoke to the fact that times have passed me, that they were very different from what they used to be and that people were judging these works in comparison with the times. 2288

I personally think that probably the greatest help to real morality, fundamental morality, possibly is an approach to our present frankness. I think nothing is more conducive to immorality than a certain amount of inhibition, a certain kind of whispering campaign. I don't think there is any comparison between the state of mind produced by our common expressions today and the state of mind of a certain group of men who would go down to 23rd Street in the hopes of seeing the women's skirts blowing about. In those days I think the state of mind was conspicuously evil when grown men could go down to see a woman's ankle, whereas today they don't even look about. 2289

Q. In other words, Mr. Pollock, you are for more frankness that we have now? A. I don't think the question of frankness is the important thing. I think the question of intent is the important thing.

2290 Q. Well, just what do you mean by that? A. Well, I was just about to give you an illustration. One of the most ob scene, to my view, which does not necessarily mean that it was obscene, was an advertisement in last Sunday's Times book review for a book called "Chicken Every Sunday", which is a very popular book. It reproduced part of the first page of that book, and the first two sentences, taken as part of the context, I thought were very, very objectionable, very coarse, but in this reproduction those sentences are played up in type that high (indicating) while the rest of the page is agate.

2291 Now I say the intention of that makes it an obscenity. I should say that most of the motion picture advertisements were obscene not because they display the female form, because that is familiar to most of us, but because their intent is to pander.

Q. How would you describe or define the average normal individual with respect to indecency, obscenity, and filth? A. It is rather a large order. I should say that the normal individual regards sex very much as he regards beef steak: as essential and sometimes desirable but not as a thing to be discussed all day long and to create a certain sub-normal reaction.

2292 Q. You approach this problem, do you not, Mr. Pollock, with the attitude of a writer and dramatic critic and a playwright? A. I should say that my activities over the past few years make me approach it rather as a person interested in the public good. After all, I have not written a play for more than ten years and shall never write another one. I have no longer any association with the theater. My present activity is commenting on the daily life of people, the government, and so on. My only magazine contact is a contract for a series of essays of which I have written near-

ly a hundred on, let us call it, common sense living and the morals. It has been the most successful thing that I have ever done. I am just about to make another contract for their extension with another magazine. 2293

I should say for ten years I have been rather a commentator on life than a dramatist or a theatrical man. I regard it as a rather high compliment that nowadays when I am introduced to people I am introduced as a dramatist, but most of the citations that I have received ignore that fact. My present activities are not connected with the theatre, not that I am not very proud of the connection.

Q. You think that your attitude toward matter of this sort we are speaking of here is the same as that of the average normal individual who walks the street and is able to buy a magazine from a newsstand? A. I should say exactly. 2294

Q. Are you familiar with Morris Ernst's book "The Censor Marches On"? A. Very familiar.

Q. Do you subscribe to the statements made by Mr. Morris Ernst in that book to the effect that so far as the mailability feature of the Postal Obscenity Statute is concerned that it should be allowed to continue and that enforcement be upheld? A. I should say that all censorships are dangerous, and throughout all history almost every censorship has wound up by being used for ulterior reasons and to suppress reason and thought. 2295

I should think that a proceeding of this sort, if it is sustained, might be one of the most dangerous things that would happen in the United States.

Mr. Bromley: You mean, I take it, based on this material, Mr. Pollock?

2296 The Witness: Based on this type of material. We have now three men here of obvious intelligence and understanding of literature. It is quite possible to have a board that has not that kind of an understanding. You can't consider these things in relation to the men who are trying them at this moment. Anything is possible, any extreme is possible.

Censorship has been used again and again as a political power. When the motion picture of "The Fool" was to be released in Philadelphia the Board of Censorship objected to its being released although
2297 the play had been advocated and urged by every church in the country, including the Catholic Church. When I went over the thing I discovered that the real reason they had objected to it was because I had spoken of the 12-hour day in the coal mines of Pennsylvania. Another thing, Anita Loos once told me that she had written a line about a mayor, in a derogatory way, and Mayor Hylan wouldn't allow the play to open until the line was taken out. It is an extremely dangerous thing.

Q. Mr. Pollock, would you say that the determination of
2298 whether material is designed for the dissemination of information of a public character warranting a subsidy which enables the publication to exist is a matter of censorship? A. I should say not properly. I should say that the fact that I gave a certain sum of money, a rather large sum, to the New Theater in New York did not empower me to say that the New Theater must not do a play of Congreve because it was objectionable from our present standards of morality.

Q. I believe you stated that obscenity is purely a state of mind of the beholder? A. I say the kind of obscenity that is not immediately identifiable by any policeman.

Q. That is exactly the philosophy that is expressed in Mr. Ernst's books, isn't it? A. No. Mr. Ernst says there is no such thing as obscenity, which I don't think is true. Mr. Ernest belongs to a new class of liberals who are a little bit too liberal for me. 2299

Q. And you think Mr. Avery Hopwood, with whom you wrote, helping you in collaboration, would subscribe to that? He wrote a number of bedroom farces of a risque character, did he not? A. At least I don't think he wrote it from that standpoint, although it is possible. Hopwood was one of the most interesting types of disintegration that I saw. When he wrote "Clothes" he just graduated from the University of Michigan and he was one of the most remarkable men I ever saw. He wrote many plays of the same type. I don't think I ever saw a man so completely go to pieces as he did. Toward the end of his life he really sent out some remarkable work, but I don't think any of his farces were of a nature to excite any comment today. 2300

When I was dramatic critic on the Washington Times we had a wave of those farces, like "The Turtle." There was the most enormous outcry about those plays, and yet today you could produce any one of them without anyone doing anything more than going to sleep.

I remember one play in New York called "The Turtle". There was an awful outcry about the fact that Sadie Martineau disrobed and threw her clothes over a screen on the stage. She was standing offstage and threw her clothes on a screen, and in the minds of many of the audience that was quite a thing to do and there was an outcry raised and a policeman was sent back stage to do something about it and when he got there Sadie Martineau was sitting in the dressing room talking to me while the property man took the clothes out of a basket and threw them over the screen. I 2301

2302 should say that what Miss Martineau did was in the mind of the beholder and not in the play.

Q. Mr. Pollock, you said, I believe, that you would not use the words "son-of-a-bitch" in certain company. Is that right? A. Quite right. Personally, I wouldn't use it in my writings but I don't impose my standards on every other writer.

Q. What is this "certain company" that you wouldn't use it in? A. I might use it before clergymen of a certain intellectuality and liberality. I wouldn't use it before some $900 a year parson in Mississippi or Alabama.

2303 That, by the way, is a comment on what I mean by things being a reflection of current customs, and so forth.

I would use a great many words in a sophisticated drawing room or a drawing room of university people.

Although, I find I am behind the times at that. I lectured at Wellesley College one time. I had done the lecture three hundred or four hundred times, and I caught myself saying "The Well of Loneliness", and I thought "Good Heavens, I am in a girls' college." I made no further reference to the "Well of Loneliness".

The first question asked by an angel-faced child was: "From your reference to the 'Well of Loneliness' are we
2304 to understand that you don't regard sexual perversity as a proper topic for literature?"

She said that in the presence of the whole faculty of Wellesley University and nobody thought it remarkable.

Q. Can you give us the names and locations of beaches on which you see women clad as scantily as some of these Varga girl drawings? A. Any beach in America. I live at Shoreham, Long Island, which is opposite Long Island University, which is a coincidence, and I own my own beach. A large section of the beach is owned by people down there, and a large section is not.

I would not be too sure about this because, unfortunately, I don't notice as I did twenty years ago, but I think it has been a long time since I have seen any young girl on the beach with more than what we commonly call a bra and what burlesque people call the G-string. 2305

Q. Mr. Pollock, you will recall some of the pictures have very transparent clothing and nothing underneath. A. Yes, I do. I don't think there is any revelation that is uncommon about it.

Q. I see. You see that sort of revelation on the beaches that you refer to? A. I have a young daughter and am fairly en rapport with the customs of the day, and I believe most women today when they go out to dinner wear a dress of rather sleazy material with either nothing under it or a thin shift underneath it. And I have never seen a drawing room thrown into orgiastic rhapsodies over it. 2306

Moreover, there was considerable disturbance at Rockaway Beach about people wearing the bathing costumes away from the beach and finally it all died down and the legal authorities overlooked it.

In my own community, which is certainly one of the most decent communities in America, everybody wears beach costumes to the post office to get the mail. Maybe the Post Office ought to do something about that.

Q. Will you look at the June Varga girl in the January issue? On what beach have you seen a costume of that sort that is, an American beach? A. It is not a beach costume. I can take you to twenty ballrooms in New York where that is commonplace. 2307

Chairman Myers: I think we are looking at different pictures.

The Witness: January.

2308 *By Mr. Hassell:*

Q. June. A. I shouldn't say you would see quite that on any beach but I do say that nothing which is not permissible on a beach should not be permissible in art. After all, bathing isn't the criterion of American art, is it?

Q. Now, look at the August picture on that calendar. On what beach have you seen costumes of that sort? A. I have not seen that on any beach. I have not seen the Greek slave on any beach, but I don't think we ought to bar the Greek slave.

2309 I am not contending that only beach costumes are permissible in art.

Q. But you did on direct say that these Varga girl costumes are no more daring or scanty than costumes you see on the beaches. A. I shouldn't say they were. It is a degree so fine that I think it takes a certain abnormality of mind to discover it.

The beach costume reveals all the curves and so forth. I suppose it does. I can't say I ever noticed it too closely. So does this. So what?

I think under certain conditions concealment, as I said before, is more obscene.

2310 When I was a boy in Washington, when you pasted a picture of a woman in short skirts on a billboard, you had to paste a piece of white paper over the woman's legs, and whenever you came to one of these pictures pasted on a billboard you came to twenty small boys trying to take off the paper to see what was underneath it. If there hadn't been any white paper there you would not have any small boys trying to tear it off.

Q. Will you refer to the Varga girl picture in the September issue of Esquire, at page 38? Would you say that

is a typical beach costume as is worn on beaches? A. No. I repeat, I can't regard the bathing costume as the only criterion of art. I judge from this picture that women have mammary glands and are bipeds, but I don't think there is anything remarkable about that. 2311

Q. You may, then, want to change your testimony on direct to the effect that these Varga girls are clad no more scantily than women seen on the beaches of America? A. I wouldn't want to change my testimony. I think it is simply a question of how literally you take that.

Although there is a certain transparency that probably does not exist in beach costumes, beach costumes reveal not much less than this. In fact, we have had an outbreak of nudist colonies lately in which most of the people wear nothing. 2312

Q. Do you think that is proper? A. I do not. I think it is a matter of interest. If I want to go bathing without clothing I propose to go bathing without clothing, but I haven't the exhibitionist complex that makes me want to do it in company.

Q. How do you regard nudist books advocating nudism, having nothing in their texts of an objectionable character, simply being an argument for nudism, but having illustrations showing pictures of men and women in the nude? A. I think that is a matter of interest. I know one nudist magazine that used to be published in Germany that I thought was absolutely all right because it was the result of absolute fanaticism of the doctors for sunlight and air, and so forth. 2313

I think the evil in most of our nudist magazines is because they are trying to get out from under the law.

2314 Chairman Myers: Is that the Friebarte?

The Witness: Yes. It was the beginning of all the nudist movement, I suppose.

But it is a matter of intention. I can do certain things from an honest and decent intention that, therefore, become honest and decent, that if I do them for gain I should say would be rather deplorable. I do not think the human body *per se* is obscene. I think if it had been God probably would not have made it.

2315 Q. I believe you said that if there is nothing wrong about a thing, there is nothing wrong about mentioning it. A. Yes. I think there is something very wrong about failing to mention it.

Q. Have you reference to the bedroom or relations between man and wife? A. It may be indelicate. I wouldn't call it obscene. If it were you and I would not be here, sir.

Q. But you think it is perfectly wrong to go into minute details with what transpires in the marriage bed, do you? A. I should think it would depend upon the publication and upon the reason for doing it. It is all a matter of intent.

Q. But you did say if there is nothing wrong about men
2316 sleeping beside their wives, there is nothing wrong about mentioning it. A. Mention and obscene revelation are two different things.

For example, there are innumerable books circulated as to connubial felicity. I have so much connubial felicity I haven't had to read them. I have no objection to them. They are freely circulated, written by medical men.

I should say they are probably quite proper, but I should say if I wanted to do so—and I don't—I might write a description of what goes on in the marriage bed that would

be very obscene and improper, and I think then the obscenity would be in my mind and not in what happens in the marriage bed. 2317

Q. You referred to a number of matters called to your attention in Esquire as being true reports.

Is your idea that truth or falsity determines whether or not a matter is salacious, indecent, obscene, lewd or lascivious? A. I think it is a material consideration.

Q. If it be factual, then it would not be objectionable from an obscenity standpoint? A. No. I wouldn't go so far as that. I regard the last chapter of Joyce's "Ulysses" as entirely objectionable. I didn't regard it as material for censorship because I don't believe in censorship. I think if you will educate, you will do a great deal more than you will by censorship. 2318

But one of the most learned courts of the country decided I am wrong, and held there was nothing wrong with that chapter. I personally thought it was offensive and raised a rumpus in Emanuel Hirsch Mt. Sinai Synagogue in Chicago. Any number of people said I was evil-minded and so forth.

Q. You said you don't believe in censorship and you would not have censored that? A. I don't believe in censorship any more than I believe in prohibition. I believe in decency and I believe in moderation. 2319

It is a curious thing that pent-up powder explodes and loose powder merely burns. It is a very dangerous thing to pen up these emotions.

Q. The part of "Ulysses" you have reference to is Mrs. Broome's soliloquy? A. It didn't make so much impression that I remember it. I have reference to the part where some man or woman was in a toilet and cogitating at the time.

2320 As I say, one of my bases of judgment in these matters would be the depth of the impression made upon me.

I read "Ulysses" a great many years ago and I understood very little of it.

Q. You found it a tiresome book? A. I found it a boring beyond belief book. I think those books come under the head of what Alexander Pope calls the dulleries of art. I think they are affectation and I think the people who do them are contemptible beyond words.

Q. Doctor, you referred to the "Star and Garter Blues" as a musical comedy. A. I referred to the "Star and Gar-
2321 ter" as a musical comedy. I don't mean to quibble with you about the word.

Q. Pardon me. Would you say that the characterization of it as $4.40 burlesque would be incorrect? A. Well, most of the sketches in the play are what in burlesque used to be called black-outs. I am rather an authority on burlesque. I covered burlesque in Washington for a good many years. There was Kernan's Theater—no one here is old enough to remember that.

Most of the sketches are sketches that have been done in burlesque for fifty years or more. The sketch where someone pours water on—I have forgotten his name for
2322 the moment—is probably old as the negro minstrel show.

But there you have a gradation, a refinement as it were, a polishing up of these things for the $4.00 audience.

Not that I think burlesque is essentially wrong. I used to go to burlesque shows in New York chiefly because I sat next to Mr. Justice Holmes, and I don't think either of us was notably corrupted by the performance. At least, Mr. Justice Holmes was not.

Q. This show we are speaking of "Star and Garter", consists chiefly of strip teases and some dances that could be

called orgiastic or erotic dances? A. I think all dances are erotic dances. I think that is the purpose of dancing, but I insist that the erotic is not necessarily wrong. I think it is rather fine, myself. 2323

Q. Doctor, would you say that the exploitation of sex continually as a magazine policy is contrary to the development of good, sound literature? A. No. I should say the exploitation of sex goes through all literature and without it you would have no literature.

Q. But the magazine which consistently and persistently plays up sex, do you think that is a good thing from a literary standpoint? A. I think from an artistic standpoint you can have too much of anything, but the two-muchness has nothing to do with morals. I don't see anything wrong with sex. In fact, I think it is a great institution. The decision that sex must be wrong must be tremendously surprising to God. 2324

Q. You don't admit that questionable pictures and questionable stories, from a moral standpoint, may have a deleterious effect upon youth or impressionable persons?. A. In the first place, I think you have got to decide what is questionable. I think you and I know that certain postcards which you and I know are sold in Paris, and which we suspect are sold in New York, have a very bad effect. I doubt that they would affect anybody that was not affected beforehand, however, because I don't think anybody who was not affected before buys them, except censors, of course. 2325

But I don't think that the mere fact that a thing deals with sex can have an evil effect. What is evil is so much more subtle than the censorial mind.

For example, Cardinal Hayes and I during a discussion

2326 were in complete agreement that the national evil of the moving picture was a matter of gross materialism. For instance, the idea that no man has justified living who does not end his life in a 12-cylinder car and living in a home that looks like the Grand Central Palace, is a bad thing. I think it is like the man with the skinny mustache and the Jap valet bringing in the girls, but the state of dressing of the girls has nothing to do with it.

I think it is unfortunate that we regard the girls with the lacquered finger-nails as the glamour girl. But that has nothing to do with sex.

2327 If I were the Post Office, which I have no desire to be, believe me, the first thing I would bar are these 50 or 60 or 70 magazines distributed to children, Superman and so forth. These pernicious and rather painful comics have a tendency to develop a wrong state of mind and are very bad art. But I disagree with some of our best educators in believing that no one who acquires a taste for that sort of stuff would ever acquire a taste for art.

But that is my personal opinion and I don't urge it on anyone else.

Mr. Hassell: That is all.

Mr. Bromley: That is all.

2328

(Witness excused.)

Mr. Bromley: Mr. Donnelly.

JAMES C. DONNELLY, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows: 2329

Direct Examination by Mr. Bromley:

Q. Will you give your name, please? A. James C. Donnelly.

Q. Where do you live, Mr. Donnelly? A. Pasadena, California.

Q. And your business is what, sir? A. I am President of the Pacific Coast Independent Magazine Wholesalers Association and a magazine wholesaler. 2330

Q. Will you tell us a little more in detail just what your business is? A. Our business as an Association is made up of 80 wholesalers from the Far Western States and the object of the Association is for the betterment and improvement of independent distribution.

Independent distribution is a system of distribution which exists in 725 or 726 cities in the United States. There are two systems of distribution, one the independent system and the other is the American News Company.

Q. Now, will you tell us a little more about your own business as distinguished from the activities of the Association? A. My own business is the distribution and sale 2331 of magazines to various retail outlets in Pasadena and the surrounding community, of which we take in about 40 towns and cities.

We represent seven of the largest publishers in America.

Q. Will you name them, please, and the magazines which you distribute? A. We distribute approximately 300 different titles. We represent the Curtis Publishing Company, who publish the Saturday Evening Post and the Ladies' Home

2332 Journal and we are national distributors for Esquire and Coronet.

We represent the Science-McCalls Corporation and distribute McCalls, Red Book, Popular Science and Reader's Digest.

We represent the International Circulation Company, who publish and distribute Cosmopolitan, Good Housekeeping, Harpers Bazaar, Town and Country, and various screen magazines and so forth.

We represent the Independent News Company, who publish a line of comics, The Cable News Company, who publish
2333 various publications, the MacFadden Publications, who publish True Story, True Confessions and Liberty, and various other small distributing companies.

Q. When did you begin to distribute the magazine Esquire? A. The franchise was taken over in June of 1940.

Q. About how many copies do you distribute a month of Esquire? A. In our agencies we distribute about 5,000 copies.

Q. Would you tell us something about the nature of the retailers who purchase these magazines for sale to the public? Who are they? A. The biggest retail accounts that we have that sell Esquire are the larger and better
2334 department stores such as Bullitt's, the May Company, the Broadway Department Store, the high-class book and stationery stores, the airport which is a very big outlet.

We sell approximately 60 per cent of our Esquires through these higher class stores and outlets, 20 percent are sold through Army camps, post exchanges and Army hospitals, and the balance are sold through the smaller stores in the outlying sections, some of them very good sections, by the way.

Mr. Hassell: I object to this line of testimony, if the Board please. This is similar to matter that has been held by the Federal courts to have no bearing on questions of this sort. 2335

Chairman Myers: I was wondering, Mr. Bromley, what your purpose is with this line of testimony.

Mr. Bromley: As I understood Mr. Hassell, he has specifically made the charge before this Board that this magazine is a hush-hush magazine and that it is the kind of magazine that is surreptitiously distributed and not handled by decent people, and not regarded in the business as a decent, clean maga- 2336 zine.

I offer this as testimony to show the character of our distributors, our retailers, and our purchasers, and what efforts they make before they handle magazines to determine their character, and what the opinion of the trade is as to the character of this magazine with comparison to others, such as the Saturday Evening Post—

Mr. Hassell: I have not made any contention that the distribution of this magazine is hush-hush, and the record will so show.

And the case which I referred to in which matter 2337 was sought to be introduced was U. S. v. Levine, 83 Fed. (2nd) 156.

The court held that the exclusion of lists of purchasers of books was correct.

Mr. Bromley: I am not trying to show lists of purchasers. I am trying to show how the magazine is regarded in the wholesale distribution field, a part of the public.

2338 Chairman Myers: I had in mind the Levine case. Having that case in mind it is the view of the Board that the objection should be sustained.

Mr. Bromley: Exception. And I now offer to prove by this witness that he and his Association uniformly and consistently make careful investigation before they handle any publication in the magazine field, that it is their policy not to handle any magazines which in their opinion the public regards as indecent, filthy, lewd, obscene or lascivious, that they made such an investigation of the magazine
2339 Esquire, that they concluded it was not a hush-hush or obscene magazine and, in his opinion, it is properly classified with such magazines as the Saturday Evening Post, Cosmopolitan, Red Book, Liberty, Reader's Digest and so forth; that it is not, in his opinion, in the girl gag class and is not regarded by his Association or himself as a sexy magazine.

I offer to prove by him that in his area a system of censorship exists which exercises very close control through police departments of the cities in which he distributes this magazine, over the type of periodical publication circulated, that the magazine Esquire
2340 has never been on any proscribed or censored list in any part of his territory, that it is approved by such representatives as the Pasadena Police Department, that it is approved by women's civic leagues and parent-teachers associations and various church organizations.

Further, that the magazine Esquire, in his territory has never been on any disapproved list, that the magazine is not classed as a hush-hush magazine.

that in his territory it regularly appears in all im- 2341
portant clubs and waiting rooms of prominent physicians, professional offices, and in the better and more decent homes of the community.

That he has never received a single complaint at any time in his capacity as distributor, against Esquire or anything contained therein.

And another thing, I offer to prove by this witness that in cooperation with the late Captain Charles Paddock, he conducted in January and February, 1943, a Varga and Esquire armed forces campaign in which magazines have been solicited for ship- 2342
ment to the armed forces abroad, and that the U. S. O.'s and local citizens in his area formed committees for cooperating in this movement and that a club was formed called the "Send More Esquires Club" and thousands of magazines thus collected were sent out to our armed forces.

That he is generally familiar with the magazine, has it in his home and has had for years before he distributed it, and it is read regularly by his family, including children.

Chairman Myers: Is that a new question you are presenting here, or is that part of your offer of proof? 2343

Mr. Bromley: That is my offer of proof.

That is all, Mr. Donnelly.

Mr. Hassell: I have no questions.

(Witness excused.)

Mr. Bromley: Mr. Orr.

2344 ROBERT W. ORR, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Bromley:

Q. Will you give the Board your full name, please, sir? A. My full name is Robert W. Orr.

Q. And where do you live? A. New York City.

Q. What is your address, please? A. My home address?

Q. Yes. A. 169 East 78th Street.

2345 Q. What business are you in? A. The advertising business.

Q. Are you associated with some firm? A. I am a partner of Lennen & Mitchell advertising agency.

Q. Lennen & Mitchell? A. Yes.

Q. And the firm of Lennen & Mitchell is a firm of advertising agents. Is that right? A. That is correct.

Q. Describe their business, briefly. A. We handle the advertising for quite a few national advertisers, that is, all phases of their advertising, display, radio, magazines and newspapers.

Q. Will you name some of the representative accounts that are handled by your firm? A. We have the accounts of
2346 Jergens-Woodbury, and Lehn & Fink for Lysol disinfectant, and Pebecco tooth paste, Bendix Aviation Company, Tidewater Oil, Carstairs and Calvert whiskies, and P. Lorillard Company, all brands excepting Old Gold cigarettes.

Q. Now, in the course of a year, how much advertising business, expressed in dollars, does your firm handle? A. It varies from $8,000,000 to $12,000,000 a year.

Q. When did you yourself first go into the advertising business? A. About 28 years ago.

Q. And what experience have you had? A. Well, it has been a rather diversified experience, having started as an office-boy from the bottom in a small agency, learning various phases of the business over a period of years. I have worked in most every department in an agency. 2347

Q. When did you go to work for Lennen & Mitchell? A. About 20 years ago.

Q. And how long have you been a partner of the firm? A. About 12 years.

Q. Can you give us an estimate of the amount of advertising that firm has handled during the time you have been with it in terms of dollars? A. I would say over that period in excess of $150,000,000 worth of billing. 2348

Q. During the time you have been in the advertising business have you observed and become familiar with the advertising content of magazines and the trends in magazines? A. Very definitely. That has been part of my job, to do that.

Q. And have you at my request examined the current issues of such magazines as the Woman's Home Companion, Ladies Home Journal, Vogue, Harper's Bazaar, Cosmopolitan, Saturday Evening Post, Look, Colliers and the New Yorker, in order to appraise the present day standards in advertising as far as illustrations and text are concerned? A. Yes, I have. 2349

Q. And have you, Mr. Orr, at my request, selected various advertisements in these magazines, which you consider as representative of present day standards of advertising and their respective categories? A. Yes, I have.

Q. I show you the magazine Vogue for May, 1938 and direct your attention to an advertisement on page 123, and ask you whether or not, in your opinion, that advertisement is typical of standards then and now in the field of cosmetics?

2350 Chairman Myers: May that be marked for identification so we may refer to it that way?

Mr. Bromley: Before you answer that question, may I have this magazine marked for identification?

(The document above referred to was marked Respondent's Exhibit No. 20 for identification.)

By Mr. Bromley:

Q. Can you answer the question? A. The advertisement you showed me is typical of that type of advertising.

2351

Mr. Bromley: I offer it in evidence.

Chairman Myers: Let Mr. Hassell see it.

Mr. Hassell: I object.

Mr. Bromley: You haven't seen it yet.

Mr. Hassell: I object to this line of testimony. Manifestly this advertisement occurs in a woman's magazine. Vogue is a well-known woman's magazine. It is not at all comparable with the matter the Board has under consideration. I think it has no pertinency and no value whatsoever in this proceeding.

Chairman Myers: The objection is overruled. Re-
2352 spondent's Exhibit 20 is received in evidence.

(The document heretofore marked Respondent's Exhibit No. 20 for identification was received in evidence.)

Mr. Bromley: I ask that the issue of Vogue for January 1, 1940, be marked for identification.

(The document above referred to was marked Respondent's Exhibit No. 21 for identification.)

By Mr. Bromley: 2353

Q. Is this advertisement appearing in Respondent's Exhibit No. 21 for identification, on the inside of the first page, of Cannon's towels, typical of the advertising in that field as of that time? A. Very typical.

Mr. Bromley: I offer it in evidence.

Mr. Hassell: The same objection.

Chairman Myers: Same ruling.

(The document heretofore marked Respondent's Exhibit No. 21 for identification was received in evidence.) 2354

Mr. Harding: We would like to have a stipulation, Mr. Hassell, that for any of these magazines that are offered we may substitute photographs or photostats, so that the original magazines may be returned to the publisher. In some instances it was not possible to get duplicates.

Mr. Hassell: I imagine we can agree to that if you will produce a photograph that will show the colors and so forth.

Mr. Harding: We can do that. 2355

Chairman Myers: Off the record.

(There was a discussion off the record.)

Mr. Bromley: I ask that Vogue for May 1, 1943, be marked for identification.

(The document above referred to was marked Respondent's Exhibit No. 22 for identification.)

2356 *By Mr. Bromley:*

Q. I show you in Exhibit 22, page 21, what purports to be an advertisement for "Tabu, the forbidden perfume", and ask you whether that ad was carried in practically all of the class magazines of that time? A. Yes, that is a very typical advertisement for Tabu. It has an illustration done by John Le Gatta, one of our best illustrators.

Mr. Bromley: I offer that magazine in evidence.

Mr. Hassell: I object to this.

2357 Chairman Myers: Let the record show that Mr. Hassell objects to the introduction of all these magazines and that the objection is overruled.

(The document heretofore marked Respondent's Exhibit No. 22 for identification was received in evidence.)

Mr. Bromley: I ask that the issue of Vogue for July 1, 1943, be marked for identification.

(The document above referred to was marked Respondent's Exhibit No. 23 for identification.)

2358 Chairman Myers: How many Vogue magazines do you have?

Mr. Bromley: Only a couple more.

Chairman Myers: All right.

By Mr. Bromley:

Q. I show you on page 4 the advertisement of Shaleen hosiery, and ask you whether that is a typical hosiery ad-

vertisement carried by most of the high class magazines dur- 2359
ing the year 1943? A. It is typical of the advertising that they are doing now.

Mr. Bromley: I offer Respondent's Exhibit No. 23 in evidence.

Chairman Myers: It may be admitted.

(The document heretofore marked for identification Respondent's Exhibit No. 23 was received in evidence.)

Mr. Bromley: I ask that Vogue for June 15, 1943 2360
be marked for identification.

(The document above referred to was marked Respondent's Exhibit No. 24 for identification.)

By Mr. Bromley:

Q. I call your attention to an advertisement of Cole of California and ask you whether or not this is a typical advertisement of bathing suits which was run, it or similar ones, not only in Vogue for 1943 but the other high class magazines? 2361

Mr. Hassell: At what page is that?

Mr. Bromley: Page 11.

The Witness: It is typical of the bathing suit advertising done by Cole and Jantzen and other houses with that type of merchandise.

Mr. Bromley: I offer in evidence Respondent's Exhibit 24.

Chairman Myers: It will be received.

2362 (The document heretofore marked Respondent's Exhibit No. 24 for identification was received in evidence.)

Mr. Bromley: I ask that Harper's Bazaar for December, 1940, be marked for identification.

(The document above referred to was marked Respondent's Exhibit No. 25 for identification.)

By Mr. Bromley:

2363 Q. I call your attention to Respondent's Exhibit No. 25, an advertisement appearing on page 103 of perfumes by Orloff, and ask you whether that is a typical perfume advertisement of the present day? A. Yes, it appears to be very typical. It is a very bad ad.

Mr. Bromley: I offer in evidence Respondent's Exhibit 25.

Chairman Myers: By the way, Mr. Bromley, in this Respondent's Exhibit 24, are the portions you offer those marked with the tab?

Mr. Bromley: I have only offered one page.

2364 Chairman Myers: That is what I thought.

Mr. Cargill: Mr. Bromley, is this what you have in mind (indicating)?

Mr. Bromley: Yes.

Chairman Myers: Respondent Exhibit 25 is admitted in evidence.

(The document heretofore marked Respondent's Exhibit No. 25 for identification was received in evidence.)

Mr. Bromley: I ask that Harper's Bazaar for March 15, 1942, be marked for identification. 2365

(The document above referred to was marked Respondent's Exhibit No. 26 for identification.)

By Mr. Bromley:

Q. In Respondent's Exhibit 26 is the advertisement appearing on page 77 for Perma-Lift brassieres by Hickory, a typical advertisement for that article of clothing? A. Yes, it is typical of what the brassiere people are doing. 2366

Mr. Bromley: I offer in evidence Respondent's Exhibit 26.

Chairman Myers: It may be received in evidence.

(The document heretofore marked Respondent's Exhibit No. 26 was received in evidence.)

Mr. Bromley: I ask that Harper's Bazaar for October, 1943, be marked for identification.

(The document above referred to was marked Respondent's Exhibit No. 27 for identification.) 2367

By Mr. Bromley:

Q. In Respondent's Exhibit 27 I call your attention at page 6 to an advertisement of Tabu perfumes and ask you whether that is representative of perfume advertising in 1943? A. It is certainly representative of Tabu advertising. I wouldn't call it quite representative of all perfume ads because most of them don't use photographs. That is an actual photographic model.

2368 Q. Was this ad or an ad similar to this, carried in 1913 in all high-class magazines? A. Oh, yes, by Tabu.

Mr. Bromley: I offer Respondent's Exhibit 27 in evidence.

Chairman Myers: It may be received in evidence.

(The document heretofore marked Respondent's Exhibit No. 27 for identification was received in evidence.)

Mr. Bromley: I ask that the New Yorker for Octo-
2369 ber 22, 1932, be marked for identification.

(The document above referred to was marked Respondent's Exhibit No. 28 for identification.)

By Mr. Bromley:

Q. Have cigarette advertisements for years featured pictures and photographs of women in various states of dress? A. They have, yes, bathing girls, dancing girls, and that sort of thing.

Q. I show you Respondent's Exhibit 28 for identification, the last page thereof, being a Lucky Strike advertisement, and
2370 ask you whether that ad was carried as far back as 1932? A. Yes, we also did a series like it called "Kissables" for Old Gold cigarettes. The idea was to smoke Old Gold cigarettes and keep your breath fairly sweet.

The idea was at that time that Old Gold did not contain any of the flavoring ingredients. It was pure tobacco and there was a basis for that argument.

Q. In Respondent's Exhibit 28, this is an oil painting of The Raid On The Sabine Women and portrays the capture by

Roman warriors of Sabine villages for the express purpose of carrying off their women. A. That is right. 2371

Mr. Bromley: I offer that in evidence.

Chairman Myers: It may be received in evidence.

(The document heretofore marked for identification Respondent's Exhibit No. 28 was received in evidence.)

Chairman Myers: At this point we shall adjourn as usual to 1:30. 2372

(Whereupon, at 12:05 o'clock p. m., the hearing was adjourned until 1:30 o'clock p. m.)

AFTERNOON SESSION

(The hearing was resumed, pursuant to the adjournment, at 1:30 o'clock, p. m.)

Chairman Myers: All right, we will resume.

2373

ROBERT W. ORR, resumed the stand and testified further as follows:

Direct Examination (Continued).

Mr. Bromley: I ask that the New Yorker for July 31, 1943, be marked for identification.

(The document referred to was marked Respondent's Exhibit No. 29, for identification.)

2374 *By Mr. Bromley:*

Q. Referring to page 9 of Respondent's Exhibit 29, for identification, would you say that the advertisement there of the Schiaparelli hosiery advertisement or stockings is a typical hosiery advertisement? A. It is an advertisement of liquid leg lotion. It is very typical. It happens to be one of our own ads.

Q. That advertises leg lotions for painting on stockings? A. For painting on the bare leg in place of stockings.

Mr. Bromley: I offer this exhibit in evidence.

2375 Mr. Hassell: Same objection.

Chairman Myers: It is admitted.

(The document heretofore marked Respondent's Exhibit No. 29, for identification, was received in evidence.)

Mr. Bromley: I ask that this New Yorker for April 24, 1943, be marked for identification.

(The document referred to was marked Respondent's Exhibit No. 30, for identification.)

2376 *By Mr. Bromley:*

Q. In that exhibit for identification, No. 30, I call your attention to page 72, to the White Rock advertisement, and in particular to the picture of Gypsy Rose Lee contained in that ad. Is that a typical form of advertising for products such as White Rock? A. Yes, a lot of the advertisers use movie and theatrical stars for testimonials and illustrations.

Robert W. Orr—for Respondent—Direct.

Mr. Bromley: I offer this exhibit in evidence. 2377
Mr. Hassell: Same objection.
Chairman Myers: It is admitted.

(The document heretofore marked Respondent's Exhibit No. 30, for identification, was received in evidence.)

Mr. Bromley: Mark for identification the Saturday Evening Post for September 5, 1912.

(The document referred to was marked Respondent's Exhibit 31, for identification.) 2378

By Mr. Bromley:

Q. I show you Respondent's Exhibit No. 31, for identification, the Saturday Evening Post, a Palmolive Soap ad featuring a lady in the bath tub. Would you say that was typical or characteristic of soap advertisements? A. I would say it is very typical of soap ads. We, some years ago, ran a whole series of nudes to convey the idea of Vitamin D sunshine which we had incorporated in our soap. Very beautiful figures all done of models in the nude. We never had one complaint from any of the readers. 2379

Mr. Hassell: What page is that?
Mr. Bromley: Page 8.
I offer in evidence Respondent's Exhibit 31, for identification.
Mr. Hassell: Same objection.
Chairman Myers: Admitted.

(The document heretofore marked Respondent's Exhibit No. 31, for identification, was received

2380 **Mr. Bromley: Will you mark for identification the Saturday Evening Post for July 10, 1943.**

(The document referred to was marked Respondent's Exhibit No. 32, for identification.)

By Mr. Bromley:

Q. I show you Respondent's Exhibit No. 32, for identification, and call your attention to the advertisement of the Sir Walter Raleigh pipe tobacco and ask you whether the black and white cartoon drawing is typical of tobacco or pipe
2381 **tobacco ads? A. Yes, it is. A lot of cigarette and tobacco advertisers use cartoons. We have done it ourselves.**

Mr. Bromley: That is on page 90. I offer Respondent's Exhibit No. 32, in evidence.

Mr. Hassell: Same objection.

Chairman Myers: It is admitted.

(The document heretofore marked Respondent's Exhibit No. 32, for identification, was received in evidence.)

2382 **Mr. Bromley: Will you mark for identification the Ladies' Home Journal for September, 1943.**

(The magazine referred to was marked Respondent's Exhibit No. 33, for identification.)

By Mr. Bromley:

Q. In Exhibit 33, for identification, page 109, is an advertisement of the Cashmere Bouquet Soap entitled "What do men want anyway?"

Is that typical of soap advertisements? A. Yes, it is, it is typical of the entire series they run. 2383

Mr. Bromley: I offer in evidence Respondent's Exhibit No. 33, for identification.

Mr. Hassell: Same objection.

Chairman Myers: It may be admitted.

(The magazine heretofore marked Respondent's Exhibit No. 33, for identification, was received in evidence.)

Mr. Bromley: Will you mark for identification this Ladies' Home Journal for July, 1942? 2384

(The document referred to was marked Respondent's Exhibit No. 34, for identification.)

By Mr. Bromley:

Q. In Exhibit 34, for identification, I call your attention to another Palmolive Soap advertisement on page 10 featuring a girl in an abbreviated bathing suit and a girl in a bath tub. Is that again typical or representative of soap ads? A. Yes, it is. 2385

Mr. Bromley: I offer this exhibit, being No. 34, for identification, in evidence.

Mr. Hassell: Same objection.

Chairman Myers: It may be admitted.

(The document heretofore marked Respondent's Exhibit No. 34, for identification, was received in evidence.)

3286 Mr. Bromley: Will you mark for identification, please, the Ladies' Home Journal for August, 1942?

(The magazine referred to was marked Respondent's Exhibit No. 35, for identification.)

By Mr. Bromley:

Q. In this Exhibit 35, for identification, Mr. Orr, at page 81, is another such advertisement entitled "Is this a honeymoon or a rest cure?" Is that typical of such advertisements of the present day? A. Yes, it is.

3287 Mr. Bromley: I offer Exhibit 35 in evidence.

Mr. Hassell: Same objection.

Chairman Myers: It may be admitted.

(The document heretofore marked Respondent's Exhibit No. 35, for identification, was received in evidence.)

Mr. Bromley: Will you mark for identification, please, the Ladies' Home Journal for November, 1942?

3288 (The magazine referred to was marked Respondent's Exhibit No. 36, for identification.)

By Mr. Bromley:

Q. In Exhibit 36, for identification, Mr. Orr, at page 150 is an advertisement of Cheramy, a perfumer, of April Showers Talc in which appears the nude bust of a woman. Is that a typical advertisement featuring nudes or partial nudes? A. Yes, it is.

Mr. Bromley: That appears at page 150. I offer in evidence Respondent's Exhibit No. 36, for identification. 2389

Mr. Hassell: Same objection.

Chairman Myers: It may be admitted.

(The magazine heretofore marked Respondent's Exhibit 36, for identification, was received in evidence.)

Mr. Bromley: Will you mark for identification this Colliers for March 26, 1938? 2390

(The magazine referred to was marked Respondent's Exhibit No. 37, for identification.)

By Mr. Bromley:

Q. In this exhibit for identification, No. 37, is an advertisement of the Seal Power Corporation of piston rings in which chorus girls in very abbreviated costumes are shown. Is that type of girl advertisement used by concerns other than soap or perfume concerns? A. It is quite typical of quite a few advertisers. Very often it doesn't tie up the product, as here, but it is used as a typical illustration. 2391

Mr. Bromley: I offer in evidence Exhibit 37, for identification, and call attention to page 66.

Mr. Hassell: Same objection.

Chairman Myers: It may be admitted.

(The magazine previously marked Respondent's Exhibit 37, for identification, was received in evidence.)

2392 Mr. Bromley: Will you mark for identification an issue of Colliers for September 18, 1943?

(The magazine referred to was marked Respondent's Exhibit No. 38, for identification.)

By Mr. Bromley:

Q. In this exhibit, for identification, 38, Mr. Orr is an advertisement for Mojud Hosiery. I show you that advertisement and ask you whether that is a typical advertisement, Mr. Orr? A. This is typical of the hosiery ads, yes.

2393 Mr. Bromley: I offer Respondent's Exhibit, for identification, 38 in evidence, calling attention particularly to page 55.

Mr. Hassell: Same objection.

Chairman Myers: It may be admitted.

(The magazine previously marked Respondent's Exhibit No. 38, for identification, was received in evidence.)

Mr. Bromley: Will you mark for identification this
2394 issue of Look for February 23, 1943?

(The magazine referred to was marked Respondent's Exhibit No. 39, for identification.)

By Mr. Bromley:

Q. In this Exhibit 39, for identification, Mr. Orr, is another undraped ad of Best Form at page 70. Is that typical

of the brassiere ads? A. It is typical of the brassiere ad- 2395
vertisements.

Mr. Bromley: I offer Respondent's Exhibit No. 39, for identification, in evidence.

Mr. Hassell: Same objection.

Chairman Myers: It is admitted.

(The magazine previously marked Respondent's Exhibit No. 39, for identification, was received in evidence.)

2396

Mr. Bromley: Will you mark an issue of Look for November 18, 1941, for identification?

(The magazine referred to was marked Respondent's Exhibit No. 40, for identification.)

By Mr. Bromley:

Q. In Exhibit 40, for identification, is an advertisement for Linit Laundry Starch featuring a girl in an abbreviated costume. Is that again typical of the use of undraped female figures in advertisements? A. I would say so, yes. 2397

Mr. Bromley: I offer Exhibit 40, for identification, in evidence, if you please.

Mr. Hassell: Same objection.

Chairman Myers: It is admitted.

2398 (The magazine heretofore marked Respondent's Exhibit No. 40, for identification, was received in evidence.)

Mr. Bromley: Will you mark for identification, please, an issue of Look for July 15, 1943?

(The magazine referred to was marked Respondent's Exhibit No. 41, for identification.)

By Mr. Bromley:

2399 Q. In Exhibit 41, Mr. Orr, I call your attention to another Limit Advertisement appearing on page 48, being drawings of undraped female figures. Is that typical of current-day advertisements, in that field at least? A. Yes, it is typical of a lot of cartoons in advertisements.

Mr. Bromley: I offer in evidence Exhibit 41, for identification.

Mr. Hassell: Same objection.

Chairman Myers: It may be admitted.

2400 (The magazine previously marked Respondent's Exhibit No. 41, for identification, was received in evidence.)

Mr. Bromley: I offer for identification the issue of Look for October 19, 1943.

(The magazine referred to was marked Respondent's Exhibit No. 42, for identification.)

By Mr. Bromley:

2401

Q. In Exhibit 42, for identification, at page 9 is an advertisement of the Book League of America advertising novels. It reads "This amazing novel of three women * * * the men they love * * * and the love they wanted," with subtitles "Their mistake in love was in giving too much" and "She loved too late."

Will you tell me whether or not that book advertisement and some similar to that type are commonly accepted by all the high-class magazines being published today? A. It is typical of the mail order book advertising appearing in most of the publications that carry this type of advertising, such as Look, American Weekly and magazines of that type.

2402

Q. Now, name some others. A. This type of advertising usually runs in magazines like Look and American Weekly.

Q. What is American Weekly? A. A syndicated magazine section published by Hearst newspapers and other newspapers with a circulation of over six million copies.

Q. That is the magazine that accompanies certain of the newspapers? A. Yes, throughout the country.

Mr. Bromley: I offer Exhibit 42, for identification, in evidence.

2403

Chairman Myers: It may be admitted.

(The magazine previously marked Respondent's Exhibit No. 42, for identification, was received in evidence.)

Mr. Bromley: Will you mark for identification, please, the Saturday Evening Post of May 1, 1915?

(The magazine referred to was marked Respondent's Exhibit No. 43, for identification.)

2404 *By Mr. Bromley:*

Q. Do you recognize the Phoenix Silk Hosiery ad appearing on page 32 as a hosiery ad typical of the year 1915? A. It is typical of the type of advertising they did back in 1915. It is quite different from the type of stuff we are doing today.

Mr. Bromley: I offer in evidence Respondent's Exhibit 43, for identification, and call particular attention to page 32.

Chairman Myers: It is admitted.

2405 (The magazine previously marked Respondent's Exhibit No. 43, for identification, was received in evidence.)

Mr. Bromley: Will you mark for identification an issue of Vogue for January, 1920?

(The magazine referred to was marked Respondent's Exhibit No. 44, for identification.)

By Mr. Bromley:

Q. In this Exhibit No. 44, for identification, by Bonwit
2406 Teller, is this a typical underwear advertisement for the year 1920 in the woman's field? A. Yes, it is typical.

Mr. Bromley: I offer Respondent's Exhibit No. 44, for identification, and call particular attention to pages 4 and 5.

Chairman Myers: It may be received.

(The magazine previously marked Respondent's Exhibit No. 44, for identification, was received in evidence.)

By Mr. Bromley:

2407

Q. Will you tell us what, in your view, is the outstanding change which has developed in advertising standards over the last twenty years, Mr. Orr? A. I think the change is fairly apparent from the comparison of the two issues, 1915 and the current issue.

There has been a gradual trend toward more attractiveness in advertising, better illustrations, better copy, better layouts, more modern approach to the problem. In other words, the trend of advertising has been pretty much in key with the trend in everything else.

2408

Q. Have you in your own business ever employed the Varga girl drawings or illustrations in current day advertising? A. Yes, we have been using Varga illustrations now for three years to illustrate our Jergen's Face Powder series.

Chairman Myers: Just what is a Varga girl? I am not clear on that. Is Varga the name of the artist or the name of the type?

The Witness: Varga is the name of the artist, Alfredo Varga, a Peruvian, born in Peru.

Chairman Myers: Where does he live?

2409

The Witness: In Chicago now. Just like the Petty girl is the name of the artist—George Petty.

By Mr. Bromley:

Q. This man Varga makes drawings not only for Esquire but for anybody who cares to hire him or buy his product. Is that right? A. Yes, sir.

Q. And in your advertising campaigns you buy drawings

2410 from him? A. Yes. Every year or so we try to think up new ideas for campaigns and we felt that Varga had a tremendous appeal to young girls and our powder appeals particularly to young girls because of the powder being sold in ten and twenty-five cent sizes, and he had popular appeal and we felt Varga would be a good man.

Q. Have you ever made use of the exact same drawing that has appeared in any issue of Esquire? A. Not exactly the same. But we have noticed in some of the drawings he had done for us, his drawings had been almost duplicates of things that have appeared in Esquire.

2411

Mr. Bromley: I ask that the magazine Woman's Home Companion for November, 1943, be marked for identification.

(The magazine referred to was marked Respondent's Exhibit No. 45, for identification.)

By Mr. Bromley:

Q. This magazine marked Respondent's Exhibit 45, for identification,—does there appear one of the Jergen's ads designed and created by you, at page 54, making use of a
2412 Varga girl drawing?. A. Yes.

Q. Will you turn to the January issue, 1943, the January girl, the Varga girl drawings particularly for the month of January in that book?. Are you able to state whether those two drawings are the same, or at least substantially identical? A. It is the same pose and it is very similar. The face is a little different but other than that —

Mr. Hassell: I submit, Mr. Chairman, that the Board, I believe, has enough intelligence to make the comparison of the two drawings.

Mr. Bromley: I agree. I offer Exhibit 45 in evi- 2413
dence.

Chairman Myers: Received.

(The magazine heretofore marked Respondent's Exhibit No. 45, for identification, was received in evidence.)

Mr. Bromley: This is in the January issue of Esquire, 1943, the first of the 12 Varga drawings.

By Mr. Bromley: 2414

Q. Can you tell me this, Mr. Orr: Could you go over a list of concerns advertising in Esquire in 1943 and tell me whether, based upon your knowledge and experience, the advertisers listed are or are not a type who would exhibit their products in class magazines generally and would be careful in their selection of media for their advertisements?

Mr. Hassell: I object. I don't think this is proper testimony, Mr. Chairman. I don't think it has any relevancy to this issue here.

Chairman Myers: Will you read that question, 2415
please?

(Question read.)

Mr. Bromley: I would like to get somebody to express an opinion as to who our advertisers are, whether they are decent people, or whether they are not.

Mr. Hassell: I don't recall that there is any issue as to the advertisers here, except that one advertisement has been called attention to.

2416 **Mr. Bromley**: I offer it only as a means of testing the respectability and decency of the magazine. If respectable people advertise in the magazine it is inconceivable to me that that doesn't tend to prove it is decent. If it is pornographic I don't believe the United States Steel Company would advertise in it.

Mr. Cargill: Do I understand you to say that on these exhibits you are putting into the record now, you intend to confine the use to the advertisements only?

Mr. Bromley: Yes.

2417 **Mr. Cargill**: All right.

Chairman Myers: The objection is overruled. You may answer.

The Witness: Yes, the list of advertisers I have looked over are all representative advertisers that do use the leading magazines and newspapers throughout the country, and are not confined just to Esquire.

By Mr. Bromley:

Q. Take this list. Is that true of American Airlines, Inc.? A. Definitely American Airlines use the leading newspapers and magazines.

2418 Q. And what do you know about the Alligator Company? A. The Alligator Company make raincoats. They advertise in quite a few of the magazines.

Mr. Bromley: You understand, if the Board pleases, that I am now referring to advertisers in these eleven issues of Esquire, not to these magazines that I have put in evidence. Have I made that plain?

Chairman Myers: It is to me.

By Mr. Bromley:

2419

Q. What about Arlington Mills? A. What do they make?

Q. I don't know. That's what I'm asking you. A. Well, that is one I am not familiar with.

Q. Arlington Mills is a division of the William Whitney Company, Incorporated. A. That doesn't mean anything to me.

Q. What about Arrid, A-r-r-i-d? A. Arrid is a deplilatory. They are national advertisers.

Q. What about Arrow Ties? A. They are Cluett-Peabody, also national advertisers.

2420

Q. What about Arch Preserver Shoes? A. They also advertise in a big list of magazines.

Q. What about Bostonians, makers of Footsaver Shoes? A. They are also large advertisers.

Q. Botany Worsted Mills? A. The same thing is true.

Q. Beech-Nut Gum? A. Beech-Nut Gum is a big advertiser.

Q. Book-of-the-Month Club? A. They are big advertisers in first-class magazines like Time and Esquire.

Q. Bristol-Myers Company? A. Bristol-Myers is one of the country's biggest proprietary advertisers.

Q. In the pharmaceutical field? A. And cosmetics.

2421

Q. What about Bank of America Travelers Cheques? A. It is a limited advertiser, but one of the best institutions of its type in the country.

Q. What about the Boston Herald-Traveler? A. The Boston Herald-Traveler is one of our oldest newspapers and uses a limited list of high-class publications.

Q. What about Burberrys, Limited? A. They are not large advertisers, but a high-class company.

Q. What about Chris-Craft Corporation? A. They use all

2422 the class magazines like Time and Esquire, magazines appealing to people with money who can afford to buy motor boats.

Q. What about Cheney Brothers? A. Cheney Brothers, cravats, they are big advertisers in men's magazines.

Q. What about Edwin Clapp & Son, Inc.? A. They are also big advertisers.

Q. Do you know what they make? A. Shoes, I believe.

Q. And the Chicago Daily News? A. The Chicago Daily News is the same class as the Boston Herald-Traveler, high class newspaper, use a very limited list of newspapers and

2423 magazines.

Q. What about Chantilly (Houbigant). A. Chantilly, perfumes. They use a fairly limited list of high class magazines.

Q. What about Ciro? A. The same thing would be true of Ciro perfumes.

Q. What about the Chrysler Corporation? A. The Chrysler Corporation is one of our biggest advertisers, of course tremendous, radio, newspapers and magazines.

Q. What about R. J. Reynolds Tobacco Company? A. The same thing is true of R. J. Reynolds Tobacco Company. They have a fifteen million dollar account.

2424 Q. Cohama Tie Fabrics? A. Not so well known. It is a small manufacturer, I believe, which has a limited list of publications.

Q. Do you know the Conklin Pen Company? A. The Conklin Pen Company is one of the largest pen manufacturers.

Q. William Demuth & Company? A. William Demuth & Company use small space in a limited list of high class magazines appealing to men like Time, Fortune, Esquire.

Q. What do they make? A. Pipes.

Q. What about Dobbs Hats? A. Dobbs Hats are fairly high class hats in a limited list of newspapers. 2425

Q. What about Mary Dunhill, Inc.? A. Mary Dunhill, Inc., they make a fairly high price line of cosmetics that run in Vogue, Harper's, Esquire, and the like.

Q. What do you know about the Electric Auto-Lite Company? A. I don't know much about their advertising. They run in high class magazines, that is all I know about them.

Q. They make storage batteries? A. Yes.

Q. What about the Eterna Watch Company of America, Inc? A. The Eterna Watch Company, I understand, is a very high priced watch that runs in a limited list of magazines. 2426

Q. That is the well-known self-winding watch, is it not? A. That is true.

Q. What about The Florsheim Shoe Company? A. The Florsheim Shoe Company is a large shoe concern large advertisers.

Q. And the Ford Motor Company? A. The Ford Motor Company is one of our big advertisers.

Q. What about Paul Flato? A. Paul Flato is a very small advertiser appealing to a very limited number of people, to those people who can pay the price of the jewelry.

Q. What about Germaine Monteil? A. Germaine Monteil is one of our high class costumers running in a limited list of magazines. 2427

Q. The Gruen Watch Company. A. The Gruen Watch Company is one of the high-class watches. They use a selected list of publications.

Q. Girard-Perregaux. Do you know anything about them? A. I am not familiar with them.

Q. General Motors Corporation? A. General Motors Corporation, of course, is one of our largest advertisers.

2428 Q. The Hamilton Watch Company? A. The Hamilton Watch Company probably make one of the finest American watches and use a select list of magazines.

Q. G. F. Heublein & Bro.? That is the brewery in Hartford. A. They make cordials, I believe.

Mr. Hassell: Cocktails.

Mr. Bromley: The advertising they place with us happens to be for A-1 Sauce.

By Mr. Bromley:

2429 Q. What about Harris Tweed Association, Limited? A. They use a select list of magazines.

Q. Is that a clothing fabric house? A. Yes.

Q. What about Hanan & Son, Inc.? A. Hanan & Son is one of the oldest shoe manufacturers.

Q. The Hat Corporation of America, making Dobbs and Knox hats? A. The Hat Corporation of America use a select list of magazines.

Q. Holeproof Hosiery Company? A. Holeproof Hosiery is one of our largest advertisers.

Q. Hartmann Trunk Company? A. Hartmann Trunk Company is one of the few trunks that are nationally ad-
2430 vertised.

Q. Hart Schaffner & Marx? A. One of our largest and really old clothing companies.

Q. Hickok? A. Hickok belts are nationally known and advertised.

Q. Interwoven Stocking Company? A. One of the biggest stocking advertisers.

Q. International Shoe Company? A. What is their trade name?

Q. Roberts, Johnson & Rand. A. Oh, yes. Well-known advertisers. 2431

Q. George Jensen, Inc.? A. George Jensen makes a very fine line of silverware and appeals only to the people who have the money that can afford that merchandise.

Q. Johnston & Murphy? A. Johnston & Murphy shoes is a well advertised shoe.

Q. Je Reviens (Worth). Do you know what that is? A. No, I don't.

Q. Jantzen Knitting Mills? A. What does Jantzen make?

Q. Bathing suits. A. Oh, yes; probably the biggest advertiser in bathing suits. 2432

Q. A. H. Pond, Inc., Keepsake Diamonds. A. A very small advertiser for a limited list of magazines.

Q. Longine-Wittnauer Watch Company, Inc.? A. One of the biggest watch advertisers.

Q. The Literary Guild of America? A. The Literary Guild of America, mail order books, I believe they run a limited list of publications with large circulation.

Q. P. Lorillard Company? A. P. Lorillard Company is one of our own accounts and advertise in magazines, newspapers and the radio.

Q. Mothersills? A. A very old remedy that has been advertised for years in newspapers and magazines. 2433

Q. Marlboro Cigarettes, Philip Morris & Company? A. Marlboro Cigarettes appeal to women. They use high class publications and magazines exclusively.

Q. Mallory Hat Company? A. A big hat advertiser.

Q. Manhattan Shirts? A. Manhattan Shirts, the same thing is true of them, a big shirt advertiser.

Q. Mido Watch Company of America, Inc.? A. A small watch advertised in a limited list of magazines.

Q. North American Aviation, Inc.? A. One of our big

2434 aviation companies, using big space, institutional space in newspapers and magazines.

Q. The New York Sun? A. The New York Sun, one of our leading newspapers using limited schedules.

Q. Northern Furniture Company? A. I am not familiar with what they make.

Q. Nunn-Bush Shoe Company? A. Nunn-Bush Shoe Company, a consistent advertiser over a period of years in high class magazines.

Q. Maker of shoes? A. Yes.

Q. A. E. Nettleton Company? A. A. E. Nettleton Com-
2435 pany, a big shoe advertiser.

Q. The Owens Yacht Company? A. I am not very familiar with their advertising. I know they use a few high class magazines.

Q. Palm Beach Suits (Goodall)? A. They are large advertisers of Palm Beach suits in Esquire, Time and the similar men's magazines.

Q. Parfum L'Orle? A. A medium-sized advertiser of perfumes using the high class magazines.

Q. Phoenix Socks? A. Phoenix Socks is a big hosiery advertiser.

Q. Pacific Mills? A. Also a big advertiser.

2436 Q. A. Stein & Company—Paris? A. Paris garters, use small spaced advertisements, very old advertisers.

Q. A. Stein & Company is the maker of Paris men's garters? A. Men's garters, yes.

Q. The Parker Pen Company? A. A big national advertiser in selected magazines.

Q. Pepsodent? A. Pepsodent is probably the biggest advertiser of tooth paste.

Q. Phillips-Jones Corporation (Van Heusen)? A. Van Heusen is second only to Arrow in volume of space used.

Q. For shirts and collars? A. Shirts and collars.

Q. The Plaza Hotel? A. The Plaza Hotel in New York, New York's foremost hotel, I would say; a limited list of publications. 2437

Q. Phillipe Patek & Company? A. That is considered one of the finest Swiss watches and uses a limited list of magazines.

Q. Prince Matchabelli? A. Matchabelli perfumes is confined largely to the better class magazines.

Q. Rolex Watch Company, Inc.? A. A very high class watch and they use a limited list of publications.

Q. Renoir Parfums, Ltd.? A. A small perfume advertiser using a limited list of magazines. 2438

Q. Sir Walter Raleigh pipe tobacco? A. Sir Walter Raleigh is an R. J. Reynolds brand, large advertisers.

Q. The Rolls Razor, Inc.? A. The Rolls Razor is an English razor which advertises in a limited list of high class magazines.

Q. Regal Shoes? A. A big advertiser.

Q. Republic Aviation Corporation? A. A big advertiser at the present time, doing an institutional job.

Q. Schiaparelli Perfumes? A. One of the bigger perfume advertisers, using a very select list of magazines.

Q. A client of yours? A. Yes.

Q. Skinner & Sons? A. Skinner satin, a real old company, and consistent advertisers for 30 years or more. 2439

Q. What do they make? A. Satin linings.

Q. J. P. Smith Shoe Company? A. I am not familiar with that name.

Q. Sonora Radio & Television Corporation? A. Sonora Radio, one of the better radio sets and consistent advertisers.

Q. The Sugar Manufacturers' Association of Jamaica, Ltd.? A. Fairly limited advertiser in a few mediums.

Q. Savoy-Plaza Hotel? A. One of the better hotels in New York City, a limited advertiser.

2440 Q. The W. A. Sheaffer Pen Company? A. Sheaffer is probably the biggest fountain pen advertiser, consistent schedules in exclusive magazines.

Q. Stetson Hat Company? A. Stetson Hat Company, one of the real old advertisers, using most of the men's magazines.

Q. Trabert & Hoeffer-Maubossin? A. I am not familiar with what they make.

Q. F. R. Tripler & Company? A. F. R. Tripler is one of New York City's leading haberdashers, using leading men's magazines.

Q. T. W. A.? A. One of many airlines now doing quite
2441 an institutional advertising job.

Q. U. S. Rubber Company? A. One of the big rubber advertisers, using quite a list of magazines.

Q. Union Pacific Railroad? A. Union Pacific Railroad is one of the big railroad lines that is doing a consistent advertising job.

Q. Vultee Aircraft, Inc.? A. Quite a large advertiser in class magazines.

Q. George E. Keith Company? A. I am not familiar with them.

Q. Don't they make Walk-Over shoes? A. Walk-Over shoes is one of the big shoe advertisers. I am not familiar
2442 with the name of the company.

Q. Willys-Overland Automobile Company? A. Willys-Overland, a big automobile advertiser.

Q. At the present time would you call that an institutional advertising campaign? A. Institutional advertisers, yes.

Q. Wilson Athletic Goods Manufacturing Company? A. One of the big sporting houses and consistent advertisers for many years.

Q. Is that comparable with A. G. Spaulding & Company? A. Yes, very definitely.

Q. Waltham Watch Company? A. Waltham Watch Company, and has been consistently advertising for years—one of our better watch companies. 2443

Q. Wrigley's Soap? A. Wrigley's Soap, rather limited advertiser, but a fairly new advertiser in quite a few magazines.

Q. Zenith Radio Corporation? A. Zenith Radio is one of the very best radio sets, consistent advertisers.

Q. What magazines did you include in the category of class magazines to which you have referred? A. I always consider magazines such as Time, Fortune, Esquire, Vogue, Harper's Bazaar, Cosmopolitan, Red Book as class magazines. In other words, magazines reaching people—we always consider class magazines as magazines reaching people having better than the average income. 2444

Q. What about Life and the New Yorker? A. Life and the New Yorker definitely. I overlooked those. Life and the New Yorker, Time and Fortune.

Q. What about the Saturday Evening Post? A. Well, that I always considered a mass magazine because of its tremendous circulation. We think in terms of class having the high price control circulation, and mass having an unlimited circulation. 2445

Q. And you place Esquire in that class you mentioned? A. I place Esquire in the class of high price control circulation.

Q. Do your company and you personally recommend Esquire as a sound advertising medium to your clients? A. We use Esquire for several of our advertisers. Yes.

Q. Is the character of the magazine and its reading audience one that has an appeal of importance to advertisers?

2446 Mr. Hassell: I object to that. We are coming to the question I think the court ruled out a while ago.

Chairman Myers: The objection will be sustained.

By Mr. Bromley:

Q. Have you considered Esquire's character as beyond reproach in placing advertising in this magazine for your clients? A. Well, frankly, I have never considered very much the character of Esquire as being any different from any other reputable magazine we have used. I look upon Esquire just
2447 as upon Harper's or upon any other magazine in that group. I haven't made any distinction one way or the other.

Q. Are large national advertisers pretty careful in selecting the kind of magazine which they use to reach their audiences? A. Definitely, yes. I know of a lot of advertisers who have kept out of quite a few magazines for years when they were not quite sure of their editorial appeal.

Q. Based upon your experience in the advertising field would you say that any of the advertisers in the list which you and I have just gone over would place any advertising in any publication of a questionable moral character? A. I doubt it very much. I know that our clients would not,
2448 because they consider it a reflection if they put them in a magazine that had any questionable standing.

Mr. Hassell: I submit, if the Court please, these questions are along the same line.

Mr. Bromley: I have only one more question and then you can have him.

By Mr. Bromley: 2449

Q. You don't believe, Mr. Orr, do you, that there is anything about Esquire that would reflect upon your client's advertisements or their products? A. No, I do not.

Mr. Hassell: I object to all these questions.

The Witness: We have advertisers in Esquire who have advertised in Esquire for years and we have never had any complaints.

Mr. Bromley: That is all.

Cross Examination by Mr. Hassell: 2450

Q. What connection, if any, do you have with Esquire magazine, sir? A. No connection other than that of an advertising agency placing space in all media. I mean, Esquire is just one of hundreds of publications that we use.

Q. How old are you, sir? A. I am 46.

Q. How long have you been in the advertising business? A. Oh, at least 28 years. I started when I was about 18.

Q. What year would that take us back to? A. Well, it takes us back 28 years. I haven't figured it out. This is 1943, it would take us back to about '18, doesn't it—1915.

Q. You say you started in as an office boy? A. Yes, sir. 2451

Q. How long did you work at that before you became an official of your company? A. Oh, a good many years.

Q. How many years? A. Well, it was about 10 years. It was more than 10 years. I have only been with them as an official for 12 years, but I was 10 years more or less doing a lot of detail work in an advertising agency before I held any job of any great consequence.

Q. You made this list up about which counsel questioned you, did you not? A. Sir?

2452 Q. You made this list from which counsel questioned you? A. No, I didn't make it up.

Q. You didn't make it up? A. No, I didn't.

Q. I thought you said you went through these issues of Esquire to determine what advertisers were in them.

Mr. Bromley: He didn't say that.

The Witness: I didn't make up the list. I saw the list. It was shown to me and I recognized the advertisers as important national advertisers.

By Mr. Hassell:

2453 Q. You don't know whether they advertise in Esquire, do you, all of them? A. No, I don't know that.

Mr. Bromley: You can have the list and check it against the list if you want it.

Mr. Hassell: I was wondering what selection he made, whether he left any out.

Mr. Bromley: If we left out any loaded dice we couldn't have done that.

Mr. Harding: They are indexed right in the back of each issue.

2454 Mr. Hassell: That is all.

Redirect Examination by Mr. Bromley:

Q. You don't receive, you or your company, don't receive any of your commissions or any payment from Esquire magazine, do you? A. Positively not. We operate on the same basis as every other agency operates, on a 15 per cent commission. You might say it is paid by Esquire. All the publications pay the advertising agencies 15 per cent on the

billing, so that is the policy that has been in effect for many years, so indirectly, really, the publication does pay the agency, but that is a policy that has been established for many years. We don't consider that we are paid by the publication. We consider we are paid by the clients, but we deduct 15 per cent from the bill. 2455

Q. Who are your clients, the magazines or the advertisers? A. The clients are the advertisers. The advertiser pays the bill, and it costs the same amount to advertise direct as it would to advertise through an agency, so it depends upon how you want to be technical about it. We deduct the 15 per cent commission from the publisher's bill, but that is the customary practice in the advertising business. 2456

Q. Now, suppose the advertiser went direct to the magazine, what would happen to the 15 per cent? A. Well, the publication would retain the 15 per cent. They are not supposed to give the commission to any other than recognized advertising agencies.

Mr. Bromley: That is all.

Recross Examination by Mr. Hassell:

Q. You collect a fee from your clients plus this commission from the magazine? A. No, sir; we only collect one fee, and that is the 15 per cent of the billing. We collect that from any medium we do business with. If we advertise with Esquire magazine we deduct 15 per cent from the bill and if we advertise with any other magazine we deduct 15 per cent from the bill. 2457

Q. You refer to your clients. You mean you don't get any compensation at all directly from your clients? A. No compensation directly from clients. That is the policy that has been in effect and that is true of any advertiser.

2458 **Mr. Hassell:** All right.

Mr. Bromley: That is all.

(Witness excused.)

Mr. Bromley: Dr. Aaron Eiseman.

DR. AARON EISEMAN, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Bromley:

2459

Q. What is your name, sir? A. Aaron Eiseman.

Q. And you live where, Doctor? A. New York City.

Q. You are a Rabbi, are you? A. Yes, sir.

Q. And what education have you received? A. You mean secular or theological?

Q. Both. A. I have attended the Jewish Theological Seminary of America, I attended, of course, public schools, and am a graduate of New York University with a Bachelor's degree, Columbia University post-graduate course, Master of Arts.

I guess that's about all.

2460 Q. How long have you officiated as a Rabbi? A. Forty years.

Q. And with what churches have you been associated? A. My first congregation is not in existence any more. It is combined with another. It was called the Beth-Israel Temple, 72nd and Lexington Avenue, New York. I stayed there 14 years.

Then I went to Mt. Nebo Temple, situated at 79th between Columbus and Amsterdam Avenues. I was at Mt. Nebo

14 or 15 years and then to the Hebrew Tabernacle at 164th near Broadway. I stayed there about four years and now I am beginning to take life a little easy. But I have officiated in the congregations, I guess, actively preaching, and associated with the synagogues about 37 years, although I still continue to function as a minister. I still marry and bury people and go around lecturing and am active in congregational and community life. 2461

Q. Now, in your rabbinical work what association, if any, have you had with young people's organizations? A. Well, nowadays I think we are beginning to realize we have got to get hold of the young. I think every congregation today, not only Jewish but Christian, are beginning to open up young people's organizations. 2462

Ministers are very vitally interested in every phase of young people's lives. We had young people's organizations in my congregations and a union of all the young people's organizations, at conferences where representatives of all young people's organizations could come together once a year and discuss the problems of young people.

Q. Are you also Chaplain at the Florence Crittenton League in New York City at ~~the~~ present time? A. I am.

Q. What is the Florence Crittenton League? A. The Florence Crittenton League is a house situated at 20th Street between 9th and 10th Avenue and it has been there for many, many years. It has been maintained by a number of very fine women. 2463

Some of the finest prominent women in the city of New York are affiliated with that organization.

It is a house of detention, all girls—no males—delinquent girls, girls who have gone astray, girls that have run away from home and their parents in looking for them have not

2464 been able to find them and they have gone to court and when they are found this house of detention takes hold of them and they remain there until they are called to the Domestic Relations Court or the Magistrate's Court as a witness, and then the court disposes of their case and they go wherever they are asked to go.

I have been Chaplain of the Florence Crittenton League for 25 or 30 years.

There was also a priest representing the Catholic girls and a minister representing the Protestant girls, and a rabbi representing the Jewish girls. We go there whenever we

2465 are called.

I am called perhaps less because there are not so many Jewish girls in proportion. Whenever I am called there, however, we have a service for them, we advise them, and we consult them and try to show what is the right road to get back on.

They are very minor cases sometimes, and some have gone through pretty nearly everything a young girl could go through. It is very sad and tragic in many cases.

Q. Have you had any work as a teacher, Doctor? A. Oh, yes. Before I became a Rabbi I was a teacher in the evening schools that taught English to foreigners in Brownsville, which is a thickly populated Jewish district, and I

2466 have been teaching in my own school. I have always felt that the minister should always be a teacher. In fact, it is traditional among our people that a Rabbi shall be a teacher.

I have taught confirmation classes, I have been a superintendent in our religious school, which every Rabbi is, and I have been very much interested in education in every form.

Q. Have you had any war service as a chaplain? A. During the Mexican mobilization, you know when we had

that little trouble in Mexico about 1915 or 1916—I don't remember the exact date, but I know it was one of those years—I, together with two other social workers, was asked to go down to the various encampments down South to look over the situation and see what could be done. Of course, we were representing the Jewish community—a lot of our boys had gone from New York, and we were asked to see what could be done to make their life happy and, if possible, establish reception places where they could come and sit around on furlough and even, if possible, to arrange dances and get them to meet some of the nice people of the community. 2467

2468

I went to San Antonio and El Paso and Douglas, Arizona, and what the U. S. O. is trying to do now we tried to do in 1915 and 1916 when there were no U. S. O.'s.

That is the type of work we did.

I was not an official chaplain. I just represented a committee of New York Jewry.

In the first war work I was a chaplain.

Q. In the first World War, you mean? A. The first World War I was a chaplain. And I used to go around to camps and do chaplaincy work and then I was placed at Hospital No. 1. That was at the Greenhuts Building on 6th Avenue and 18th Street in New York. That was the hospital that received most of our wounded boys just as they came off the transport. It is estimated that at least 40,000 of our wounded boys came through that hospital. They had to be deloused—I need not tell you gentlemen that the most tragic things any man could ever witness was seen there. 2469

Wonderful work was done there. The women of New York were marvelous, as they always are. When the boys were convalescing we took them to ball games and theaters and

2470 to see the sights and those that were bed-ridden had flowers on their tables and we gave them all the delicacies, the best food, and, as I say, it was a beautiful piece of work. I stayed there until the hospital closed.

Q. When was that? A. I think that was around 1916 to 1918. I think the hospital was open about two years.

Q. Now, at my request have you examined the material which has been cited and specified here as obscene, lewd, filthy, indecent, and lascivious, in the Esquire magazines for the eleven issues of 1943? A. I have.

Q. On the basis of your knowledge and your experience
2471 and on the basis of your contacts with young men and women, are you able to give us your opinion as to the likely effect of this material on normal average human beings? A. Yes.

Q. Based upon that knowledge and experience, will you state whether in your opinion this material is apt to have a harmful or detrimental effect on average persons in any age group?

Mr. Hassell: I object to this testimony as opinion testimony. I submit Doctor Eiseman has not shown by his answers thus far that he is qualified to answer
2472 this question or to furnish any information which would be of value to this Board.

Chairman Myers: The objection is overruled.

Mr. Bromley: Will you read the last question, please?

(Question read.)

The Witness: I don't think it would have a harmful effect.

Mr. Hassell: In what age group? 2473

Mr. Bromley: Any.

By Mr. Bromley:

Q. In your opinion, is there anything obscene, lewd, lascivious or filthy in any of the cited material? A. I don't believe so.

Mr. Cargill: What was the Doctor's answer to the previous question?

(The previous question and answer were read.) 2474

By Mr. Bromley:

Q. In your opinion, is there anything in this material, whether textual or pictorial, which would have a tendency to corrupt the standards of what is right and wrong as regards the sexual relation, or to stimulate sexually impure acts and thoughts? A. I don't think so.

Q. And based upon your knowledge and experience, gained in your 40 years as a Rabbi, will you state, in your opinion, whether the complained of material violates in any way the current standards of morals in the community, as you have observed them? A. I don't think they do. 2475

Q. In the course of years of your experience, Doctor, have you observed a constantly changing standard of morals in the community as affects frankness and candor of expression and illustration by the use of the feminine form? A. Definitely so.

Q. Do you recall the poem, "Benedicts awake," in the January, 1943, issue of Esquire? A. Yes.

Q. Referring to that poem specifically, in your opinion,

2476 is there anything lewd, lascivious, filthy, indecent or obscene in it? A. I don't think so; no, sir.

Q. Will you give us your reasons for that opinion, Doctor? A. The very name "Benedicts", of course, refers to a married man or married men. We usually put people in two classes, benedicts and bachelors.

These are married men. I suppose the story had gone out that they are going to call married men to the front to be soldiers, draft them.

Here is a poem which tells married men that the time is coming when they have to give up the joys of their married 2477 life, the pleasures of their married life, that Hitler is coming and Tojo is coming and "You fellows are going to be taken away from these things. Beware, be safeguarded, lose your complacency, wake up."

That is the only thing I can see in the poem. I see nothing that is obscene or in any way immoral in a poem which says to a man who is married, who has a right to indulge in sexual things,—I see nothing wrong in having a poem of that nature.

Q. Have you examined all of the various Varga girl drawings appearing in the eleven issues? A. I have.

Q. In your opinion, is there anything obscene, lewd, lascivi- 2478 ious, filthy or indecent about them? A. No, sir.

Q. Will you look specifically, Doctor, at page 107 of the March issue of Esquire, which is the hill-billy cartoon of the women with the two children, in the act of nursing one of them? A. Yes.

Q. Do you find that obscene, filthy, indecent or lewd? A. I certainly don't.

Q. What is the basis of your opinion with respect to that cartoon? A. First of all, it is a cartoon. It is a mother nursing her child and the other child is bawling, probably a little

jealous of the one that is being nursed, and wants to also be nursed. 2479

It is a hill-billy way of putting the thing, but I don't see anything obscene in a mother nursing her child. I have seen these things right in the city of New York.

You can go to the slums and see Italian women and Jewish women on a warm night, sitting on the stoop, nursing their children. There is nothing obscene there. It is a perfectly natural, legal, moral thing. It is God's way of arranging things and I would like to see a great many more mothers take their little bundles of flesh to their bosom and nurse them. 2480

I don't see anything here that is in any way impure, immoral, or lascivious in this cartoon.

Q. Now, will you direct your attention to the verse in the April issue of Esquire on page 38 in connection with the Varga girl picture, which picture is entitled: "Peace, it's wonderful", and tell me whether you find in the verse, either with or without the picture, anything that is obscene, indecent or immoral in the picture or in that little piece of poetry. A. I don't see anything obscene, indecent or immoral in that picture or the verse.

Q. Do you think there is anything contained in the verse, taken with or without the picture, which would tend to corrupt morals among any part of the people in your experience, Doctor? A. Definitely not. 2481

Q. Do you think there is anything in the verse or picture, taken together or singly, which would have a tendency to lower standards of right and wrong so far as sex matters are concerned? A. No, sir.

Q. In your opinion as a clergyman, based upon your experience, would you say there is anything objectionable in a

2482 moral sense, to reference in a magazine of general circulation to normal sexual relations between husband and wife? A. Certainly not.

Q. Have you read the article entitled "The Court of Lost Ladies" in the April, 1943, issue? A. Yes, sir.

Q. What is your opinion with respect to that article? A. I found that especially interesting from my point of view. It is the writer's account of what he saw at a night court.

I have seen exactly what he has seen in that article. I know exactly what goes on in the night court, but not only that, my brother-in-law was a clerk in the night court for

2483 30 years and he used to tell me what goes on.

Q. Do you think the article is accurate? A. I think the article is very accurate. I think it is an exact reproduction of what goes on in the night courts day after day, and night after night.

Q. Do you think there is anything morally detrimental or harmful to any class of society in a magazine publishing a report such as this is? A. Definitely not, and may I go a little further? I go to the Florence Crittenton League. There are some girls there who have perhaps had their first offense along these matters.

In their blindness and stupidity they may be looking for

2484 such a life, an easy life, they think. If I could have that chapter, that part of it, and take that to the Florence Crittenton League and read it to those girls and let them see that this is what they will have to meet some day if they don't look out, these are the humiliations and degradations and the heartaches and tears, that you girls, if you persist in going down the road that you think is going to be glamorous and full of life and ecstasy and pleasure, are going to have.

I would say: "You won't be able to look anybody in the face, your parents or relatives or anyone."

I think it would have a very beneficial effect on them.

I saw nothing in that article that was in any way immoral. I think it is a fine educational article and that anybody reading a thing like that might be deterred from such a life and those who are in that life would say: "God help me! I don't want to go through a thing like that."

Q. Turning to the June issue, page 134, do you remember the article on libels which the rough Western editor published in his newspaper? A. I would like to refer to that.

Q. June, page 134, entitled "Libel suits were as wine to that hell firin' editor of the old West, Dave Day." A. Yes, I read that.

Q. Do you notice that there is a reference to a paragraph or two which that editor printed in his paper about two weddings being on schedule for that week and that that kind of weather made people think two in a bed, spoon fashion? A. Yes.

Q. What kind of reference is that, Doctor, or would it be read by people who look at it? Is it a reference to marital relations or otherwise? A. It is announcing a social item in the paper about two weddings going to be on the calendar.

Q. It is a pretty rough reference, isn't it? A. It would not be the right thing to do. It is rough.

Q. Do you think it is obscene or indecent? A. It is certainly not obscene to refer to the announcement of two weddings.

Q. What is your view of the publication of that four line epitaph that follows the wedding reference? Do you consider that to be obscene or indecent when printed in a magazine of general circulation? A. I wouldn't call it obscene. I would say it is inelegant language, but I don't see how anybody's morals could be affected by a thing like that. I have

2488 heard it many times. It is an old epitaph that goes back many, many years, and people are not affected by it.

Q. And, further, have you read the paragraph about each correspondent of the paper being assigned his own asterisk? Do you remember that? A. Well, we know what an asterisk is. It is a punctuation mark, isn't it?

Q. Do you get any dirty connotation from that, Doctor? A. No, sir; I can't get anything dirty about it.

Q. Now, suppose you separated the last word so that the last sentence read: "Each correspondent will have his own ass to risk". Would that change your opinion of it? Do you
2489 consider that the word "ass" is an indecent or obscene word? A. Not according to our modern standards of talking and, reference to the word "ass" is peculiar. It just comes to me now.

I used to teach the girls in the Sunday School classes, and, of course, the Tenth Commandment: "Thou shalt not covet they neighbor's wife, nor his house, nor his maid-servant, nor his ass, nor anything of thy neighbor."

Years ago there used to be a little titter, a little laughter amongst the kids, misinterpreting, but later on when they probably understood and really heard the expression, it was not the same.

2490 Q. Now, will you look, Doctor, at the July issue, page 76, the picture of a scene from a show called "By Jupiter". Look particularly at the degree of exposure exhibited by the show girl in white in the center of the picture. Do you find anything indecent, obscene, lewd, or lascivious in that picture? A. I do not.

Q. Would you think that the publication of a picture such as that in a magazine of general circulation would have any adverse effect morally upon any class of society that you know? A. I do not.

Q. Is that a commonplace thing on the New York stage and other stages, as you know them? A. Yes. 2491

Q. And is it commonplace now to publish such pictures as that in magazines of general circulation? A. Decidedly so.

Q. Would you think that public reaction to this picture would have been different 20 or 40 years ago? A. I think it would.

Q. Would the publication of such a picture as that be condemned 40 years ago, do you think? A. There is a possibility, considering the conservativeness with which we looked upon these things. I don't know whether it would be eliminated, but I think a lot of people would have felt it was not 2492 the right thing to do.

Q. As of that time? A. Of course, at that time.

Q. Have you observed, Doctor, a change in the times in the last forty years as to the propriety of revealing the feminine form both in our life and in picture magazines and in advertising? A. Decidedly.

Q. And has the tendency been towards greater frankness and forthrightness in that respect? A. Decidedly.

Q. Did you read the story "The Portrait Above the Fireplace" in the Ooctober, 1943, issue of Esquire? A. Yes, sir.

Q. What is your opinion with respect to that story? A. 2493 There is one story that appealed to me very much. I think it is a beautiful thing.

Here the boy is left an orphan, according to the story, with a great yearning for companionship and love and he gets this picture and puts it over his fireplace and thinks of it. It is probably a very beautiful girl or woman. And he goes to bed and dreams of her.

This picture is an inspiration to him and it inspires him to such an extent that he rises on the rungs of the ladder

2494 and studies hard and becomes a lawyer and gets a great deal of good, healthy thought and happiness out of this picture.

A foolish drunken friend tells him that that picture he has had on his mantel is a mistress, a fallen woman. It was a very unfortunate thing that a fool like that should have ever tried to shatter the ideals and dreams of this fine boy.

I don't see that in any way, not even by the greatest stretch of the imagination, that there can be anything obscene or lewd or impure or immoral in the entire article.

I am glad that the boy didn't take the advice of his drunken friend. Maybe that boy had gone to a church and
2495 had heard a sermon that is preached very, very frequently in the Christian church, the fallen woman who was met by Christ on the road and the populace were about to stone that woman because of her sinfulness. Christ turned to the crowd: "He who is without sin, let him cast the first stone. Go, and sin no more."

If you want to put things in a picture, perhaps the boy may have had the picture and thereafter he said: "This is still my mother, no matter what my drunken friend has said about her."

That would be my interpretation as a minister.

Q. Now, Doctor, having examined all of the complained
2496 of material, will you please state whether, in your opinion, taken collectively in any one issue, or singly, it is obscene, indecent, filthy, lascivious or lewd? A. I don't think collectively or singly that there is anything obscene or lewd in those pictures.

Q. Taking all of the material collectively in any one issue, or singly, do you think it would have the tendency to corrupt the morals or lower standards of right or wrong with respect to sexual relations or to stimulate sexually impure thoughts in the normal average human being? A. I don't think so.

Q. Is that your opinion, Doctor, even though you consider the material collectively in all of the eleven issues? A. That is my opinion. 2497

Q. Have you ever been a subscriber to Esquire? A. Yes, sir.

Q. For how long? A. The last three years.

Q. Are you a regular reader of the magazine? A. Yes, sir.

Q. Do you have it in your house? A. Yes, sir.

Q. Do you have any children? A. I have two sons.

Q. Do you know whether or not they have read it during their adolescence? A. They have.

Q. Do you know what their reaction to the publication has been? A. They like it very much. In fact, both of them have told me that. 2498

Q. Have you ever had any objection to its being around the house and their reading it or looking at it? A. No, sir.

Q. And have you recently donated your collection of Esquire copies to any organization? A. Yes, sir.

Q. What one? A. I sent it to the U. S. O. branch at the most fashionable Temple in New York, Temple Emanuel, 65 Street and 5th Avenue, where they have given over the entire vestry room, the Louis Marshall room, to the U. S. O.

When I moved from one apartment to another I had about 50 copies, and I decided to send them over to them and I got a letter of thanks from the authorities there telling us that the boys were very, very fond of Esquire and making good use of them. 2499

Q. Have you made an examination of these eleven issues, not only limited to the complained of material, but generally, as to their general contents? A. Yes, sir.

Q. All the issues? A. Yes, sir.

Q. In your opinion, is there any one of the eleven issues which, taken as a whole, panders to the prurient taste or over-expresses the sex side of life? A. No, sir.

2500 Q. Now, has your experience been with the so-called privileged class of our society or with the middle or even less privileged classes? A. I would say the middle class, also the under-privileged, the poor.

Q. Where were you born and brought up, Doctor? A. New York City. I was born on the east side, in the slums.

Q. Were you brought up there as a youth? A. My earliest days were spent there.

Q. So your experience has been with the poorer people in that metropolis? A. Yes.

Q. For part of your life, anyway? A. Yes, practically all
2501 of my life, because my sisterhood in the congregation had what is known as a milk-fund where poor people could apply for and get free milk, and most of these cases, of course, came from the poor districts, from the Bronx and the east side, and I would go down there and hear reports from the sisterhood in the meeting and come in contact with the poorest of the poor. All of my ministry has been in connection with that.

Q. Would you say that our current day standards are featured by frankness and forthrightness of expression with regard to sexual matters, differing from that which prevailed 40 years ago when you started out as a Rabbi? A. Most
2502 decidedly so.

Q. You believe, Doctor, that as a Rabbi, so far as such frankness and forthrightness of expression with regard to sexual matters that the tendency in the majority of cases has been to build up a resistance against lewdness and sexual impurity, rather than to break down our moral standards? A. I am emphatically of that belief.

Q. In your opinion, can you tell us, after your examination of the issues of this magazine as a whole, whether such material complained about furnishes the dominant note on

the issues taken as a whole, or whether it does not? A. It does not, certainly not. 2503

Q. Are there among the major parts of these issues many pages which are devoted to worthwhile subjects quite different? A. Yes, sir. Well, the reason, is I looked at the contents and I see so many articles by men that I have known myself, Sholom Asch.

Q. Who is he? A. Sholom Asch is the great Jewish novelist who, by the way, has written two books on the New Testament, on the Nazarene and St. Paul, that are acclaimed to be probably the finest pieces of work on those two characters in existence, and I advise everybody to read those books and get the greatest amount of inspiration, especially "The Nazarene". 2504

On this Mr. Phelps, everybody knows the outstanding type he was and that under no circumstances would he ever contribute to any magazine or any article that would in the least be obscene or lascivious or immoral.

Q. You refer to William Lyons Phelps? A. William Lyons Phelps who just died about three months ago.

Q. Do you notice that each issue of the magazine features many articles about sports? A. Yes, sir, very popular part of the magazine, sports.

2505

Mr. Bromley: That is all.

Cross-Examination by Mr. Hassell:

Q. Doctor, what shade of Jewish life— A. What is that?

Q. What shade of Jewish life is your congregation represented by? A. My first congregation was conservative, the rest reformed.

Q. The more recent, reformed? A. Yes.

2506 Q. You have never been connected with an orthodox congregation? A. Not a strictly orthodox one. We have three kinds of congregations, orthodox, conservative, and the reformed.

Q. Of these the reformed are the more liberal, Doctor? A. Yes, sir.

Q. In thought, than the others? A. Yes, sir.

Q. Now how much contact have you had with teen-age boys and girls, adolescent, and immediate post-adolescent? A. Well, a junior organization of adolescent boys and girls, post-graduate girls and boys. We have the Young Folks
2507 League and Junior Organization, we all come in contact with them.

Q. How close are young Jewish people to the Rabbi of a congregation? A. The same, I suppose, as in every other congregation, Christian or any other form. I wouldn't say they are intimate, yet in many cases we find certain classes of boys that come closer to the Rabbi than others, not that the Rabbi in any way tries to shun that intimacy. In fact, we try to develop it as much as possible. I can say that in all my ministry I have been very close to my boys and girls, so much so that there is hardly a week passes now that these boys and girls, grown to manhood and womanhood, do not
2508 come to me and ask me to marry them when the time comes, in spite of the fact that all these years have intervened and I may not have seen them or heard from them, yet they remember me because of the years they spent with me in my religious school or in the Young Folks League.

Q. Do these young people in the Jewish congregation, as a general rule, come and confess their sexual derelictions and so forth to the Rabbi? A. No, we have no confession.

Q. In how many instances during your 40 years as a Rabbi has any member of your congregation, adolescent or young

man, come to you and confessed as to what might have caused 2509
him to have sexually impure thoughts and to practice so-called self-abuse for instance? A. How many cases?

Q. Yes. A. I wouldn't say there were many. There were individual cases of boys that I am intimate with, but those have come into my study and told me about these intimate relationships.

Q. Those were the rare cases, though, weren't they, Doctor? A. Well, they are not so rare now as they were years ago.

Q. I understood you to say that now, though, for the last four years you have not been officiating as a Rabbi? A. Not 2510
connected with any congregation.

Q. Since 1936? A. Since 1936, yes, but still active in the community and still a chaplain of the Florence Crittenton League where I have interviews continually with those people.

Q. You want this Board to understand that, as a general rule, the young people in your various congregations would come and tell you or volunteer to you just what things, publications and other things, caused them to have sexual desires and made them especially or unduly sexually stimulated? A. I don't get the first part of your question.

Q. Do you want this Board to understand that as a general 2511
and usual thing the young people in your congregation have come to you and confessed voluntarily what caused them to become sexually stimulated? For instance, a magazine of this sort. Do you want the Board to understand that the youths of your congregation usually did that? A. No.

Q. Do you consider the girls in the Florence Crittenton Home immoral? A. Not all of them.

Q. Not all of them? A. Oh, no, not all of them.

Q. As to those that you contacted, did you ever run across

2512 cases where they confessed to you that they were brought to that condition by obscene matter in print or pictures? A. No, sir, never have.

Q. No obscene matter in print or pictures whatsoever? A. No, sir.

Q. In the Hebrew Schools, in the congregation schools, children are usually under 13 years of age, aren't they? A. No, sir.

Q. Would you say the majority of them are under 13? A. No, sir. In some schools we have a very large number who are beyond 13.

2513 Q. You are speaking now of the schools? A. Yes.

Q. Comparable to the Christian Sunday school? A. Sunday school.

Q. You have a large majority above 13? A. Not the large majority. I would say a fair proportion.

Q. In some there is a majority above, but, as a matter of fact, in most of them the majority is 13 and below, isn't it? A. I wouldn't know what proportion, but I know that there is a tendency nowadays to try to get these boys and girls in their adolescent period, whereas in former days, when they graduated from the religious school, many of them would leave. Now the tendency is to keep them. We have

2514 post-graduate courses in the religious school and when we get them out of the post-graduate and graduate them we try and keep them and get them into the junior organizations and the Young Folks League where they can have dances and entertainment. The thing is to get them and keep them under the auspices of the church, the wholesome auspices of the church.

I suppose twenty-five, or thirty, or forty years ago if it was suggested that we have dances in the church the Board of Deacons would raise their hands in alarm, but today the

Board of Trustees in my Temple said, "Let us have all the dances we can; let us have the boys and girls right here instead of running around to Roseland or on the Great White Way. Let us have them here where they can meet other boys and girls," and I think that is a great idea. 2515

Q. Are not other Rabbis different from you as to the indecency of this Esquire magazine? A. Oh, I imagine that they might differ. They are entitled to their opinions.

Q. They are entitled to their own opinions? A. They would be entitled to their own opinions.

Q. Probably other Rabbis who have had just as much experience as you? A. Very possible. They would be entitled to their opinion, but may I say just this one word. 2516

Q. Just a minute, Doctor. A. All right.

Q. Do the majority of the Jews belong to the reform organization or the reform— A. Temple?

Q. —congregations or Temples? A. The largest majority?

Q. Yes. A. It all depends on what city you are in.

Q. Well, for instance, do you know anything outside of New York City? A. I know something about it.

Q. Well, take New York City. Out of the majority of the Jews in New York City how many are members of the reform congregations, and in the conservative, and orthodox congregations? A. In New York City I would say that as to reform and conservative they would have more than orthodox. You see the orthodox members were increased by immigration, people coming from Russia and Poland. They were orthodox and they came here and replenished the orthodox stock. The children of the orthodox did not remain orthodox; they graduated into the reform movement, into the up-to-date movement as they felt. I don't know how many of you gentlemen know what orthodox means, or what an orthodox con- 2517

2518 gregation is, but an orthodox congregation is one where the sexes are separated, where the men are downstairs and the women are upstairs, and the services are all in Hebrew, no English, unintelligible to an intelligent boy of today; therefore, the reform congregation has received a tremendous number of the orthodox, so I would say that the reform temples are in larger numbers than the orthodox.

Q. The reform has a larger number than the orthodox has in New York City? A. Yes, and in all large cities. The same applies to all large cities.

Q. But how about the conservatives? You have left the
2519 conservative out of New York City. A. The conservative are in between. The conservative is not a very large number.

Q. Well, are there more in the conservative than the orthodox combined and in the reform? A. No, I wouldn't say that. There are more orthodox than there are conservatives.

Q. There are more orthodox than conservative? A. Yes.

Q. But there are less of those two combined— A. Than in the reform.

Q. In New York City than there are of the reform that are in the majority? A. Yes.

Q. Do you have any statistics or anything to base that on? A. There is no way of finding that out. I have never seen
2520 any statistics revealing how many orthodox Jews or reform Jews or conservative Jews there are. We have never tabulated them that way. The only way would be to get it from the different congregations.

Q. Can you state how many congregations there are in each one of these three groups in New York City? A. You mean Temples?

Q. Yes. How many does the reform have as compared with the total number of conservative and orthodox? A. You see we are different from any other denomination. In New York

you may have dozens and dozens of very little, what they call Chevres, that is an association of orthodox Jews; they call themselves a congregation. They may have a little loft or a room in a building and they call themselves a congregation; or you may have a regular orthodox congregation of which I don't think there are more than 15 or 20 in the congregation. Those are the predominant ones. 2521

On the other hand, the largest congregations, the most influential congregations in New York are the reform congregations. Like from 79th Street to 96th Street you will find a dozen of the largest reform congregations probably in America, and you will find just two or three orthodox congregations and just about two conservative congregations. 2522

Q. Would you say that that same proportion will hold throughout the United States? A. I think so.

Q. Are you familiar with the number of reform congregations in the City of Washington? A. No, sir, but I know there is one very large reform congregation.

Q. Would you be surprised if you were told there is only one reform congregation but thirteen conservative and orthodox congregations in this city? A. No, I wouldn't be surprised. That may hold true in some communities but it all depends on what you call an orthodox congregation. As I said, it may be a congregation of 25 members and still call itself a congregation. I know one thing, they are not large congregations with large membership, whereas the reform congregation includes probably the most prominent members right here in Washington. 2523

Chairman Myers: The orthodox have cantors and schoichets, do they not?

The Witness: What is that?

Chairman Myers: Schoichets.

2524 The Witness: The reform may have them also.

Chairman Myers: The reform have cantors and schoichets?

The Witness: No, no schoichets; they just have cantors. The schoichets are only in the orthodox.

Chairman Myers: We will take a short recess.

(Whereupon a short recess was taken.)

By Mr. Hassell:

2525 Q. Doctor, is it a fact that the wealthier Jews are usually associated with the reform congregations? A. That is the impression that a lot of people have, but there are wealthy people connected with orthodox congregations, too.

Q. But more in the reform congregations, Doctor? A. I would say yes.

Q. Doctor, is it a fact that clergymen generally are strongly in favor of maintaining the sanctity of marriage? A. Yes, sir.

Q. You say yes? A. Yes, sir.

Q. If that is so, do clergymen generally and do you approve of jokes glamorizing the illicit relation, sexual relationship? A. It all depends on the joke. After all, in our 2526 day there has been such a liberalization in regard to these things and I think that most clergymen realize the changes that have taken place and they begin to understand that marriage, sexual desires and appetites are normal and legal, physically and spiritually; that unless the joke is really a very licentious one—

Q. If it deals with illicit relationship, Doctor, that is what I have reference to. A. Such as rape, will you say?

Q. Well, cartoons dealing with illicit sexual relationships. A. I don't think there would be any objection to them.

Q. You would not object to it? A. I would not object to 2527
it.

Q. Have you, say, let up a little on the effect of that portion of the Tenth Commandment you cited, "Thou shalt not covet thy neighbor's wife"? A. What do you mean, let up?

Q. Well, do you believe in that? A. Yes.

Q. Do you practice that? A. I certainly do.

Q. You practice it in so far as literature is concerned affecting that relationship? A. Yes, sir.

Q. In the November issue of Esquire, page 52, I call your attention to a cartoon in colors showing a sheik talking to 2528
a couple of possibly slave girls, but with hair-dos and facial contours indicating they might be American girls, and another Oriental gentleman going off in the distance has his arm about two girls and underneath the legend, "Such a neighbor, always borrowing." Do you think that that reflects upon the sanctity of the marriage relationship in the United States where this magazine is being circulated? A. Decidedly not.

Q. You don't? A. No, sir.

Q. You think so far as the Tenth Commandment is concerned it would have no application to this? A. No, sir.

Q. Well, the sheik in the distance not only coveted his 2529
neighbor's wife, or his women, but he went and borrowed them actually and he is taking them away, isn't that the fact? A. You must remember you are not in America here. That is an old custom in the East.

Q. But why publish that in an American magazine circulated throughout the United States? A. Oh, there is nothing obscene about it, unless what you read into it. I don't see any lewdness or any lasciviousness in it. I don't see that that cartoon would in any way arouse any

2530 sexual desires or lower the moral standards of anyone looking at it. I don't think anybody looking at it would ever even think of the Tenth Commandment.

Q. Probably have never heard of the Tenth Commandment? A. Well, they have heard of it all right, more than we think, but I don't think they would ever, in any way, ever connect the Tenth Commandment "Thou shalt not covet" with this here Oriental custom of borrowing even his wife. In New York City we have a neighbor coming in and says, "I would like to borrow this and borrow that, will you give me some eggs today and some coffee today", an old American

2531 custom.

Q. And an old American custom to borrow females? A. No, it is not, thank God, not yet.

Q. We need not go over it further, but you think it is perfectly proper and it bears no reflection to the marital relationship? A. No, sir, I think it is perfectly proper.

Q. It does no injury to your religious views? A. It certainly does not.

Q. Or your views relating to morality? A. No, sir, none whatsoever.

Q. Now, referring to the cartoon on page 65 of the February issue. There we have another cartoon indicating

2532 that a young lady with flaxen hair, apparently not Turkish or Egyptian, or near-Eastern, with a very revealing costume, is being sold. Do you think that reflects upon the sanctity of marriage, that cartoon? A. Certainly not. Do you want me to give my opinion on the cartoon?

Q. I think you have done so, Doctor. A. What?

Q. We might save a little time by going ahead. A. All right.

Q. Page 49 of the March issue. Now here we have another cartoon, full page in colors, showing what appears to be a

slave girl in a very scanty costume and two apparently French soldiers on the desert, and the statement underneath "I wonder how the Sultan knew this was my birthday?" You say this has no improper sexual connotation whatsoever? A. No, sir. 2533

Q. Apparently this slave girl is not the wife or the intended wife of either one of these soldiers; wouldn't you say that is the fact? A. I don't know, she is probably not, but I don't see anything obscene about it and it is an old custom in the Orient there.

Q. An old custom to give women for birthday presents? A. No, I didn't say an old custom to give women for birthday presents, an old custom for Sultans to have a harem, and to show his appreciation he wanted to give this girl, but it doesn't say in the picture that there is any illicit relationship or anything immoral in the picture. It may be in the mind of the soldier but that is putting something in that is not there. 2534

Q. What interest do you think the readers of such a magazine as Esquire would have in a question of that sort? A. What interest?

Q. Yes. A. Well, I certainly don't think that they would get anything obscene or immoral out of it. It is a cartoon. And most of us look upon cartoons as something humorous and that's about all. It is nothing serious at all. I don't think it affects their sexual minds in the least. 2535

Q. No matter what the cartoon is? A. I don't say no matter what it is, but this cartoon we are talking about—

Q. The fact that it is a cartoon lends some decency to it, in your mind, does it? A. Not necessarily, but a cartoon is usually something humorous, a caricature, intended to try to create a laugh.

Q. What is amusing about that cartoon you just looked at?

2536 Mr. Bromley: Where is it; I have lost it.

The Witness: I said it is intended to create a laugh. I didn't say it was always successful.

By Mr. Hassell:

Q. There is nothing amusing about it? A. There is nothing amusing about it to—

Q. Even though it is obscene? A. The cartoon does not say it is obscene or immoral. These fellows might be thinking something obscene, but that doesn't mean that the reader can read into this cartoon any obscenity.

2537 Q. Would you say there is nothing amusing about it? A. I wouldn't laugh myself sick about it.

Q. Would you laugh at all about it? You say it is not amusing at all. A. I would say it is not amusing.

Q. You think it is just a waste of space to put it in there? A. Not a waste of space. Some people might get a laugh out of it. They may like this type of cartoon.

Q. Why would some people like this type of cartoon? A. Why?

Q. Yes. A. There is nothing obscene about it. It is like any other cartoon. If you look through a book like this, you like cartoons. I don't know why they like them.

2538 Q. Would the reader or the person who buys this Esquire and looks at that cartoon be likely to put himself in the position of the soldier who is receiving the birthday present? A. No, sir; certainly not.

Q. You don't think so? A. Not unless he was a degenerate or a moron. But an ordinary human being with an average mind, clean minded, looking at a picture like that, I don't think he can get anything obscene out of it.

Q. I see. There is no point to it at all, is there? A. Nothing at all to me and— 2539

Q. You referring to a person being a degenerate who would attempt to put himself in the place of one of those soldiers.

Mr. Bromley: Will you let him answer the question before you rush off into another one?

Mr. Hassell: I thought he had. Did you have anything further to say?

The Witness: That's all right.

By Mr. Hassell: 2540

Q. You spoke of a person being degenerate who would place upon this cartoon any sexual implications. Is that right? A. I didn't understand that.

Q. Any person who would attempt to visualize himself in the place of the soldier receiving this birthday present, Is that right? A. If he had an evil mind, he might do that.

Q. So doesn't it naturally follow that this is a picture of a degenerate act here? This soldier is receiving a woman, a personable, well-formed young woman, as a birthday present. Doesn't it follow that he is a degenerate then and it is a picture of a degenerate act? A. I don't get that im- 2541 plication.

Q. I see. Refer to page 43 of the September, 1943, issue of Esquire. Here we have a cartoon in colors, full page size, showing what appears to be a Near Eastern sheik or a man dressed in Near Eastern garb, two girls on the platform with loose jackets that don't entirely conceal their breasts or the fronts of the upper parts of their bodies, with hair-dos that have a very startling resemblance to American girl hair-dos of the present day and a Near Eastern

2542 audience in which there is a soldier, apparently an American soldier, cigarette in mouth, holding up money, and a tank in the background showing that this is near the scene of recent military operations, and under this appears the words: "Sold American."

Do you say that this depicting of a Near Eastern slave market in women has no immoral sexual connotations? A. Yes, I say that.

Q. What would the soldier do with one or either of these women when he bought them? A. How do you expect me to know what the soldier is going to do?

2543 Q. I see. You don't think he would do anything with them. He couldn't take them to his barracks, could he? A. No, he may be taking them out for an ice cream soda or taking them out in the park to sit down and talk. He's homesick and wants to see an American girl. You can't blame him for that.

Q. Do you think these are American girls? A. They might be English, they might be French. Judging from the faces, I don't think they are Turkish.

Q. They are not in American or English costumes. They apparently have on trousers, do they not? A. They have trousers.

2544 Q. Yes. There is a line showing where their legs— A. But nothing offensive is shown about them. I don't see anything that is lewd about their make-up here.

Q. Do you understand it is the practice even in North Africa to auction off American girls? A. In North Africa?

Q. Yes. A. I wouldn't know. If it is, it will probably be changed very quickly.

Q. Of course, you wouldn't know either whether this soldier is married? A. There is no way of finding it out from looking at it. I don't see any wedding ring on his finger.

Q. Doctor, look at page 105 of the August issue, the cartoon in the lower right hand corner. A. Yes. I see it. 2545

Q. That shows the man on shore— A. Yes.

Q. Clinging to a tree and the sailor in the small boat paddling toward the shore and four husky grinning black women in the background and underneath "Thank God, help at last."

Do you think that has any indecent sexual connotations? A. Absolutely not.

Q. What do you think the man is so glad help is coming for? A. Well, if I were there I would want help from such looking things. I don't think that anybody can see any sexual relationship, especially with mugs like that. 2546

Q. Now, refer to page 65 of the September issue. There we have a full page cartoon showing the husband leaning out the kitchen door with an apron on and the milk girl, a rather husky figure—you might call her buxom—and she is red-haired, and underneath that: "Come back later sweet-my wife hasn't left for the factory yet."

Do you think that is a ribald or intended to be a ribald joke, making light of the marriage relation? A. No, sir; I don't read that in it. It is the old story about the milk man, which is so old, as old as the hills.

Q. Do you say antiquity lends respectability to filth and indecency? A. By no means, but I can't read into this picture or see in this picture anything immoral. I don't know what is in his mind. He may want to play gin rummy with her, but there is nothing here saying that they are going to have any illicit relationships. 2547

The picture does not show it. It is a cartoon; there is nothing obscene about it.

The fact that the girl is a little buxom—there are buxom girls in the world—but she is completely covered, absolute-

2548 ly nothing to see that would in any way stimulate sex thoughts in anybody looking at the picture.

I can't see anything that is immoral to any average mind.

Q. Doctor, do you remember the verse or whatever you want to call it on page 141 of the July issue, "Dog's Worst Friend?" A. Yes, I remember that.

Q. And is it your testimony that there is nothing filthy about that? A. Nothing filthy whatever.

Q. No filthy connotations? A. No, sir. You are right up my alley when you come to dogs. I have a dog, my best friend.

2549 Q. And you sympathize with the writer of that verse? A. I sure do, and I don't think there is anything immoral that is going to suggest to any human being any sexual thought or act or lower his morals by reading it.

It is probably a good representation of what great dog lovers feel about the way some of these women act towards their dogs when they cut their tails, these French poodles and all that.

If we could only know what the dog is thinking of as well as the master.

Q. Doctor, did you read the "Star and Garter Blues" article in the January issue? A. Yes, sir.

2550 Q. Do you recall the statement in that review announcing that there were certain orgiastic dances in that show? A. Yes.

Q. Do you think it is entirely unobjectionable for a show currently appearing in New York to be advertised in that way? A. Yes, sir.

Q. Did you see the show, sir? A. I didn't see the show, but I don't think there is anything in this article, which is just a man's dramatic criticism of the show, nothing obscene in the description or the reporter putting it on paper.

I should say the show may be immodest in many degrees, but not the reporting of it, and that's all you have got here. 2551

Q. I see. Now, refer to the November issue of Esquire, pages 94 and 95. Did you read these jokes or alleged jokes, Doctor? A. Yes, sir.

Q. I call your attention to the first one, item 44, beginning at the bottom of the first column of page 94. It tells the story, doesn't it, Doctor:

"The corporal was going home on a furlough and was lucky enough to have a Pullman reservation. When he got ready to retire and pulled back the curtains to climb in his berth, he was astonished to find two luscious blondes reposing there. He carefully checked his ticket, reservation and berth number to make sure he wasn't wrong, then said: 'I'm deeply sorry, ladies, I'm a married man—a man of respect and standing in my community. I cannot afford to have a breath of scandal touch me. I'm sorry—one of you girls will have to leave.'" 2552

Would that imply to your mind that he intended that the other girl, the luscious blonde, should remain and share the Pullman berth with him? A. No, sir.

Q. What does it imply to your mind? A. Well, I would say that it is the corporal's way of cracking a joke, a soldier's way of cracking a joke. I consider it just a wise crack. There is nothing immoral here. He doesn't say that he went into the berth with her. 2553

Q. You don't get any such implication? A. I don't get any. It is a joke of a corporal, a soldier, trying to be funny. I wouldn't think it was indecent.

Q. Nothing whatever indecent about it? A. I don't think it is indecent.

2554 Q. Nothing reflecting upon the sanctity of marriage? A. No, sir.

Q. Now, look at item 15. That is the second from the bottom on the fourth column, page 94. A. Yes.

Q. That is where a woman is talking to a man and the man says: "I see your husband has been promoted to a master sergeant. I suppose he's brilliant and knows everything."

And she says: "Don't fool yourself. He doesn't suspect a thing."

Does that imply any illicit relation between this woman
2555 and man talking? A. I don't think so.

Q. Item 24, that is the top item in the second column of page 95:

"Home on furlough the soldier was surveying his sweetie whom he hadn't seen in months: 'Slimmer, aren't you?' he asked.

'Yes,' she replied, 'I've lost so much weight you can count my ribs.'

'Where', asked the G. I., with a gleam in his eye, 'do I start?'"

Do you say there is no indecent connotation to be had from that joke? A. I wouldn't read it that way. I don't
2556 know why you should overemphasize "gleam in his eye," and I don't think there is anything obscene in it.

Q. Well, why did he have a gleam in his eye at all, Doctor? A. I don't know why he had a gleam in his eye.

Q. Did he anticipate the pleasures of making a manual excursion over this young lady's anatomy? A. I wouldn't go so far as that. That would be the extreme idea. He might have liked the girl and gone out with her and not necessarily had illicit relations.

Q. But he said, "Where do I start?" Did he mean where

in the city, or where on the person of the young lady? A. I don't think it implies that. I think it is reading things in it that I can't see. 2557

Q. Now, look at item 27. Have you read this joke? That is: "The beautiful Army hostess, newly arrived in camp, thought she would take a nude dip in the clear blue lake while the men were out on drill and no one was nearby."

A rookie K. P. went for a bucket of water and found her and she came out of the water finally and seized a dishpan which she held in front of her and it winds up:

"You wouldn't have such a smirk on your face if you knew what I'm thinking," and he answered: "Oh, I know what you're thinking all right, you're thinking that pan's got a bottom in it." 2558

What portion of this lady's anatomy do you think that joke or alleged joke refers to? A. I can't tell from this joke what part.

Q. You couldn't tell? A. I can't tell.

Q. You can't see that at all? A. I don't see the joke at all and I don't see anything obscene in the mere joke itself. I don't see how anything can rouse any sexual thought in a little story like that.

Q. I see. Well, look at the buck private one a little further down in that same column: 2559

"I'm afraid we can't have much fun tonight. All I have left of my pay is some small change."

Do you think the kid brother would have to have the $5 bribe to go to the movies? A. I don't think so. That is an old story of giving Johnny a quarter to get out of the room so the folks can spoon. It doesn't mean that the boy is going to have any illicit relationships with that girl when he gives the boy the $5 to get out of there so he won't be there while they are talking or holding hands.

2560 Q. Item 31:

"'Pardon me, Miss,' said the sentry, 'but it's against regulations to swim in this lake.'

'Well, for heaven's sake,' exclaimed the maiden, 'why didn't you tell me before I undressed?'

'It ain't against regulations to undress, lady.'"

Do you think that is an indecent implication there in that joke? A. Positively not.

Q. Not decent? A. It is not indecent.

Q. It is not indecent to conjure up in words of this sort a picture of a young lady in the nude before a young
2561 soldier? A. No, sir. We forget that during the war there are going to be an awful lot of things that soldiers say and soldiers do that 25 years ago would have been considered immoral.

They have a new vocabulary that we never dreamed of. Some of them may be a little off-color. We are not going to ostracize them for saying these things. Most of these are soldiers' jokes and we must look on them as soldiers' jokes.

My boy went in the Army and he never knew a curse word and he came back after a month and he began to cuss like an old general.

You get in the Army a month and you will learn how to
2562 swear words you never heard before. Get in touch with a couple of sergeants and see how they educate you on cuss words.

Q. We are seeing a tendency to break down moral standards, aren't we? A. It has a tendency to break down everything and I think, Mr. Hassell—

Q. And you— A. May I add this word, Mr. Hassell? Religion and education for hundreds of years,—what have we tried to do? We have tried to put love where there is hatred and human brotherhood and amity where there is

enmity. We have been doing that in prayers and sermons and books and stage and everywhere, and here a war comes along and we deliberately say to these millions of boys who are being trained in the camps, "We want you to hate with a hatred so great that you shall murder and massacre every enemy that comes in contact with you." 2563

Overnight we have destroyed what we have tried to do for centuries and the only hope we have is that when these boys come back that they will lose all of that hatred and antagonism that we are definitely trying to plant into their fine hearts. It is a terrible condition.

You say that war threatens to diminish the morals of our boys. It destroys everything, not only morals but religion and all the finest ideals that mankind has ever cherished and treasured. 2564

Q. Would you say that when these boys come back, like, for instance, when yours came back, that we would like to have them forget and put out of their minds some of these salacious and obscene jokes that take place in certain parts of the Army? A. If they are very bad. I think we would rather that they would get back to the nicer things. Of course we would, everybody would, society would. It is going to be a hard problem to do those things, but I think if we try we may succeed.

2565

Chairman Myers: We will take a little recess at this moment.

(Short recess.)

Chairman Myers: Let us resume.

2566 *By Mr. Hassell:*

Q. Doctor, I call your attention to the cartoon appearing at page 49 of the October issue of Esquire. Would you take the gentleman standing in that cartoon in the spats, cane, gloves, hat, muffler, topcoat, and the glaring eye, to be the husband of the woman seated in the lap of the fuel oil man? A. There is nothing in the picture to show that he is her husband.

Q. Underneath it it says: "Hello, dear, here is the gentleman who sells us" u-s-, "our fuel oil." A. It doesn't necessarily say he is the husband. They may not be married.

2567 Q. I see. They might be living together without being married? A. There's a possibility; it is done, you know.

Q. Even if that were so, would you say that this cartoon does not have any illicit sex relation connotation? A. I see nothing obscene in the cartoon. A fuel man. Nowadays with fuel one of the luxuries of life, she is just making a little love to the old fuel boy. Maybe she will get some more fuel out of him.

Q. You think it is perfectly all right? A. I think it is a cartoon and there is nothing obscene, immoral or lascivious in the thing or that will in any way arouse any sexual—that is, our emotions in any way.

2568 Q. Now look at the picture on page 89 of the August issue. This is the "Paste your face here." A. Yes, sir.

Q. —picture. A. Yes.

Q. You think there is nothing obscene and indecent about this? A. Nothing whatever.

Q. I see. A. I have for my judgment—I think there are three pictures like this, one for the Army and the Navy and the Marines. I think the purpose of the editor's—

Q. Where are those pictures? A. Somewhere around. I think somebody told me—

Q. You mean in Esquire? A. Yes, in Esquire, three pictures. 2569

Q. Counsel called your attention to those when you were preparing to testify, didn't he? A. No. I looked through these pictures. They didn't call my attention to these three pictures.

Q. You say someone told you? A. No, I didn't say someone told me.

Q. You started to say someone told you. A. No, I said that I had seen three pictures, one for the Marines and the Army and the Navy, and there is nothing obscene or indecent about them. You see it at the seashore where the 2570 girls get on the fellows' shoulders and play piggy back with them, and I think the purpose of these pictures was to give the soldier an opportunity to have a little fun and they do have fun. They paste their face there and send it to their friends and I don't see that there is any sexual implication whatever.

Q. Doctor, is there any standard of morals or decency which is unchangeable? A. Standards of morals?

Q. Yes. A. It is changed territorially. The standards of morals for America are not the same standards of morals, let us say, in Japan. When a woman's hair fell in Japan, it was considered obscene and she ran away quickly. 2571

Q. Now, let us say— A. The woman whose hair falls in America, there is absolutely nothing to it. The morals of people change.

Q. Let us come back to the Tenth Commandment and not wander off to Japan. A. But you asked me a question whether the morals are changed and I just told you that territorially even morals are changed and for different degrees. What may be obscene or immoral in one country is considered perfectly normal and not immoral in another country.

2572 Q. Now most of the people in this country believe in the Tenth Commandment, do they not? A. They believe in that. They don't, perhaps, carry them out but they believe in them, I think. There are some revolutionary people who throw the Ten Commandments out of the window. I wish they all believed them anyway.

Q. Now, which one of the Commandments says: "Thou shalt not commit adultery"? A. The Seventh Commandment.

Q. The Seventh Commandment? A. Yes.

Q. Isn't it a fact that it is the same today as it was when
2573 it was given to Moses on the tablet? A. The same Commandment.

Q. Now, isn't adultery just as indecent today as when it was given to Moses? A. Yes, sir.

Q. Does tolerance of illicit sexual acts or relationships change the fact that such things are still immoral? A. I don't get the significance of your question.

Q. Does tolerance of illicit sexual acts, thoughts or relationships change the fact that such things are still immoral? A. It does not change it. You mean the adultery, the Seventh Commandment, you are referring to?

Q. Illicit sexual acts. A. Leading to adultery, you mean,
2574 or adultery? In reference to adultery?

Q. Adultery and fornication and coveting a neighbor's wife or a maid servant. A. Well, coveting a neighbor's wife is not an immoral act. I wouldn't call that immoral; it may be a mental idea, but it is not immoral, I would say.

Q. But taking your neighbor's wife would be, wouldn't it? A. Taking her?

Q. Yes. A. And having immoral relations with her?

Q. Yes. A. It would be considered immoral but merely

coveting, that is mentally coveting her, I wouldn't say it would be an immoral act. 2575

Mr. Hassell: I think that is all.

Mr. Bromley: That is all, Doctor. Thank you.

(Witness excused.)

Mr. Bromley: Congressman Weiss.

Whereupon,

2576

SAMUEL A. WEISS, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Bromley:

Q. Your name is what, sir? A. Samuel A. Weiss.

Q. And where do you live? A. Glassport, Pennsylvania.

Q. You are a Congressman, are you, from Pennsylvania? A. Yes, sir.

Q. Tell us from what district you are from and how long you have served as a Congressman. A. The 37th district of Pennsylvania, now the new 30th district by reapportionment in the State of Pennsylvania. I am now serving my second term. 2577

Q. Now, you have had a great deal of experience, Congressman, in the world of sports in this country, have you not? A. Yes, sir.

Q. Will you tell the Board about that, please? A. Well, through high school I played baseball and football and entered Duquesne University in Pittsburgh and played foot-

2578 ball there; captain of the football team in 1923 and the baseball team in 1924. I am a member of the Eastern Inter Collegiate Football Officials Association and referee high school and college football games, and I am a referee for the National Professional Football League for the past two years; college and high school games for the past twenty years.

I am on the Athletic Council of Duquesne, having been appointed by Father J. J. Callaghan in 1934. I am connected with youth clubs. I sponsor two organizations personally, baseball and basketball teams in my community
2579 and have for the past eleven years. I am identified with the youth advisory group and the youth group in the city of McKeesport and the Boys Club there, and on the directorship of two other boys clubs for seven, five and three years.

I have been actively engaged in sports. I refereed the football game last Sunday between the Washington Redskins and the Chicago Cardinals.

Q. In Washington? A. Yes, sir.

Q. Do you go around the country a great deal and referee games? A. I do; Washington, Green Bay, New York, Philadelphia, all over.

Q. So would you say as of today you are reasonably well
2580 acquainted with the current moral standards of athletic youth in this nation? A. I should say so.

Q. Do you think as a public official that you have a reasonable degree of acquaintanceship with the sports public in so far as morals and morality are concerned in the magazine field? A. I think so.

Q. Now, have you, at my request, examined all of the material complained of in the Esquire magazine, the eleven issues for 1943? A. I did and I went over some of them.

Q. Did you look especially at the Varga girl drawings contained in those issues? A. Yes, I did. 2581

Q. Now, will you tell the Board whether, in your opinion, you believe there is anything indecent, filthy, lewd, lascivious or obscene about any of the Varga girl drawings or their verses? A. Absolutely not.

Q. Do you have any contact with service men here in this country? A. I visited 16 camps in the country as a member of Congress and with groups personally; I have spoken to the sailors at Norfolk; I have addressed a crowd three different times at Fort Meade; I have talked to about, I would say, four or five thousand soldier and sailor boys, and I 2582 communicate, a personal hobby of mine, with, I would say, 50 or 60 soldiers every single week. I write letters to them in New Guinea and Guadalcanal and all over Africa, England, and all over the world; personal letters; not typewritten letters. I drop personal notes to these kids and boys whom I have known in college through playing football and in my association in life.

Q. Do you think that there is anything in the Varga girl drawings or verses which would tend to corrupt the morals of either the service men in this country or the football or athletic boys in this country? A. Absolutely not. 2583

Q. Did you serve in the last war, sir? A. No, sir; too young.

Q. Do you think you are reasonably familiar with the standard of humor now current with our soldiers in this country? A. I think so.

Q. You think one result of this war has been to bring about an accomplished and impending moral breakdown in this country among the men of soldier age? A. Absolutely not.

Q. You think that the circulation of a magazine such as

2584 Esquire, as you are familiar with it, has any tendency either among the service men or athletic boys in this country to lower their standards of right and wrong or to corrupt their morals?

Mr. Hassell: I object. The same objection I have made before. This witness, I submit, is not qualified by the questions that have gone before to give an opinion which would be of value to this Board and it is outside the issue.

Chairman Myers: The objection is overruled.

2585 The Witness: I would say absolutely not.

By Mr. Bromley:

Q. I want to show you this cartoon which is a service man's cartoon in the August issue, "Paste your face here," on page 89. Have you examined that picture? A. I have.

Q. Do you find anything obscene, indecent, or filthy about it? A. Absolutely not.

Q. I want to show you also in the August issue this cartoon in the left-hand corner of page 90, "She came directly from the wedding—boy! That's patriotism."

2586 What is your opinion with respect to the propriety of that cartoon? A. I don't think there is a thing indecent, lewd or obscene about that picture at all, but that cartoon is mild compared to some I have seen in Life and other magazines. I don't think that there is a thing that a person can find wrong with it, even that an abnormal mind can draw any abnormal conclusions from that picture or cartoon.

Q. Did you examine this double page spread in some of the issues, particularly November, entitled "Gold-bricking with Esquire," being excerpts from service men's papers throughout the country? A. Yes, I read them.

Q. Did you read the first joke entitled "The corporal was going home," and ending up "I'm sorry, one of you girls will have to leave"? A. Yes, I read that. 2587

Q. What is your opinion of that joke, as to its decency or lack of it? A. There is certainly no indecency in that joke. This is an ordinary joke.

Q. Did you read this joke: "I see your husband has been promoted to a master sergeant" and ending up with "Don't fool yourself; he doesn't suspect a thing"? A. Yes, I read that.

Q. What is your opinion of that joke? A. Well, I saw the same joke in a magazine issued by the Massachusetts Institute of Technology, in one of their school publications, and I read it,—I don't know whether it was the Yank magazine or a soldier publication, the very same joke. I don't think there is anything obscene about it at all. 2588

Q. And this joke over on page 95: "Have a good time at the party, daughter dear, and be a good girl."

"Make up your mind, mother."

What is your opinion about that? A. Just a good joke.

Q. Is there anything obscene about it? A. No, sir.

Q. And the next joke: "I'm afraid we can't have much fun tonight. All I have left of my pay is some small change.

"Well, how much do you think it takes to send my kid brother to the movies—a five-dollar bill"? A. A darn good joke that will bring a good laugh from any soldier. 2589

Q. Do you think the publication of jokes like that has any tendency at present to lower moral standards either among the soldiers or among the civilians at home? A. I think jokes like that build the morale of soldiers up. The captain who asked me to address the boys at Camp Meade said: "We don't want a speech." He wanted some darn good jokes. They went through a grueling set of maneuvers

2590 that day and they were getting ready to go to the replacement center. That is the thing that builds the morale.

Q. Do you have the same opinion about the joke about the three girls who went swimming with the camouflaged soldiers on the bank and the caption "You're sure there are no soldiers around here"? A. Absolutely.

Q. Do you have the same opinion as to the joke below it ending: "The answer came quickly, 79. Darn it"? A. Yes, sir.

Q. Now, will you look at the cartoon in the May issue, the airplane spotter, and one of them saying: "She looks
2591 more like a B-17 than a P-40". What is your opinion with respect to that cartoon? A. I can't see a thing that is either lewd, lascivious, or obscene or even in bad taste about that cartoon.

Q. I show you— A. Mind you a person with an abnormal mind would have to be darned abnormal, I don't care who it is, whether it is a college professor or not, but anybody can take a picture on the wall and he can read into it anything he wants to, but not in that.

Q. I show you the picture of the airplane spotters on the roof. A. Nothing different in that.

Q. Do you think that is the same thing? A. The same
2592 conclusions I just gave you a moment ago.

Q. Do you think the general publication of cartoons like that would tend to lower the standards of right or wrong or tend to corrupt any part of our population with which you are familiar? A. Absolutely not.

Q. And this joke in the September issue, under "Goldbricking with Esquire" on page 87, at the bottom of the third column: "Would you like to see where I was operated on for appendicitis?

"No, I hate hospitals".

What is your opinion with regard to that joke? A. 2593
Nothing obscene or lewd or leading to any improper conclusions from that joke.

Q. Are you familiar with the Sultan cartoons which are repeated to some extent through these eleven issues, like the one in this issue? A. I saw quite a number of them in there.

Q. What is your opinion of this cartoon: "What am I bid for this 100 pounds of sugar?" A. I don't see even a thing the matter with it. That one in particular.

Q. Do you think that would have any tendency, or other Sultan cartoons of a similar nature, with respect to selling 2594
women, to corrupt morals or lower the standards of right or wrong? A. No.

Q. Now, based upon your examination of all of these eleven issues and on the material specified also which has been complained of, have you found anything in any of them which in your opinion is obscene, indecent, lewd, lascivious or filthy? A. No; I would say none. There are some things there that might be called a little risque or maybe in bad taste, and I wouldn't publish them, but I wouldn't construe any of these things as indecent, filthy or obscene, any of them, not as bad as you might get in the headlines of a newspaper where you can read about the 2595
Errol Flynn trial, or any other trial, much worse.

That is the tendency of modern American life, to be frank and openly discuss things. Mothers talk to their children of nine or ten years of age when before they hated to talk to them when they were fifteen or sixteen. Kids are reading these things, but to a kid with a clean mind it has an entirely different effect, a nice effect. We think nothing of this today. The average American child I would say is very much like that. Years ago these stories were not con-

2596 sidered that way, but today they are all right. Our American soldiers are getting clean, wholesome fun out of this. They will be better fighters when they come back, they will be men with strong morals, and we will have confidence in our soldier boys.

Mr. Bromley: That is all.

Cross Examination by Mr. Hassell:

Q. Congressman, how did you come to testify for Esquire?

2597 A. I am a very close friend of Mr. Dilweg; I have followed Esquire for years, their sports column. I have been also a very close friend of Clark Shaughnessy, and he and Laverne Dilweg have written some of the finest sports articles in the country. Dilweg was a member of Congress and some weeks ago wrote an article about sports in war, and Shaughnessy had an article on that.

I had subscriptions for seven or eight copies of Esquire for the boys in service; one of them was stopped at the time when he went overseas, and I have been fighting this sports ban for members of the armed forces, and one day Dilweg said to me: "I see where they stopped the magazine", and I told him I happened to be the fourth ranking

2598 member of the Post Office Committee and we had two bills with regard to certain mailable matter going through on account of subversive and pernicious literature, going through the mails.

I said: "It is high time to stop this fellow Gerald Smith and those fellows, but I can't see why they are going to stop Esquire using the mails". I think on that sub-committee there was one member that disagreed with that contention, and that is the time when I was speaking with Dilweg and

he said that they were having a hearing, and he said: "I might ask you to go down". 2599

I said: "I will be glad and happy to go down and testify".

I don't know anything about Esquire, have no financial or any other connection with them. I came down on my own time and agreed to do it voluntarily; to do what is just.

Q. Is Laverne Dilweg connected with Esquire? A. No, no connection at all, but he did publish an article, and he and I began fighting this sports attack and the ban that the Army put on Army trainees participating in sports.

We have been fighting this problem since last January and Frank Knox, the Secretary of the Navy, told us that 2600
we could have trainee participation in sports, but Stimson and some of the others did not believe in it. We were interested in it so that these boys could participate. As Knox said: "I would like to have a whole battleship of football players".

Well, Stimson disagreed with us; that is, he put a ban on the floor, showing the value of sports. One of my Mulrooney of Oklahoma, we were all fighting trying to get them to set that ban aside, and I made several speeches on the Floor, showing the value of sports. One of my speeches was published all over the country. I said: "If England can play soccer with a hundred thousand people 2601
when the Luftwaffe is just a half an hour away, surely so can we", and we had Grantland Rice and Chet Smith, of Pittsburgh, interested in it, and I have in my files nearly 5,000 letters from soldiers all over the world asking me to keep up my fight for sports, and that is where Dilweg and I have been leading the fight.

Dilweg made this speech on the floor that was published by the Associated Press, I believe, and Esquire picked it up and published it; a very worth-while article. You ought

2602 to read it. He was former all-American at Marquette and a professional football player at Green Bay.

Q. Congressman, do you consider yourself an expert on obscenity and indecency and filth? A. Oh, I wouldn't say any more expert than you might say reading a lot of those articles, but in reading a lot of magazines, in reading a lot of the modern jokes and the modern stories and knowing something about the modern attitude of people and soldiers and students today, I would say I consider myself probably as much an authority in my activities with youth as anything.

2603 Q. Every man is entitled to his own opinion about those things. A. I would think so, yes. I would say that.

Q. Congressman, have you had connections with an organization known as B'Nai Brith? A. Very active today. I am the national vice-chairman of the war service committee. Next to the president I myself direct the activities from Washington.

Q. Does this organization have a junior organization known as the AZA? A. Yes. I was the advisor for them in McKeesport, Pennsylvania.

Q. Do you feel that the type of material found in Esquire would be helpful in playing up the character of these young
2604 men? A. I don't think it would hurt them a bit. I would as soon have a young man look at a Varga girl with probably over-emphasized beauty than to have him sneak around an alley and look at some picture. I don't think it would affect anybody at all.

Mr. Hassell: That is all.

Redirect Examination by Mr. Bromley:

2605

Q. What is the B'Nai Brith? A. The B'Nai Brith, I would say, is the largest Jewish organization in the world. It is one organization today that has purchased $156,000,000 in war bonds and has made a great contribution to the war effort. It is an organization that does not discriminate between Jews of different beliefs, whether you are an orthodox or a conservative or a reformed. Mr. Maisky is the president of the organization. I myself have held office in the organization for about 15 years and I am now the national vice chairman of the War Service Committee.

2606

We have purchased several Liberty ships, we have had 56,000 members, and we have purchased $156,000,000 worth of war bonds and we have 32,000 of our youths in service.

In my own group we have 400 boys and we have 116 boys serving all over the world; kids whom I have practically raised up when they were 12 to 14 years old.

Q. You mentioned in your testimony your interest in the Esquire Sports Poll. A. That is right.

Q. I show you the February issue of Esquire, page 86, and ask you if that is an example of the article to which you referred? A. That is right.

Q. Does that regularly occur each month in Esquire? A. That is right.

2607

Q. I have looked through and I notice that it appears in each one of the eleven issues which are before us. Do you know who Herb Graffis and Ralph Cannon are? A. Herb Graffis is probably one of the best sports authorities in the country.

Q. Well, can you tell us something about him? A. I don't know him personally. I never met him personally. I know he has made a great contribution in the sports field.

2608 Bill Stern on the radio and Red Barbour frequently refer to articles by Herb Graffis. He is considered one of the most foremost sports authorities in the country.

Q. Would you say that this article was devoted to the dissemination of public information in the sports field? A. Absolutely. The University of Pittsburgh frequently refers to him and Duquesne University has sports articles which refer to him.

Q. In the classes or where? A. In the classes, in the library. They wouldn't permit a book to get in there unless it was permissible. Doctor Bowman or anybody would not
2609 allow anything if the material was lewd or obscene or indecent or had anything filthy in it.

The articles in Esquire are referred to frequently.

Q. Is Duquesne University a Catholic institution of learning? A. It is. It is a Catholic institution of learning but anyone is permitted to attend the school. I was probably the first Jewish athlete in history that ever played at the school. I was given fairer treatment by the reverend fathers than probably anyone else. They have given me every honor that anyone can receive at the University.

Q. Now, this Sports Poll, does it regularly attempt to poll the public on matters of sports? A. I think every
2610 important question that arises in the sports field is taken up through a poll of public interest. It requires a great deal of work. I know Herb Graffis probably goes to a great deal of pains in getting up the information. I don't know where he gets it, but it certainly reflects a cross section of the American public interest in sports.

Q. I notice his first question in the February issue reads: "Do you think that President Roosevelt should appoint a committee to study the war-time situation of all sports and make recommendations for their conduct during the war,

on the theory that these sports are of use for the physical and mental welfare of the people?" and then the answer: "Yes, 68.49 per cent". 2611

Is that the type of question on which public opinion polls are taken in these sports articles? A. That is right. Well, when he first started that poll there was an idea of appointing a committee. Senator Mead and some other men said that it should be done. I was somewhat opposed to it, but the majority were in favor of it and they went ahead with it.

Q. The second question: "Should the public and private golf courses be kept open this year so that the public can play and get as much relaxation as possible, even though play has to be carried on under difficulties, such as walking or bicycling to the links, carrying one's own clubs, etc.; or do you think that all public and private golf courses should be closed this season?" 2612

And the answer: "Keep open, 97.32 per cent." A. That is right. That reflects public interest. Jack Kelly, the head of our physical fitness program, rides a bicycle when he plays golf.

Q. And the third question: "Can organized baseball still be regarded as an important adjunct of civilian and military morale?"

And the answer: "Yes, 86.57 per cent". A. And I still agree that we ought to continue all sports during the war. 2613

Q. And I notice the fifth question: "Should professional boxing be allowed to die for the duration or should efforts be made to promote this sport further in order to provide relaxation for war workers and men in the services"? A. That is right.

Q. Promote 70.11 percent? A. That is right.

Q. I notice that this article by these two authors quotes a great many public men. A. Commander Tom Hamilton.

2614 Q. Who is he? A. Commander Tom Hamilton is one of the great men from the Naval Academy. One of the great football stars of America who has been a great figure in keeping alive the sport picture in the Navy. He is one of those men who fought for the idea, saying that this war is a tough war and you have to be tough in order to carry on. When Tunney came out with the 1-2-3-4, which I am opposed to because you can't build vigorous strong fighting men with 1-2-3-4 exercises in some gymnasium. Football is the greatest builder of rugged men, the rugged physique, and that is what you need to fight a war like we are fighting
2615 today, and that is what Commander Hamilton said.

Q. I notice that he has permitted himself to be quoted in the paragraph. A. Yes.

Q. I notice there other people such as John Baturski, who writes under the first question with regard to President Roosevelt appointing a committee. A. Yes.

Q. Do you know who he is? A. I don't know whether he got All-American mention, but he was a football player at Colgate, either on an end or on the line.

Q. And R. J. Steinhilper of Williamsport, Pennsylvania. Do you know who he is? A. He is a sport editor on one of the newspapers. Not only he but men all over the country,
2616 men whom I mentioned a few minutes ago, have written on this. Grantland Rice's article is very enlightening. Grantland Rice is the national sports figure that we have today, number one, and he has been hammering in his column consistently on the same attitude.

Q. And among those favoring the appointment of such a committee referred to in question number 1 are men such as these: Bill Hillenbrand, Otto Graham, Bob Wiese, Dick Hoerner, Herman Frickey, Pat Harder, Bunky Morris, Bill Daley, Jackie Field and many others.

Who are they? Who are the men whose names I have mentioned and whose names are mentioned here? A. Those are All-American football players now playing throughout the midwest, Michigan, Indiana, and so on; great football players. I think all those men are in the service. I think every single one of those men are Army or Navy trainees today. Bill Daley, I think, leaves next week. Most of those men are in the Marine Corps Training School. 2617

Q. Do you think that those men would allow the use of their names in a filthy, dirty magazine? A. I doubt it very much. I certainly would not.

2618

Mr. Bromley: That is all.

Chairman Myers: Any further questions?

Mr. Hassell: No.

Chairman Myers: All right.

(Witness excused.)

Chairman Myers: We will resume at 9:30 tomorrow morning.

(Whereupon, at 5 o'clock, p.m., the hearing in the above entitled matter was adjourned until 9:30 o'clock, a.m., Wednesday, October 27, 1943.) 2619

HEARING OF OCTOBER 27, 1943.

2620

PROCEEDINGS RESUMED.

Chairman Myers: Proceed, gentlemen.

Mr. Bromley: Mr. Swing, please.

RAYMOND GRAM SWING, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Bromley:

2621

Q. Will you please give us your name? A. Raymond Gram Swing.

Q. Where do you live, Mr. Swing? A. In Washington.

Q. What is your business? A. I am a radio commentator.

Q. Now, will you tell us something about your background, your educational background, and what degrees, if any, you hold? A. My background is chiefly that of a newspaper man. I started out as a newspaper man in a very small way in Ohio and moved around in various positions. I was a correspondent in Europe before the last war.

2622

during the last war, after the last war, and I came back to this country in 1934, and I continued in newspaper work and editing, and started radio broadcasting.

I have several degrees from colleges, doctors degrees, and a Master's degree from Harvard, but they are honorary degrees and don't represent work done at those Universities.

Q. At the present time you are broadcasting, are you? A. Yes, sir.

Q. Will you tell us something about that? A. I am a news analyst, discussing chiefly the war, four nights a week

over the Blue Network; and discussing American affairs to England regularly every fourth night. 2623

Q. Does your work require and have you travelled extensively around this country? A. Yes, I have travelled in almost every corner of this country.

Q. Would you say that you were reasonably familiar with the state of public opinion so far as the morals of the United States was concerned especially? A. It would be hard to say what an expert in that field was. I should think I was in fairly close touch with it.

Q. Are you familiar with the magazine Esquire? A. Yes. 2624

Q. And am I right in assuming that you read or look at large numbers of magazines? A. Oh, yes; I see a great many.

Q. In your opinion, is Esquire a magazine which now or at any time has ever pandered to the prurient taste?

Mr. Hassell: I object, the same type of objection I have made to similar testimony heretofore.

Chairman Myers: The objection is overruled.

The Witness: I always considered Esquire as a magazine which represented in the men's field something similar to the women's magazines in the women's field, which was focused more on men's interests and men's minds, just as women's magazines are focused on women's minds; that it did not pander to anything. 2625

By Mr. Bromley:

Q. Have you yourself ever written articles for Esquire? A. Yes, I have.

Q. When and what about? A. About three or four years ago, I should say, I wrote three or four articles having to

2626 do with the last war. Experiences of my own in the last war; experiences which I had come upon in the last war.

Q. Would you write for the magazine today if you had the time and opportunity? A. I would with pleasure.

Q. Now, at my request have you examined what I have told you is the material complained of in the eleven 1943 issues of Esquire? A. I have.

Q. Have you looked at the Varga girl drawings in each of the eleven issues? A. I have.

Q. Will you tell the Board your opinion of the Varga girl drawings from the standpoint of whether in your
2627 judgment they are obscene or indecent? A. Am I permitted to retort with a story?

Q. Yes, go ahead.

Chairman Myers: Go ahead and describe it as you like.

The Witness: Your question is so like a question that was asked by Boswell of Dr. Johnson; they were going through an art museum and they passed a painting of a nude woman, and Boswell said to Dr. Johnson: "Do you consider that painting obscene?" And Dr. Johnson said: "No, but your question is." And that seems to me to disclose a whole
2628 philosophy, because Dr. Johnson was the most sophisticated man of his time. He knew what obscenity was; he wrote a dictionary. He did not consider the picture obscene but he considered the mind which would direct his attention to the thoughts of another man to be obscene, and in the same way it seems to me that the Varga girl drawings objectively looked at cannot possibly be considered obscene.

By Mr. Bromley:

2629

Q. In the expression of your opinion, have you taken into consideration the verses which appear, I think, in connection with each one of the Varga girl drawings? Does that change your opinion in any way? A. I read the verses. I do not see that they are in any way beyond the scope of what I consider a man's magazine dealing with things in terms of men's thoughts and lives.

Q. Now, would it change your opinion at all, Mr. Swing, if it were the fact, as I believe it is, that this magazine although a man's magazine is readily available to any class of our citizens? A. Well, being a man's magazine obviously women are going to read it; more so I should say than men read women's magazines because they think it is more interesting. After being read by others, there is nothing objectionable about the verses, in my opinion.

2630

Q. Have you any children yourself? A. Five.

Q. What range in ages are they? A. From 12 to 30.

Q. What can you tell the Board about your attitude towards your own children with respect to whether or not you have permitted them to see and read this magazine? A. The magazine is in my home; they have it and read it and are familiar with it.

2631

Q. Have you ever observed that it had any immoral effect upon them, lowered their standards or injured them? A. I don't think these moral standards are made in magazines or by magazines. Morals are based upon the competence of the individual judging what is right and wrong.

Q. Now, what can you say about current day standards of morality with relation to whether or not these Varga girl drawings violate them or go beyond them in the amount of exposure of the feminine form contained in the drawings?

2632 A. Well, it seems to me that the most remarkable thing about the development of social standards is the change that has come over almost all of Western civilization in the last 50 or 60 years.

We have passed out of the hoop-skirt era, we have passed out of the time when it was required that women should wear bathing skirts, and we have come out into what I would call the biped era from the pre-biped era.

It is now accepted that women, like men, have two limbs, nether limbs, and there is nothing about that that in any way calls attention to them, and pictures like these are
2633 completely within the accepted decorum of a large number of people today.

Q. Now, turning for a moment to the textual matters, frequent reference has been made to the poem in the January issue at page 45: "Benedicts Awake!" Do you recall it? A. Yes, I do.

Q. And do you notice the triple repetition of the opening lines, "Men sleeping beside your wives, awake"? A. Yes.

Q. What can you say as to whether or not that reference violates current day standards of morality in the printed word? A. Do you mean to say that it is immoral for a man to sleep beside his wife?

2634 Q. No, I should think not. What is your view as to whether or not it is immoral to refer to it in a magazine of general circulation? A. That it becomes immoral to refer to a morality?

Q. That might be one view about it. What is your view about it? A. The intimate relations between man and wife is an expression of the most wholesome thing there is. The generative principle behind the universe is present in all of us and reference to it as being in existence, unless it is done to cast filth upon it, in itself passes any high standard of decency, I should say.

Q. Do you think this poem could reasonably be construed by anybody as an attempt to cast filth upon the marital relationship? A. It didn't occur to me when I read the poem. 2635

Q. What is your opinion about the poem and its propriety? A. I think it is proper. I don't think it is particularly beautiful from the standpoint of poetic technique, but the spirit of it is wholesome.

Q. Now, turning to the Varga girl, to a feature which I overlooked, there is one particular verse in connection with the Varga girl in the April issue at page 38 of that issue entitled: "Peace, It's Wonderful", and I direct your attention to the conclusion of the stanza: 2636

"He won't be so lax, believe me,
When the clock upon the mantel points to taps."

Do you think a reference of that kind textually in a magazine of general circulation, exceeds the limits of present day standards of frankness in the field of morality? A. I think my answer to your previous question covers that, if that is an attempt to make it seem somehow wrong to do what is socially right.

It seems to me that the reference there is a particularly straightforward reference to something that everyone knows, and mention of it cannot be considered indecent. 2637

Q. Did you read Gilligan's article entitled: "The Court of Lost Ladies"? A. Yes. I thought it was a very well written piece about a subject which is part of—that is a good instance of the kind of things that can be talked today that could not be talked about 50 or 60 years ago.

It is part of life. Every one knows it is part of life. If you examine it, if you write about it honestly, you know

2638 it is a problem that requires social action. You cannot have the social action without knowledge, and knowledge of a thing is never in itself corrupting.

Q. Did you think the author, Gilligan, gave a serious treatment to that subject and not a flippant one? A. Oh, very definitely. I thought it was a very fine piece of descriptive writing.

Q. Did you think there was anything objectionable about publishing such an article as that in a magazine? A. Oh, no.

Q. Of wide circulation which might be available to children such as yours in their adolescent stage? A. Well,

2639 that raises a basic question of whether a conspiracy of silence is more corrupting than the code of candor and frankness. I should say that in this day we have adopted somewhat unwillingly a code of candor. We find it throughout our literature; we find it throughout our press; we report details of lawsuits, divorce cases, and murders, and Hollywood affairs with a candor unheard of.

The question then is does candor corrupt more than a conspiracy of silence? And my opinion is that even particularly for an adolescent that a frank wholesome honest acceptance of the facts of things that are part of life is more beneficial to that person than a conspiracy of silence

2640 because the conspiracy of silence produces curiosity; there is some over-hanging urge to find out what it is that is not being told, and I think that is more corrupting to an adolescent than being told just what it is and what is to be known about life.

Q. Would an illustration of what you mention as now being commonly printed in the press be the references which you see from day to day in the Sir Harry Oakes murder trial, about the pre-marital trip of the daughter Nancy with the accused murderer? A. That is the kind of thing that

is very often carried in the papers, even in the most reputable papers and the papers which pride themselves upon their so-called reputation. 2641

Q. Now, I direct your attention to a page of fiction in the October issue, the story: "Portrait Above the Fire Place". Did you read that story? A. I did, and it is a beautiful story.

Q. Will you give the Board your opinion of that story, Mr. Swing? A. I think that Esquire has published some of the best phases of fiction, and I call that a beautiful story, beautifully written with a beautiful concept of a human being. I mean as a piece of art; I don't mean the man's weaknesses; his dependence on the portrait for moral strength, his moral character, all that made the story beautifully done. 2642

Q. Would you say it was usual for Esquire over years to have printed pieces of fiction which deserve to rank as literature? A. Oh, yes; I think Esquire has probably done much better than its share of publishing first rate artistic fiction.

Q. Would you say that it had a reputation over its ten year period for having published a very considerable amount of first rate short story fiction? A. Oh, yes; I think it has some of the best writing that has been found anywhere in American periodical literature. 2643

Q. What comment can you make with respect to the articles as distinguished from the fiction? Do you know that Esquire has as a matter of editorial policy in each issue always published from four to six to ten articles of an informative or serious nature? A. Oh, yes. As an old reader of Esquire I know that very well. It has first rate articles; some of them are humorous, but a great many are serious articles. It has articles on sports, it has articles that are going to interest men.

2644 Q. Were the articles which you did for Esquire about the last war humorous or very serious? A. Oh, serious. The mass content of Esquire has been of a serious nature. That is, you can't just have humor all the time in a magazine such as that and have as many readers. You have to have a base of solid interest and Esquire has always had it. The editors of Esquire have somehow understood that you have to get first-class writing into a magazine and they have done it much more so than women's magazines. I think the writing in Esquire has displayed more artistic taste than that in women's magazines.

2645 Q. Would you say the mass content of the magazine was information of a public character devoted to literature or the sciences? A. Well, I should say that there is always a core of substance of that kind. I would say that the appeal of the magazine is based primarily upon its humor, but it has a sound editorial policy to deliver your humor always with a core of substantial content.

Q. Now, I would like to ask you about the piece of fiction in the August number called "Offensive on the Home Front", and particularly two references near the end of that story: one: "He noticed how large the uniform made her behind look", and two: "Once he had slapped a prostitute in Bor-
2646 deaux". Do you remember the story? A. Yes.

Q. Do you remember those two references? A. Yes.

Q. What can you say about them as to whether you consider them to be obscene or not? A. I don't understand your question? What is obscene?

Q. The charge has been made, Mr. Swing, that the use of the word "behind" in that story and that context, is indecent or filthy. A. If the story had said he struck her on the rump it would have become ipso facto proper?

Q. I have no enlightenment as to that. It has been

charge' that the word "behind" is obscene. What is your opinion about that? A. I lived for a while in England. There is a word in England that you must never use in a parlor, and it is 'bloody". You must not say "bloody" under any circumstances. 2647

Now you say bloody here and it is perfectly proper.

These are matters of local usage, but I don't see that the word "behind" has become a matter of even delicacy in this country. It is a word that is more frequently used than "rump" or "buttock".

Q. Would you say the word "behind" in that connotation, to mean the rear end of a man or woman, is accepted in all society in this country? A. It is not the most proper piece of verbal selection, but it communicates the idea and I think it is even preferred in a drawing room to the words "rump" or "buttock". 2648

Q. What about the word "fanny", to indicate the same portion of the body? A. That is slang, too, and I think somehow or other there is a connotation there that makes it a little bit less delicate than "behind", but it is a question of delicacy and not propriety.

Q. And certainly not of indecency? A. Oh, good Lord—that is, unless the buttock is indecent?

Q. And do you think the reference to the husband in the story, in connection with his having slapped a prostitute—using that word—in Bordeaux, is an indecent or filthy reference? A. It is a statement of fact. Is the fact indecent, do you mean? 2649

Q. Is the use of the word "Prostitute" in that story indecent? A. You raise again the whole issue: Are we going to know what happens in the world, or are we going to have a conspiracy of silence about it. I am for candor, myself.

2650 Q. Now, I would like to call your attention just for a moment to some of the Army jokes which are published in the magazine, and particularly this one in the November issue of Esquire, page 94, about the corporal who discovered two luscious blondes in his berth and said one of them would have to leave.

Do you consider that a joke such as that, printed in a magazine such as Esquire, has any indecent, filthy, lewd or lascivious or obscene connotation, or what do you think about the publication of such a joke as that? A. My first response is that it is funny. I think it is a funny story,

2651 and when you start to analyze humor—all of us are people who live in a society in which we are taught to repress certain predelictions, let us say, and the consistent repression of those predelictions constitutes good social behavior, but the repression of them does not annihilate them, they are there and psychologists will agree they will try to come out.

Humor is very often a way of expressing those things, which is a counterpart to the repression of them and, therefore, helps. You go and see a comedian on the stage smack somebody with a stick. Well, I can't smack my colleague that I don't like with a stick. Therefore, I have a good

2652 laugh to see the comedian smack somebody.

Therefore, I put this in the category, if you don't probe too far into it it is good humor. The minute you start probing too far you get into the repressions that are not in the humor at all.

But humor is the expression on this plane of the experiences of the subconscious mind.

Q. Do you find anything obscene or indecent in that joke? A. No.

Q. Now, without making specific reference to the other

material, I want to ask you whether generally you found anything in any of the eleven issues, texts, and pictorial, which in your opinion was obscene, filthy, indecent, lewd or lascivious? A. I will confess that when I went through these things one by one with all the citations marked, I was astonished in the first place because it seemed to me the great mass of them didn't even border on the place where the editor would want to discuss it, as to whether or not this might be considered by some few people as indecent. 2653

It seemed to me in most of them you have to look very hard.

And then there were certain cases where I understand that there might be some people who would question the propriety of putting it in a magazine. I wouldn't myself have omitted some of them from the standpoint of obscenity. I don't think some were particularly good humor, up to the standards of Esquire, but that is not the issue, I believe. 2654

Q. That is right. So you found nothing that was indecent or filthy? A. No.

Q. And is it in your opinion material that is accepted by our present day standards of morality? A. Yes, in a magazine which is known and considered as a magazine for the interests of men primarily.

Mr. Bromley: That is all. 2655

Cross Examination by Mr. Hassell:

Q. Mr. Swing, in your broadcasts do you use the word "behind" or these other words referred to in Esquire, over the radio? A. No, I don't.

Q. Why don't you? A. Because I am not writing. I am talking over an instrument that goes into a very large number

2656 of homes which cannot be shut off until after something has been done, whereas a newspaper or magazine cannot be read by children of five, six or seven years of age. The person who has a magazine or newspaper can keep it away from children if he wants to.

I think it would be an invasion of the right of the parent to choose what his child should hear if I should put those things into the home before the parent knew it, but I don't think the two cases are in any way comparable because the mediums are not comparable.

Q. I see. You think it is perfectly proper to put these
2657 double entendre jokes, questionable pictures and cartoons that reflect upon the marital relation, in a publication distributed freely through the United States mails and sold on pretty near all the newsstands, but you don't think it would be proper and decent for you to employ that kind of material in a broadcast? A. You are putting words into my mouth. I have not said it would be proper or decent. I said it would infringe upon the right of the parent to choose what his children should hear.

Q. If it is decent why should the parent have any right about it? If those thoughts are decent, why should the parent be considered? A. I am talking about my right to
2658 determine for the parent how he shall bring up his children. It has nothing to do with what I consider decent or what the parent considers decent.

Q. In other words, you think these words in this type of joke and picture and cartoon are perfectly decent and that they should be allowed to go in every home because they state the facts of life. Is that right? A. I say that the freedom to circulate that magazine is according to our current standards of decency, yes.

Q. As a newspaper man you resent the idea that anybody

should put any restrictions on what is said or written, don't you? A. No, I don't resent a censorship of certain things, certain kinds of things. 2659

Q. Do you set yourself up, Mr. Swing, as an expert on obscenity, indecency, lasciviousness and filth? A. I never knew that I had.

Q. You don't intend to do that now? A. I don't set myself up at all. I have been called as a person conducting a known profession in this community to give my opinion.

Q. How did you happen to be called as a witness in this case? A. Mr. Gingrich is the editor of Esquire and is an old friend of mine and a valued friend of mine, and asked me if I would look over the material which had been cited and give my opinion about it. 2660

Q. Since you have been a subscriber to Esquire for some time you have thought for years that the material in it is perfectly all right? A. Yes.

Q. Not questionable at all; is that right? A. Yes.

Q. Would you say that Esquire has the reputation of being spicy and a little off-color? A. I would accept the word "spicy". I don't know that I would accept the word off-color.

Q. Well, why does it have the reputation for being spicy? A. Because it has humor and it is men's humor. 2661

Q. Men's humor carrying jokes, pictures and cartoons that deal with sex? A. To some extent, certainly; just as man's life deals to some extent with sex.

Q. And carrying pictures such as the Varga pictures which appeal or are designed to stimulate the sex urge in man? A. Well, I don't know that they are designed to stimulate the sex urge in man.

Q. Would you say that they are art, Mr. Swing? A. Not of a high type, no.

2662 Q. They are not held out in the magazine as art, are they? A. No. I think they are very skillfully done; they are skillfully drawn and I think they have taste in their drawings. To say that they are Titians and Rembrandts would be absurd.

Q. Would you make the statement that the filmy costumes in which a number of them are shown are put on to add to their salacious appeal or to conceal nudism? A. I didn't hear the question.

Mr. Hassell: Read the question.

2663 (Question read.)

The Witness: I don't think that they are put on to add to salacious appeal.

By Mr. Hassell:

Q. Mr. Swing, did you hear the recent statement over the radio by Red Skelton to a woman on the program: "Let us read Esquire and blush together"? A. No, I didn't hear it.

Q. Would you subscribe to that sentiment? A. No; except as humorous. It might be that he was trying to make a
2664 joke about it.

Q. You don't think that is the general opinion of the public as to Esquire? A. No, definitely not.

Q. Now, your attention was called to this story of the two luscious blondes in the Pullman berth and the married man who had a reputation in his community for uprightness, finding them there and telling them that one of them had to leave. You referred to that, I believe, as a funny story. Why is it funny? A. Well, I went into a lengthy

explanation of why I thought that was funny. I will repeat it if you wish, but I don't really think it is necessary. 2665

Q. I haven't heard you say why it was funny. I heard you say it was funny. A. Well, to go back to my concept that all human beings have most of the elements in them, and if we live in society, society requires us to repress certain predilections, I call them, in our life.

Q. What predilections? A. Well, the predilection to murder and a predilection to all kinds of violences and forth right expressions. We are anxious to repress them, and the humor very often becomes a means of expressing those repressions in a delightful way and reflects simply that 2666 we are and must be repressed individuals to a certain extent, and I gave the instance of the comedian on the stage who hit another man with a stick, which expresses my feelings that I can't express myself perhaps towards someone that I don't like, and I laugh at it and I think it is funny.

Q. What is the predilection here that is being repressed? A. Well, there is a tendency in our life towards anti-social anarchy in all of us. We don't live in society because we are born that way; we adopt these repressions so as to maintain social life.

Q. Would you say that the predilection pointed to here is the general predilection of the average normal American 2667 married man to commit adultery? A. Well, I don't know when you are talking about adultery—whether you are talking about a legal fact, aren't you, and I don't think men have predilections to legal facts. I think they have predilections to natural expressions.

Q. Well, we won't confine ourselves to the legal term, but the fact is that the man has indicated he is married and he has indicated he would go to bed with one of these

2668 persons, hasn't he? A. There again your monogamy is not a concept that is in the atavistic human being. The sexual expression, and I think all that is expressed in this story, is that, and it is entirely on the humorous plane. The repressed and disciplined individual who conforms to social requirements.

Q. Now, you think it is perfectly decent and proper in a magazine enjoying subsidies from the United States Government to carry jokes of that kind which imply improper conduct by a married man with an unmarried woman? A. Well, if somebody went around with every issue of the
2669 magazine and sat down and said: "Please study this. Doesn't it mean that somehow or other there is going to be an immoral act" and draw attention to it and destroy the humor then I would question it. But as a piece of humor it is harmless.

Q. You said if you did not probe too far into this story it would be considered humorous. It would not be if you gave too much thought to it, would it? A. Too much of what I might call obscene thought.

Q. Well, what is the natural thought that would follow to the natural normal man, a story like that, Mr. Swing? A. To laugh.

2670 Q. To laugh about what? A. Laugh about the story and then he has expressed something which I would say is socially repressed in him and that is the purpose of humor. The minute you start taking humor apart like a fly you destroy it and then the whole thing has a different connotation. The connotation is not there until you destroy it.

Q. The opinions you expressed are your own, purely? A. Why, certainly.

Q. You do not represent them to be the opinion of the American people as a whole or any part of them? A. Well,

I supposed I was put on here to give my personal opinion about things. I am not a member of any organization testifying after a meeting, which passed a resolution, and then asked me to express the sense of the meeting, no. 2671

Q. Do you think you are competent to gauge the sentiment of the American public as a whole and determine what the average man wants or what his reaction is to material of this sort? A. I suppose no single individual is competent to do more than express his general judgment as to what people as he knows them feel or think about any issue. He can't ever be encyclopedic in his knowledge about what people think.

Q. Mr. Swing, do you subscribe to the theory that there is no such thing as obscenity except in the mind of the individual? A. No. I do not subscribe to that theory. Things may be definitely obscene, obscene representations which are intended to be obscene and which are circulated for the purpose of gratifying an obscene desire. 2672

Mr. Hassell: That is all.

Redirect Examination by Mr. Bromley:

Q. I don't understand that last answer. You say you do subscribe to the theory that there may be such things as obscene things deliberately circulated? A. Well, to be frank about it, the so-called French post-cards, the so-called Japanese drawings which are made by I call dirty-minded people to interest dirty-minded people. 2673

Q. That is what I thought your answer meant, but I was not sure it was so phrased. In other words, you believe that there can be this material, pictorial material, which is obscene and which is circulated by dirty-minded people for

2674 the deliberate purpose of pandering to the prurient in people? A. Yes.

Q. Now, you do not consider that any issue of Esquire or anything in the issues, so far as you have examined these eleven issues, comes within that classification, do you? A. No, I do not.

Mr. Bromley: That is all. Thank you, very much.

(Witness excused.)

2675 ERNEST OSBORNE, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Bromley:

Q. What is your name, please? A. Ernest Osborne.

Q. You live where? A. New York City.

Q. What is your address? A. Home address?

Q. Yes. A. 106 Morningside Drive.

Q. What is your business or profession? A. I am a college professor.

2676 Q. Where? A. Teachers College, Columbia University.

Q. Will you tell us something about Teachers College so we can know what kind of institution it is, please? A. Teachers College I think can be fairly characterized as a professional institution. Our student body comes from every state in the Union and it is primarily for the training of graduate students in the field of teaching education, public health nursing, religious education, and other essentially educational professions.

Q. How long have you been a professor in that college? 2677
A. I think my professorial rank began back about twelve years, but I have been connected with the institution about seventeen years in one capacity or other.

Q. Where did you go to school? Will you give us the background of your education? A. In higher education?

Q. Well, yes. A. Pomona College, a Southern college, a small liberal arts college, Bachelor's degree there. Doctor's degree at Columbia University in the field of psychology.

Q. Have you ever done anything other than teach, Professor? A. Yes, sir; I have been a camp director and at the present time I am doing some administrative promotional work for the University and the State of New York in Harlem on problems of delinquency. 2678

Q. About when did you start to teach? A. I started teaching children in 1927 in the elementary school.

Q. When did you start in college? A. In college teaching?

Q. Yes. A. 1930, 1932. I don't have these figures straight. It goes too fast. It has been since 1932, approximately.

Q. Now, with what age groups has your experience been, Professor? A. Well, my experience has been with youngsters as young as two up through the whole adult field.

Q. Now, will you tell me something about your other activities? Do you hold any offices in connection with organizations outside of the College? A. Yes, sir. 2679

Q. What are they, please? A. Well, I am an advisory editor for the Parents Magazine, which is a magazine with national subscription, probably the leading one in the field.

Q. It is a commercial magazine? A. It is a commercial magazine.

Q. Published and sold on the newsstands? A. Yes, sir.

Q. It has a list of subscribers? A. Yes, sir.

2680 Q. And caters to parents generally, does it? All right, what else? A. I am on the executive board of the Child Study Association of America, which is one of the older institutions in the field of parent education, and I have retired as a member of the governing board of the National Association of Nursery Education, and several others.

Do you want any more?

Q. I do. A. I am a member of the Parent Educational Committee of our New York Federation of Churches, a member of the advisory committee with Msgr. Moore and Walter Pettit, head of the New York School of Social Work, mem-
2681 ber of the advisory board to the National Girl Scouts, particularly for the senior girls, the executive committee of the United Parent Association, which is a city-wide organization made up of some 250 school parent associations in Greater New York.

There are several other things that I don't recall.

Q. What about the national council of Parent Education? A. That is right. I am co-chairman with Mrs. Gruenberg of the National Council of Parent Education, an organization of professional workers, particularly those connected with various universities and Government departments, who are engaged in some phase of parent education work. It is a
2682 strictly professional group.

Q. What about the National Council of Religion and Education? A. The National Council of Religion and Education is a fellowship group, which is made up of some 250 men and women who are teaching, either directly in the field of religion, or what we assume to be related fields in institutions of higher education, primarily liberal arts colleges. It includes about 12 or 15 college presidents, among them Swarthmore, Colby, and George Williams Colleges. It is a group of men and women who have worked together for some 15 years.

Q. Now, you said that you had conducted summer camps: 2683
A. That is right.

Q. What kind? A. I was director of the New York City Y. M. C. A. camp for younger boys for three years, and following that initiated and organized and carried on a camp for families under the auspices of the university.

That camp is still being run by the parents themselves after some seven or eight years, but my connection with it has now been severed because of the difficulty of carrying too many things.

Q. When you say "university," you mean Columbia? A. Columbia University is right; the teachers part of Columbia 2684
University.

Q. Have you ever had any experience in being called in to advise public officials in connection with obscenity? A. Mr. Oliphant, Assistant United States Attorney in New York, asked me to give an opinion on materials the Post Office Department had objected to, and I did so.

Q. What kind of material was it? A. Largely photographs which supposedly were being used by those who were sending them out as a basis for sex education for children.

Q. They were photographs of nudes, were they? A. That is right.

Q. And they were being sold and sent through the mails 2685
on the basis that they would be helpful in sex education? A. Yes.

Q. What opinion did you give the United States Attorney on that? A. I told him I thought that procedure was not at all justified, that they had very little contribution, if any, to make to sex education, and in my opinion the Post Office Department should bar them from the mails.

Q. Do you know whether thereafter they were barred? A. I don't know. I don't believe it ever came to trial.

2686 Q. Do you know whether or not they were ever withdrawn? A. I never followed it up. I assume they were from the kind of pictures that they were.

Q. Have you ever given courses on the psychology of family relations and on parent education? A. That is one of my areas.

Q. Today? A. Yes.

Q. In Teachers College? A. Yes, that is right.

Q. Have you at my request examined the material complained of in the eleven 1943 issues of Esquire? A. Yes, I have.

2687 Q. On the basis of your knowledge and experience and particularly your contacts with youths of all ages, are you able to give an opinion as to the likely effect of this material on a normal, average human being? A. Yes.

Mr. Hassell: That is objected to. The same objection as heretofore.

Chairman Myers: Objection overruled.

By Mr. Bromley:

2688 Q. Will you state whether or not the complained-of material is likely to have any harmful or detrimental effect on normal persons in the age groups with which you have been familiar? A. Absolutely not.

Q. In your opinion is there anything lewd, obscene, lascivious, filthy, or indecent in any of the material objected to? A. No.

Q. In your opinion is there anything in this material which would tend to corrupt morals or lower standards of right and wrong as regards the sexual relation, or stimulate sexually impure thoughts or actions? A. No, sir.

Q. I call your particular attention to the so-called Sultan cartoons which appear in three issues of the eleven, to-wit, February, March, and September. Will you give us the basis of your opinion that there is nothing obscene, filthy, or indecent in these Sultan cartoons? A. Those are the ones in which in some form or another a young woman is associated with either semi-commercial activities or other types? 2689

Q. Yes, that is right, such as one "What am I bid for this 100 pounds of this sugar?" and the Sultan who indulges in the American habit of borrowing from his neighbor, and the one where the soldier boy with the money in his hand is entitled "Sold American." A. I see no objections to these. It seems to me that it is depicting a rather fanciful sort of thing that at one time did occur in the Orient. They are not very realistic but I see nothing obscene about them. 2690

Q. Do you think the publication of these cartoons would tend to stimulate or encourage or create a public sentiment for the institution of harem girls and dealing in women in this country generally? A. It seems rather absurd that anyone could think that.

Q. I would like to particularly call your attention to the article by Gilbert Seldes, "The Fall of the Flattering Word," and paragraphs 4 and 6 of that article which appear on page 68 of the magazine. There is a reference in the sixth paragraph to the "fly front." 2691

Have you read that paragraph and particularly that reference? A. I have.

Q. Do you know what a "fly front" is as related to clothing? A. I believe I do.

Q. What is it? A. As I understand it, a fly front is a method of covering buttons, often used in connection with trousers, but not solely confined to that.

For instance, there are top coats that have definite fly

fronts. I think commonly I would have to say that that does
2692 refer to the type of opening customarily found in men's trousers, but I don't see anything obscene about that rather useful kind of arrangement.

Q. Do you see anything filthy or indecent about the way the term "fly front" is used by Seldes in this article? A. I don't think I have that kind of a mind, sir.

Q. If you strained your mind could you possibly get any filthy or indecent connotation out of it? A. No, not and be sincere.

Q. And in the same paragraph a reference to the fact that
2693 clothes do enhance the sexual attractiveness of women. A. Yes.

Q. Do you find anything indecent or filthy about that paragraph or that reference? A. No.

Q. Could you possibly conjure up anything in that reference that in your opinion would make it filthy or indecent? A. No.

Q. Did you read Gilligan's article entitled "The Court of Lost Ladies"? A. I did.

Q. What is your opinion as to that? A. I happen to remember seeing one or more of the articles that appeared in a New York paper by Mr. Gilligan some years ago,—I don't
2694 know just when,—and I remembered my reaction, and I had the same reaction when I read this.

It was a very masterful piece of reporting and gave a kind of realistic picture that, in my opinion, rather than leading to any kind of unfortunate stimulation of perverted imagination, gave a picture of one segment of our social life that is one of our problems.

And I know I talked to one of the judges in New York about this in connection with my work in Harlem and we didn't refer to this specific article, but the discussions of

the rather pathetic situations that do come up in women's courts makes me think that that question comes up quite often in the courts and as citizens we need to know what the situation is. 2695

I don't think one can be accused of straining in order to make something of it.

I think it is a valuable article, sincerely written, and why anybody would object to that is beyond my comprehension, unless I suppose there are certain words that would be objected to by people whose training and background has been restricted.

But those words are in current use and in no sense obscene except in the minds of people who unfortunately have had poor educational background as far as their own attitudes are concerned. 2696

Q. Do you remember that the Gilligan articles to which you refer were on this same subject matter and appeared as a feature in the New York Sun five years ago? A. I don't remember that. I do remember reading at least one of those articles, but whether it was five or seven years ago doesn't stay with me.

Q. Did you know that Gilligan has also written a book on the subject of night court experiences? A. Yes.

Q. Do you know who Mr. Gilligan is? A. Yes. 2697

Q. Who is he? A. A free-lance writer, I understand.

Q. Of good reputation? A. Of good reputation, and with a very special interest in the Newfoundland fisheries. He has taken a number of trips on Gloucester schooners, and so forth, and I understand from friends of his that that is his burning enthusiasm at the present time.

Q. Did you know that he writes more or less regularly for the Saturday Evening Post? A. I didn't know that. I knew he had an assignment or two from Readers Digest, however, on this fisheries business particularly.

2698 Q. In the July issue I would like to call your attention to that poem Dog's Worst Friend," page 141. Do you remember reading that? A. Yes, I do.

Q. Did you get the inference that at the conclusion of the poem it was suggested by the writer that the people who mistreat dogs might well be planted in Central Park and introduced to a lot of dogs? A. That seemed to be fairly obvious, yes.

Q. Do you find anything indecent about a reference such as that in a magazine of general circulation? A. No, sir.

2699 Q. And in connection with the August issue, the color photograph "Mood for Red Hair," which appears at page 73—do you remember that photograph? A. Yes, I remember that particularly.

Q. What is the basis for your opinion with respect to it? A. Do you want my opinion first?

Q. Yes, please, your opinion first. A. I think it is one of the more esthetic, one of the more beautiful color photographs in the magazine, the issues of which I have examined.

Q. Do you think there is anything indecent or obscene about the way the purple drapes have been arranged? It
2700 has been suggested that they are arranged so that the reader can mentally, easily, take them off. A. No. Again I think it depends entirely on whether the individual that might be put in that frame of mind has had a limited sort of background, I would say almost a perverted kind of training.

If you are going to strip someone you are going to strip them anyway, mentally. I suppose it might be a little easier than having to unbutton a few clothes.

If you are going to strip a photograph for sexual satisfaction you are going to do it. 2701

I think the esthetic arrangement there would tend to make that less likely to arouse.

Q. Do you see anything obscene or filthy in that picture? A. No.

Q. Now, for a moment, will you give me your opinion of the cartoon in the August issue at page 90 where the girl in the wedding gown is shown at the lathe with the subtitle, "Boy, that's patriotism." A. I was particularly interested in that because I felt I must be much more naive and unsophisticated than I supposed. 2702

I have asked a number of friends and also my 14-year-old twin daughters what they got out of that, and it seems to me there must have been some very ingenious kind of thinking that went into the development of the objection to that, Mr. Bromley.

I perhaps am still able to learn something, but I don't quite get it. You can make a very involved assumption as to what that might mean, but it doesn't seem to make some sense. If someone can make something dirty out of that I think they can make something dirty out of almost anything, and that's not hard if you have that kind of a mind.

Q. Do you think the publication of a cartoon like that could possibly have any detrimental or corrupting effect upon any class of our society? A. I can't see it. 2703

Q. In the same issue did you read the story "Offensive on the Home Front," and do you recall the references to the wife's behind and to the husband having slapped a prostitute? A. That is right.

Q. Will you give us the basis of your opinion that that article, and particularly those references, are neither ob-

2704 scene or indecent? A. I didn't particularly enjoy that article but I see nothing obscene or objectionable about it. Is the word "prostitute" not used in polite society?

Q. You tell us, will you? I only get paid for asking questions. A. I had assumed it was. I perhaps have not been moving in the right circles, but I thought that was a respectable word with a perfectly understandable meaning.

Q. And can be used anywhere? A. And can be used anywhere and, as far as "behind" is concerned, that is merely a statement of locale, isn't it?

2705 Q. It seems to me it may be more than that. It may be a term for that area just like "fanny" might be. A. That is right.

Q. But is either word used in print in a magazine either obscene or indecent? A. It is not as accurate as using the term "buttocks," but as far as my feeling is concerned I don't see how there is anything obscene about it.

Q. In the October issue, at page 37, there is a small black-and-white drawing of a sailor with a dancing girl tattooed on his arm and a live dancing girl looking at it. A. Yes.

Q. What connotation of decency or indecency did you 2706 get out of that cartoon? A. I don't quite know how to answer your question because it doesn't seem to me that is involved.

We do have dancing girls. I suppose it is a rather neat treat for a sailor to be able to use his muscles so that he gives a realistic impression of a girl dancing, but to assume that dancing is obscene is, I think, making a pretty hasty assumption. There is no indication of the way in which that girl is dancing. I suppose she's a hula dancer or a "hoochy-coochy" dancer, or whatever you call it, but I can't see that there is anything obscene about it.

Q. Well, does it become obscene because an actual hula-hula girl is looking at the demonstration? Does that change your opinion in any way? A. No. 2707

Q. Remember the second color photograph which occurs in the November issue at page 73, which is entitled "Golden Mould"? What is your opinion with respect to that photograph? A. My opinion with respect to that would be the same as to the other.

What is the other one called? "Mood in Red"?

Q. "Mood for Red Hair." A. It would be the same sort of thing.

Q. Do you find anything indecent or obscene about this? A. No. 2708

Q. The "Golden Mould" photograph? A. No. Perhaps I ought to be looking a little more for those things, but I can't for the life of me see it.

Q. Well, it has been suggested that there is a suggestive dark shading down there on the front of this girl where my finger is, which is somewhere below her pelvic region. Do you see anything indecent about the looks of that shading? A. No.

Q. I meant to ask you your opinion of the cartoon which appears in the July issue on page 148, the perfume counter and there being two cartoons, "Burning Desire" and "Baby's Breath." Do you remember that? A. Yes. 2709

Q. Do you see any possible ground for contending that that is obscene or indecent? A. Well, yes, if you have an obscene or indecent mind, just as I said that almost anything can be taken in that way. You can make connections with anything, but it seems to me the whole point of that joke, at least as I interpret it, here is a very prissy kind of a floor walker who comes up and who is so cautious about anything, that is the point of the joke. There is

2710 nothing there that should arouse any obscene or indecent feeling except in a person who is already obscene and indecent.

Q. Now, in your opinion, does the objected-to material collectively or as to any one issue render that issue lewd, lascivious, obscene, filthy, and indecent? A. No.

Q. Take the objected-to material collectively and in all eleven issues. Do you think the fact that this material is in the eleven issues renders the magazine as a whole—that is the eleven issues of the magazine—either obscene, indecent, lewd, lascivious, or filthy? A. No. Last night as
2711 I was thinking a little bit about this I tried to think for myself just what my reaction to the magazine had been over a period of years when I had seen it in the airplanes or railroad trains or doctors' offices, all pretty decent places. I think from our work, from the character that I did, that one could simply say that it is of a sophisticated nature, primarily for adults, but that the cartoons and the pictures are not the essential quality of the thing. They give a certain bite to it, if you will, which, it seems to me, is perfectly legitimate for adults, but the thing that I have been impressed with it is what I can call literary quality. My field is such that I can't offer an expert point of view
2712 and say that it has a high literary quality, but from the standpoint of my own case it does have a high literary quality. The kind of articles and the pictures I think is considerably above the average, again within this sophisticated kind of thing.

Q. Do you have the magazine in your own home? A. No.

Q. Have you shown it to any children? A. Yes.

Q. What has been their response to it, if any? A. They enjoyed it, they appreciate some of the humor. Some of

the rest of the humor they don't understand. The only think I found ever embarrassing was that it was hard to explain to a child some of the humor, not that I have any objection to explaining it, if they would understand it, but just as it is hard for a child under 12 or 13 years of age to understand the quality of such relationships between mature adults and a marriage, it seems very silly and stupid to them, some of those things, and it is embarrassing, not because of their lack of maturity but it does not give them any stimulation; they don't get it at all. 2713

It seems to me we have gone too far in thinking that everything in the entertainment world or the reading world should be at the level of a six or seven-year-old child. In other areas we don't do that, we don't give them coffee. We don't give coffee to a six or seven-year-old child, but we don't think it is wrong for adults to have coffee. We don't expect adults to go to bed early, and all of those things. 2714

To give you an instance, one of my colleagues in the camp field carried on one of these things pretty far, so far as the councils are concerned, because he didn't believe it was good for the children to have coffee the councillors, as councillors, were not supposed to have coffee; because he didn't believe it was good for the children to smoke the councillors were not allowed to smoke; because it was good for children to go to bed about 8 o'clock the councillors had to go to bed at 8 o'clock. It seems to me that kind of narrow provincialism is something which I think all of us would recognize as having no legitimate basis. 2715

I would not advise it as a children's magazine; I think there are others which are more appropriate, they would enjoy more, but it is not going to hurt any of them.

Q. Based upon your examination of the magazine, is it your opinion that it panders to the prurient taste? A. No.

2716 Mr. Bromley: That is all.

Chairman Myers: Doctor, do the Sultan cartoons in any wise suggest to your mind the "Arabian Nights"?

The Witness: Yes, somewhat.

Chairman Myers: Referring to the doggerel about the dog, have you ever read James Whitcomb Riley's "The Piddling Pup"?

The Witness: I haven't read "The Piddling Pup," no. I will look that up; it sounds as though it might be good.

2717 Chairman Myers: We will take a recess for a few minutes.

(There was a short recess taken.)

Chairman Myers: All right.

Cross Examination by Mr. Hassell:

Q. Doctor, would you say the family is the foundation of our society? A. I feel that very strongly, Mr. Hassell.

Q. And that the marriage relation is a sacred one? A. Yes.

2718 Q. Do you think jokes and cartoons and questionable words which reflect upon the sanctity of marriage and the marital relation are entirely decent and proper? A. That reflects upon the sanctity of marriage and the marriage relationship, did you say?

Q. Yes. A. Probably I can't answer that question in general. I would like to know what specifically; give a specific instance because there are all sorts of things.

Q. Well, having to do with sex. In other words, jokes and cartoons which deal with sexual relations of married

men and women in a flippant manner. A. Well, I think probably I have somewhat a different point of view than your question implies that you have. I believe that one of the very unfortunate things that has happened in the whole field of sex education is the fact that there has been first of all a kind of conspiracy of silence about it which has aroused in the minds of growing youngsters and youth the fact that there is something nasty-nice about it, and a lot of adults have been particularly affected by it, and if we try to put that attitude of human experiences, which is a very important one, into some special category then we can answer it and get a wholesome attitude, so the answer to your question specifically is that I see no reason why humor should not—in fact, it seems to me humor inevitably comes into the sex relationship as it comes into other types of relationships. There are all kinds of humor and if it is a kind of humor that brings about a perverted reaction, that is one thing, but to say the marital relation and the factors about it are so sacrosanct that no humor can be anything but objectionable, that seems to me to involve an unwholesome kind of attitude. 2719 2720

I don't know whether I made my stand clear on that point, but I feel that very strongly.

Q. Would you put in that category the kind of humor that is reflected in one of the jokes that has been referred to here, where a man is on a Pullman car and he checks his ticket and he finds two luscious blondes in his berth and the joke shows he is a married man and respected in his community, and he tells one of them "One of you will have to leave"? Do you think that that falls in this category such as that you are speaking of. A. Let us see if I recall it. That joke was in the feature which takes jokes from vari- 2721

2722 ous army papers, the kind of jokes such as that; is that what you mean?

Q. Well, it has been said so. Is that your information from talking to counsel? A. No; they didn't tell me that. I saw it.

Mr. Bromley: He knows it does; of course it does.

The Witness: I was a little bit surprised, as a matter of fact. Perhaps this is off the record, but I expected a little more coaching last night when I got in and I don't think I got very much help from Mr.

2723 Harding.

By Mr. Hassell:

Q. How long did you study it? A. I don't know whether he is earning what he gets or not, but he was very casual about the whole thing.

Q. How long did you study this Esquire business before you testified? A. Studying the Esquire business?

Q. Yes. A. I haven't had time to study Esquire. Do you want the whole story?

Q. Yes, I would like to have it. A. I don't remember whether it was Mr. Harding that came up to see me or

2724 not, but anyway it was someone from their office, and I didn't have time to see him. I was just too darn busy to see him.

Q. When was that? A. Unfortunately I have come to rely on my secretaries, and I couldn't tell you. It wasn't more than two or three weeks ago, or perhaps it was three weeks ago?

Mr. Harding: I would guess so. I am not certain.

The Witness: I am sorry. I hope it is not important. I could find out easily by calling my secretary. 2725

Mr. Harding: Two or three weeks ago, anyway.

The Witness: Two or three weeks ago, and he said the matter was of great importance, but I unfortunately had some other matters that I thought were of equally great importance, and some time later Mr. Pearle, who is associated with this group, came to see me, bringing one copy, I think it was the January issue, asking me if I had seen the magazine, and what I thought about it, and I told him I would study it, and four or five days later the year's numbers 2726 came up, and I asked my secretary if she would have an objection, if she thought she would be contaminated if she went through the articles that were indicated and cut them out so I could see them in one place, and I looked at them on the train coming down once, and I hadn't looked at them again until last night. We just went through them very briefly, indicating a little more clearly the type of objection you had to them.

So that is the process of preparation unless you include in your questions that I have asked friends, some of these nursery school teachers I have been 2727 working with in Boston in the last four or five days, some of the secretaries from college, my boss' secretary, as a matter of fact, a very good Catholic girl who has been raised at home. I asked her about them. I haven't done anything in an organized way, I didn't have time. I would have enjoyed doing it because I would have liked it.

2728 *By Mr. Hassell:*

Q. So you agreed to come down and testify before you had even gone over this thing? A. Oh, no, sir. I think if you recall what I said that I had looked over what Mr. Pearle brought me before I ever came down, the one issue which I believe was the January issue.

Do you know?

Mr. Harding: That is right.

Th Witness: January, 1942.

2729 Mr. Harding: 1943.

The Witness: 1943?

Mr. Harding: That is right.

The Witness: The January, 1943, issue I looked through. I read that before I said I would do anything. He said this was characteristic of the type of objection. I don't know whether you agree that it was characteristic, I believe that it had the—

Mr. Harding: The 12 Vargas.

The Witness: Yes. That is the one that has the calendar of Varga girls, so I don't think it would be quite fair to say that I agreed to come before I looked it over. I had seen Esquire where Mr. Bromley was questioning me about it.

2730

By Mr. Hassell:

Q. You are not a subscriber to it? A. No, I am a college professor and it costs five bucks a year, and I usually get a chance to see it, but the reason I am not a subscriber doesn't have anything to do with any reason as to its being objectionable.

Q. You do say the magazine has a reputation of being sophisticated, do you not? A. Well, that is my personal opinion, yes. It is a magazine for adults, I should say. It is not supposed to be a children's magazine. 2731

Q. Now, you referred to talking to other people or friends and acquaintances of yours? A. Yes.

Q. About this? A. Yes.

Q. Was that after you had seen the January issue? A. Yes.

Q. Did you then go over all these issues? A. No, I didn't take the magazine with me at all. I just asked them whether they had ever seen Esquire, and most of them had.

Q. And asked them generally what they thought about it? A. I asked them particularly what they thought about the Varga girls, whether they had ever seen them. 2732

Q. Any particular Varga girl picture? A. No. I didn't think it was important. I just mentioned that as part of what little background I had. I wasn't supposed to make—that is a survey or anything like that. I didn't understand that. He wanted my own opinion and not a survey, but I was interested in that personally.

Q. What did they agree to pay you to come down here to testify? A. Well, as a matter of fact there have been no agreements at all. 2733

Q. You have no understanding at all? A. I have absolutely no understanding at all.

Q. You told them what your daily fee is? A. I have no daily fee. Maybe I am not that expert, I suppose that is one indication of an expert, but I have no daily fee.

Q. The understanding is that they are to pay you a fee and your expenses? A. That is right, but when they asked me what my fee would be I said it didn't make any difference to me. I suppose I probably have been contam-

2734 inated by the profession I am in and haven't been interested in it. I make a very good salary, I am making more money this year than any other year. I am not interested in the fee thing. I expect to get something, I hope to. I will be rather disappointed if I don't.

Q. Doctor, do you think the word "behind," referring to the portion of the anatomy that is usually sat on, and the word "ass," referring to the same thing, and the words "son-of-a-bitch," are entirely decent words or in common use in polite society? A. Well, I wonder if you wouldn't like to separate those, or do you want to lump them together?

2735 Q. Well, take up each one of them. A. I would definitely agree that the first one is of a different quality than are the other two. Perhaps it would be less objectionable if you used the French word "derriere." It is more euphonious than "behind," but so far as "ass" is concerned I think all would agree in ordinary groups we don't use that at all, or "son-of-a-bitch" is a term that we don't use. I don't know whether you call it "polite" society, but in describing what you might not call polite society I think it is perfectly legitimate for people to read it. I think it would be inappropriate not to use that term.

Q. Doctor, you have gauged the matter in Esquire— A.

2736 I have what,—gauged?

Q. Yes. Or judged it or weighed it? A. Yes.

Q. In the light of the medium in which it occurs? A. Yes.

Q. That is, it is a sophisticated magazine for men, is it not? A. Yes.

Q. You would be shocked to see these matters that we have been talking about in a magazine like the Saturday Evening Post, would you? A. No, I don't believe so. I think, however, I can't recall any specific instances, that you can undoubtedly find cartoons which are at least as

suggestive as this one of the bride coming back to the lathe.

Q. I would like to have you point it out because I have been reading the Saturday Evening Post for 40 years, and I never saw anything like that. 2737

Mr. Bromley: Well, did you look at the ones that are already in evidence?

The Witness: I haven't been prepared by Mr. Harding, or anyone else, to answer that question very specifically, but it is my impression that you could find material in the cartoons that could be interpreted by one who wished to interpret them, or whose professional job it was to interpret material and find dirty meanings. I believe you could find them in the Saturday Evening Post. I suppose it is out of order, but I would like to have someone explain to me more adequately than counsel have been able to do what is dirty about that bride and the lathe, for instance? I was stumped on that. 2738

By Mr. Hassell:

Q. I understood that you said on direct that you couldn't see the point at all. A. No, I didn't say that. I think if you will refer to the record, I said it seemed to me I couldn't see at all how anyone except the person who could pervert almost anything could find anything objectionable in that. I could make a kind of rational outline of what might be in anyone else's mind, but I can't say that there is any justification for it, or that it could be possible to call it obscene. 2739

Q. In a magazine of this sort you think it is entirely unreasonable, in a magazine of this sort, for anyone to draw

2740 the inference that that woman instead of going home and partaking of the joys of the marital relations right after marriage is so patriotic that she goes to the factory with her wedding gown and veil on? A. I think the point that that was obscene—

Q. You don't see that? A. I don't believe that the marital relationship was obscene. If I did I would have stayed a bachelor. I don't believe that to realize and to understand that men and women who are married do have sexual relations—I don't think that is obscene. It seems to me that takes us clear back to a kind of excessive Pur-
2741 itanism that is about as unwholesome as anything can be in the human relationship.

Q. You think it is perfectly proper and decent to make light of the marital relationship by making a joke out of the fact that a woman goes to a factory directly after getting married with her wedding gown and veil on instead of going home and divesting herself of her clothes and participating in a honeymoon? A. Of course, when I looked at the picture I didn't mentally take her home and undress her and put her to bed, so to me I didn't see anything objectionable.

It comes back to my original point, Mr. Hassell. I believe
2742 there is legitimate humor centered around that phase of human relationship just as there is legitimate humor in regard to other human relations.

But when you set something apart and make it sacrosanct you are not likely to engender the kind of attitudes that you and I have here, because of the training and background we have had. When I say "You and I" I am referring to our generation.

Q. The wedding night has been the subject of a great many ribald jokes over a period of a great many years, has

it not? A. Yes, and some are humorous and some are not. Some are just nasty. 2743

Q. And you don't see that this is a joke of that kind? A. I don't think it is nasty at all.

Q. When appearing in a man's magazine, a sophisticated man's magazine that deals to a great extent with sex and sex relationships? A. I wouldn't think that that is a very valid statement that you have just made.

Q. You wouldn't think that? A. No. I think it would be demonstrated not by opinion, but by a careful reading of any of these magazines, that you could hardly say it was primarily dealing with sex or some phase of the sex relationship. 2744

Q. I didn't say "primarily", Doctor. A. What did you say?

Q. I said it deals with sex matters. A. I thought you used some term which implied that was the general tone, that was the major emphasis in the magazine. I may have misunderstood you and if I did I am sorry.

Each one does have materials which deal with that.

Q. Each issue? A. Oh, yes. I don't think anyone would try to deny it, but I don't think that is objectionable. If this magazine were primarily for the purpose of raising the untoward sex feelings which you speak about, then I think the publishers ought to try to get a new editor because he surely has not made the most of his opportunity if that is his major objective. 2745

It seems to me that comes in and has been recognized and accepted in a magazine for adults, but it certainly is not the characteristic thing, in my opinion, and I am sure it could be demonstrated in terms of other quantitative figures that that isn't the result.

These are not the words that come first to my mind when I think of Esquire.

2746 Q. Did you read the story "The Unsinkable Sailor", page 95 of the February issue? A. Yes, I did. I have read all the materials that were objected to.

Q. How many times did you read that story, Doctor? A. I read the whole thing once to get the whole thing in context, which I think is the only fair thing to do, and then I went back and read the parts that were specifically objected to.

Q. Do you think that story correctly portrays the average run of the boys in the American Merchant Marine today? A. I didn't assume that it was supposed to be an accurate
2747 picture of the average run of boys in the Merchant Marine. I didn't think there was any claim made to that.

Q. The title of the story and the text indicates that this sailor has been on board merchant vessels that have been sunk in this war? A. Yes.

Q. And in column one, page 95, down the center of the first page it is stated:

"In Las Palmas he went to work as a sort of contact man for an establishment known as The Black Cat, and the less said about that phase of his life the better." A. Yes.

Q. What would you say that described him as? A. Well, I suppose it is pretty obvious.

2748 Q. What? A. That when he was ashore he acted as a procurer of sorts. I assume that is what it was.

Q. As a pimp for a bawdy house? Would that be it? A. I would use a little more elegant term, but I expect it means the same thing. I have no objection, if you would like to have me say "a pimp for a bawdy house". It doesn't shock me if you thought it would.

Q. Now, further in the third paragraph of that column he is quoted as having said:

"I grabbed a piece of broken glass and I yelled, 'the first

sonovabitch that moves I'll cut his head off.'" A. Where is that? 2749

Q. That is the third paragraph, the first column on page 95, the latter part of the paragraph.

"They left the room—but I went to the hospital." A. Yes.

Q. Do you think the use of that term as an epithet and not as a greeting—I believe someone has said that that sometimes is used as a greeting— A. I haven't heard that. Again, I was not prepared well enough. I am beginning to wonder whether Mr. Harding should have—

Q. Would you say that that term as used in this connection or connotation is an entirely decent term? A. Well, if one is attempting to describe with a certain kind of validity the sort of thing that an individual with this background in that sort of a situation would say, then I think they would be very wrong not to use that term. 2750

I have been around some pretty rough customers and I think that is a pretty natural and realistic thing to say.

The kind of writer that would have this man say "Now, any of you gentlemen who attempts to show a belligerent attitude toward me will be subjected to serious damage" would be quite inappropriate.

I think a man in that situation, with this background, would say "son-of-a-bitch" and consequently I think it fits into this kind of an article. 2751

Q. And you think this kind of an article fits into this kind of magazine? A. I think it deals, as some of the others do, with certain phases of human relationship which all of us know exist and which are part of our common American life.

I wouldn't want a steady diet of that any more than I want a steady diet of any other phase but I think for an adult person this kind of thing is perfectly acceptable, just

2752 as I think the "Court of Lost Ladies" is acceptable, and if I were an editor and in a situation such as this those terms were not used, I would think my writer probably wasn't good enough to publish.

I am not an editor, of course.

Q. In view of the seriousness of the present war we are in and the necessity for a merchant marine, do you think this type of story adds to the war effort? A. I don't see what it has to do with the war effort. I don't know what you are implying, Mr. Hassell. I am a little slow sometimes.

Q. You don't think it might discourage some decent boy
2753 who had planned or thought of going into the Merchant Marine in order to get munitions and so forth across the seas— A. Might discourage him from going in because they would have too rough customers or something of the sort?

Q. Yes. A. I think that is stretching things pretty much.

Q. Do you recall the balance of this story? A. I don't recall it very clearly. Perhaps you had better remind me of the parts you are interested in.

Q. In the next column on page 95. A. In column two?

Q. Yes, down below the boxed-in material. A. Yes, I see it.

Q. There is recited the meanderings of the so-called Un-
2754 sinkable Sailor. A. Yes, sir.

Q. How he gets a jar and apparently puts a sample of urine in it— A. I assumed that is what he was talking about.

Q. And he takes it to this place and gets the manager to put it in his safe and so forth, and then gets a suite of rooms and a bottle of whiskey and has himself a good time— A. With the whiskey—

Q. Yes, with the whiskey. A. I thought maybe I may have missed something else.

Q. And then beginning at the bottom of the third column:

"There is a new secretary in the union hall who isn't used to sailors or their language. It seems Showboat went up to her when she was alone in her office, bent over her shoulder—loop-legged drunk—and rasped, in his peculiarly hoarse and penetrating voice, 'How's chances to lower the boom on you, sister?' The girl jumped up in terror and ran screaming from the room. 'Oh, that man! That man!', she cried. 'Help! He wants to do something terrible to me.'" 2755

Do you say that that portion of this article has no indecent or lewd connotation, Doctor? A. My understanding is, though I am not much of a sailor—I have done some—that this phrase "lower the boom" does not have any indecent implications. 2756

"I suppose I can probably figure up some. As a matter of fact, I didn't when I read it the first time, and here I think a little plug for Mr. Harding should come in. It was he who pointed out what you felt that might mean, and I can see how if one were looking for a dirty meaning there that that could be used, but I had not honestly seen it. Again, that is a phase of my unsophistication.

Q. Let's be perfectly frank about this thing, Doctor. Don't you gather from the language that follows this phrase: "How's chances to lower the boom on you, sister?" that this had a rather startling effect on the girl to whom it was spoken? A. Well, apparently it had a startling effect. A good many things have startling effects on unsophisticated women—mice and so forth. 2757

Q. But she said: "Oh, that man! That man. Help! He wants to do something terrible to me." A. Yes.

Q. Do you say that the meaning sought to be conveyed by that is obscure to you? A. I said, and perfectly honestly, that when I read it the first time and until it was brought to my attention, I didn't make that connection.

2758 Q. You did not? A. I did not. That may be an admission of weakness on my part, but it is true.

Q. You had heard the use of this expression, "Lower the boom on you", before? A. That is right, in sailing circles.

Q. That is right. And you gauged the meaning of that by your prior knowledge of it outside of the story? A. Yes.

Mr. Bromley: It spells out the meaning in that very paragraph, doesn't it, Mr. Hassell? You never refer to that.

Mr. Witness: If I had not had the understanding
2759 before, it says very directly that what it means is a touch.

By Mr. Hassell:

Q. Yes, that is plain, but the first part of this is also plain, isn't it? A. You mean the girl screaming and saying what the terrible man is going to do to her is plain?

Q. Yes, he is going to do something terrible to her. A. Apparently she misunderstood the situation, yes.

Q. On page 10 of the March issue there is what purports to be a letter signed with an initial and "Somewhere, Indiana." This is emanating from a high school teacher.
2760 He refers to the Varga pictures as "Varga-vistas of forbidden fruit."

Do you think he has a perverted idea of what the Varga girls are calculated to portray? A. No, my interpretation of all of these letters is that there are people who like to see themselves in print and who try in writing their letters to write something with a certain tang to it so it will be printed, but I don't see anything particularly objectionable or obscene about it.

Q. Why do you think the editor of this magazine picks this out to publish out of probably thousands, or at least hundreds of letters? A. I have not consulted the editor, so I have no direct data on which to base a judgment. I would say that out of the many thousands of letters he undoubtedly gets, he would pick letters that tended to have a certain tang to them, if you want to use the word, not obscenity at all, so far as my opinion is concerned—that would make interesting reading for sophisticated adults. 2761

He may have some other motivation. I have not had the pleasure of getting acquainted with the editor except in a very superficial way.

Q. Do you think they are published in order to let other readers, the public generally, understand what the reputation of Esquire really is? A. I don't know. It is sold and this is a pretty good letter because the main part of the letter, beside the introductory thing, as I get it, is this man's interpretation of the high quality of the literature in Esquire. 2762

Q. He takes objection, does he not, to the cover pages? A. Apparently.

Q. Do you take any objection to the cover pages or the front covers of Esquire? A. No, not especially. I have seen other covers that I enjoy more, but I have no objection to them. 2763

Q. You don't think they have any improper sexual connotation? A. They don't to me, but as I said before, I know enough about people to know that there are some people to whom almost anything can have an improper sexual connotation.

Q. The writer of this letter here points those out and says the only way in which he could avoid taking these covers in "without disturbing small town codes of conduct, would

2764 be to somehow camouflage that bulge-eyed masher on the front of each issue."

Do you think of the figure Esky, which represents Esquire, as a bulge-eyed masher? Did you ever think of that? A. No, I thought he was a rather silly figure, but I have not been able to see how he would have much sex appeal for any woman that I have ever known.

I didn't mean that personally, because I have known them.

Q. I see. Now, turn to page 134 of the June issue, please, Doctor. Did you read those items in the lower part of that page? A. The number two by Roscoe Fleming?

2765 Q. The libel suits. A. Yes, I read that.

Q. The first item: "Two weddings are on dit for next week. This weather kind of suggests two in a bed, spoon fashion."

Do you think that is an indecent reference to the marital relation? A. An indecent reference?

Q. Yes. A. I think it is a definite reference to the marital relationship and I think no one needs to play a dewy-eyed innocence. I think that it indicates that in the rough language of that particular time in the frontier town, the suggestion is that is one good way to keep warm. I think it is characteristic and fitting for the kind of publication it is describing.

2766 Q. Do you think it is characteristic and fitting for the kind of publication in which it occurs here, Esquire? A. I think that would go back to some of the other things I said before, yes. I think in a magazine that attempts to do the job that Esquire does, that is one point.

I don't see anything especially objectionable. It does not encourage, in my opinion, or facilitate the development of that kind of language in our modern times. It is a historical kind of a document which I believe a mature adult has a perfect right to read about, and to understand the

part of our whole developing culture, that there was some very rough stuff. 2767

You can find books in any library describing accurately similar kinds of things on any historical basis.

Q. How about this type of material for children, young adolescents or post-adolescents? A. Some of them wouldn't understand it and those who did probably would have had the kind of interpretation and understanding and guiding from their parents so that they would see it just as any mature adult would see it, which I would hope would be in its context and so forth.

As I understand obscene things, they are the sort of things that would be likely to develop or raise in the minds of people attitudes or ideas that would lead to overt action or the development of one particular phase of human experience. 2768

Maybe my interpretation of "obscene" is not accurate and does not fit your interpretation.

Q. Do you think this kind of an article is perfectly proper literature for circulation in a magazine of general circulation, available to children as well as to adults, on any newsstand? A. I would have to answer "Yes" to be consistent with my expressed point of view about the fact that I don't believe any magazine or any material should be written down purely to the level of children, and I don't believe children will be affected by that. 2769

In fact, they won't understand it.

Q. Do you think they would have any trouble understanding the next item, page 134 in that issue. A. That who would have any trouble understanding it, children or I?

Q. Children. A. You mean the little epitaph or verse?

Q. Yes. A. I think it is perfectly clear what is being said.

Q. You don't think anybody could read it and have any trouble understanding that? A. I couldn't say that. First

2770 grade children can read, but I don't think they can understand that. Sixth grade children can usually read, and I don't think they would be able to understand it.

Q. Certainly, if they didn't know what the word "virginity" means they wouldn't understand it, Doctor. But do you think there is anything ambiguous in that doggerel or whatever you want to call it? A. I don't believe so.

Q. And do you think that is perfectly proper literature for general circulation? A. You see, Mr. Hassell, it all depends on what your point of view is, of what is proper.

Q. You have stated that before. Would you say yes or no
2771 to that in view of your former statements? A. I would say it is perfectly acceptable in an article that describes accurately what the attitudes and the *mores* and the customs were at a particular time in a particular section of the country.

They are brought in as examples of the times existing then. Otherwise, it would not have any validity.

I wouldn't say that this encourages the development of that kind of language in a society that does not feel it is particularly appropriate or acceptable.

Q. I see. A. It is the same kind of thing where you have a sports writer quoting a baseball manager or baseball
2772 player on something related to a big league game, where the possibilities of a successful outcome are discussed. He uses words of that kind instead of reporting what the person probably said, which might not be profane or anything of the sort, but which would have much more of a colloquial flavor.

I think that is poor reporting when the writer reinterprets and puts in fine flowing phrases. When he says what the man says, leaving out any profanity, and puts in colloquial terms, it is much more accurate and realistic reporting.

Q. Refer, please, to page 87 of the July issue of Esquire. 2773
A. Yes.

Q. The exploits of Esky. A. Yes.

Q. Do you understand Esky to be the symbolic character representing Esquire? A. Yes.

Q. The cartoons numbered 55 and 56. A. Yes.

Q. Picturing the mermaids and Esky with a handful of bills, and the man in sailor costume standing behind him, to whom he apparently is talking—this man named Verne.

That says in the text under 55 beginning just beyond the center of that:

"Immediately the surrounding water was filled with mermaids. 'You see—women are women the world over.' Esky 2774
turned to Verne: 'Say, there's something I've always wondered about mermaids—'. 'I wouldn't know', replied Verne."

Then, note the mermaid picture in cartoon 56 and Esky with the bills in his hand.

Do you think the meaning of that has any indecent connotation in connection with this character Esky? A. I expect it could have an indecent connotation, yes, if one wished to make one. I don't think it is very amusing, personally. I don't think this whole Esky series is very amusing, but that is not the question you asked.

Q. I don't think there would be any controversy on that between us. But you think this would not have any in- 2775
decent connotation? A. What do you mean by "connotation", Mr. Hassell?

Q. That this does not imply something indecent. A. I think it could be interpreted, just as many other things could be interpreted to be indecent, yes. I think it easily could be interpreted that way, yes.

Q. In a magazine of this sort, read by men, and designed for men, a sophisticated magazine, dealing with such jokes

2776 and cartoons as have been referred to here, you would say that that would be a natural interpretation of this cartoon? A. It would certainly be one very common interpretation, yes.

Q. I see. A. But I don't know that that would affect the sanctity of the home very much. It is rather fantastic.

Q. Now, refer to the August issue, page 10, the Sound and the Fury, which is the letters from readers page. A. Yes.

Q. There is in this first column, the center of the column, under the heading "Considered Opinion", the following:

"In your May issue (this year, too!), page 93, the article
2777 entitled Broadway for the Boys (italicized). It is said '20 per cent don't (italicized), 20 per cent do (italicized), and 60 per cent might (italicized).' While in no way representing the opinion of the Navy Department, it is the considered opinion of this patrol squadron that 20 per cent don't (italicized), 20 per cent do (italicized), and 60 per cent don't get the opportunity (italicized)."

"Now, you guess which category we fall in."

Doctor, what do you think that has reference to? A. Well, having read the Broadway for the Boys article—where was that—in May?

Q. Yes, the May issue, 1943, page 93. A. I assume that
2778 it refers to the kind of thing that apparently has been discussed in this hygiene class as portrayed in the play, and when I remember my college days, the discussion in those hygiene classes—I think it was very ineptly done—but a part of the discussion was definitely related to the undesirability of sex relationships before marriage from the standpoint of the possibility of contracting venereal diseases.

I think that some such discussion is now disseminated as a part of the whole picture with soldiers.

Q. Do you think, Doctor, it is entirely desirable to divide the Army—no, it is the Navy—on the basis it is attempted to be divided here, 20 per cent do, 20 per cent don't, and 60 per cent might, because they don't get the opportunity? A. Well, I don't know how one could determine the validity of these statistics. I think almost any of us would recognize that at the present time there are a good many individuals in the Navy who probably are not virgins, and who have had sex relationships, and it is dealing with a factual situation, I suppose. But I can't say anything about the validity of these statistics. 2779

Q. I wasn't asking you that. A. You were asking if it was proper to discuss it? 2780

Q. I was asking whether you think it is a perfectly proper subject of a discussion in a magazine which is not a scientific magazine—it isn't a scientific magazine, is it? A. No, it is not.

Q. In a sophisticated man's magazine. A. I would think that in a sophisticated man's magazine it is perfectly proper to recognize the fact that men in the armed forces, as well as out of the armed forces, do have illicit sex relationships. It doesn't set standards. I don't see how those dry figures would encourage anyone who otherwise was not ready—who was not looking for sex experience—I can't see how that would encourage or in any way motivate, but that is a matter of opinion, again. It is an honest one, however. 2781

Q. Refer to the picture at page 89 in this August issue, Doctor, please. A. Yes.

Q. This is the paste-your-face-here picture. A. Yes. It is one of the series of what—two or three others.

Q. Who told you that? A. I looked through the magazines. I had all the magazines.

2782 Q. What has this got to do with any other picture? A. It is the same kind of method that is being used, of putting a picture of one's face into a situation, as far as I can see, to boast or show off before friends in what obviously is a situation that one can boast about.

Q. Do you think the fact that this is one of a series of pictures in which men are supposed to paste their faces or pictures of their faces, affects the character as far as decency is concerned, of this picture? A. No, I don't believe it makes any difference.

I would be perfectly willing to give my opinion on this
2783 picture by itself without reference to the others.

Q. But you did consider it in connection with the others, did you not? A. I saw the others, yes, as I read through the magazine. The others, as I remember, were not specified and I only remember one of the others—I am not sure there were three—but I remember one of the others in which there were a couple of girls on a bench. I am not clear about it.

Q. You didn't have in mind that you wanted to bring in here arguments on behalf of the decency of this picture by referring to the others? A. No, not particularly. It was a type of picture which was rather different than any other
2784 pictures that appeared because it suggests that they be used for the type of purpose for which they appear, and I have already given my understanding.

Q. Do you think it is entirely proper and desirable among young people to encourage postures and attitudes of this sort, a young woman astride the shoulders of a young man? A. It is a very common thing to see at any of the beach resorts and it depends entirely upon the attitudes of the individuals involved as to whether it is improper or indecent, in my opinion.

Q. In this instance, if a young man reader of this magazine would have his picture taken in exactly that size, the face, and should paste it there and put it up, do you think that would be without any indecent connotation at all? A. For me it would be without any indecent or obscene connotation. I can point out many situations in which things that you and I would not consider indecent by other people are considered indecent, depending on their whole attitude and background and whether they had a different attitude about some of these things because of unconsidered and unwise attitudes in their own homes. 2785

Q. Why would you think such a young man would want to go to the trouble of having his picture, a picture of his face exactly the same size as that blanked out white space, made and go to the trouble of pasting this thing here? Why would you think he would want to do that? A. I wouldn't read into his motives anything obscene. I think we have other evidences of a similar kind of thing. You go to Coney Island or some other place and fit yourself into a cowboy costume and have your picture taken that way. Of course, if you wish to read something obscene in it is perfectly possible, just as it is possible to read into it a good many other things. 2786

Q. In this instance it is a photograph of a young lady. A. Yes. 2787

Q. And she is pictured there in colors? A. Yes.

Q. And she would be a stranger to probably most of the 700,000 men or people who get this magazine and buy it? A. Yes.

Q. Why should anybody or any young man want to paste his face in a place of that sort and have her seated on his shoulders in that way; an utterly strange woman? A. Well, for the same reason that many of our photographers as I

2788 understand it, around places where there is a big concentration of military forces, have young women there, not for any immoral purposes, but to have a soldier or a sailor have his picture taken with her. I suppose it is one of the foibles of human nature which just want to impress somebody with how able he is to develop a friendship with a good-looking woman of the opposite sex. I don't think that is misjudging things; I think it is a fair interpretation.

Now, if you want to build up a dirty picture you could do it, or anyone can do it if it was necessary.

Q. Now, if this picture that is shown here were instead
2789 the picture of a well-known movie actress would you think that would have a different bearing on it? A. No. I don't see what you have in mind.

Q. Are you a close observer, Doctor, that is, as to reading, do you think of things quickly? In this instance the legend there on the blanked out spaces says "Paste your face, face here", doesn't it? A. Yes.

Q. It doesn't say paste your picture here? A. No.

Q. Didn't that occur to you before? A. No. I have been fortunate enough not to be impelled by my background and experience to find dirty meanings in everything I read. Not that I am not human enough to see the possibility at
2790 times, but I don't go around looking for it. I don't think most people do.

Mr. Hassell: Could we adjourn here?

Chairman Myers: Yes. We will adjourn until one-thirty.

(Whereupon, at 12:00 o'clock noon, the hearing was adjourned until 1:30 o'clock p. m.)

AFTERNOON SESSION

2791

(The hearing was resumed, pursuant to the adjournment, at 1:30 o'clock p. m.)

Chairman Myers: All right, we will resume.

ERNEST OSBORNE resumed the stand and testified further as follows:

Cross Examination by Mr. Hassell (Continued):

2792

Q. Doctor, will you refer to page 105 of the August issue of Esquire? A. August?

Q. Yes.

Do you think that cartoon in the lower right hand corner has any objectionable sexual connotations? A. Did you add the adjective "objectionable"? You did, didn't you?

Q. Yes. A. No.

Q. Will you look at page 65 of the September issue, sir? Do you think that full-page cartoon in colors was designed to portray an off-color joke? A. I think it is in rather poor taste. I wouldn't call it obscene.

2793

Q. Now, look at the Varga girl picture on page 38. A. The same issue?

Q. Yes. A. Yes.

Q. Do you think this young lady is attired so as to conform to all the conventions? A. What conventions?

Q. Of decency? A. You mean for street apparel or home living or stage or what? There are differences, aren't there?

Q. I mean as to having in mind the displaying of this picture. A. I don't quite understand your question.

2794 Q. Strike out what I said before.

Would you say that to all intents and purposes this young lady is totally and entirely nude except for her shoes? A. No, she has on some rather revealing lingerie; no one could deny that.

Q. It doesn't conceal any part of her, as a matter of fact, does it? A. The costume?

Q. Yes. A. Not the costume, apparently.

Q. Now, look at the Varga girl picture at page 43-44 of the September issue? A. September, '43?

Q. October. I beg your pardon. Isn't that young lady's
2795 costume quite revealing? A. Yes, it looks to be the kind of lingerie that I understand—she is obviously not fully dressed.

Q. And the costume you see on the upper portion of her body is apparently transparent, isn't it? A. It is all one costume. There is no differentiation between the two parts, is there?

Q. I see it is all one costume except possibly for her stockings since her legs are not tinted the same color as her arms and chest. A. Yes.

The question you asked me was what?

Q. It is quite transparent? A. Yes, obviously.

2796 Q. Now, Doctor, you defined, I believe, an obscene picture as a picture such as the French picture post cards. A. I made no comment.

Q. You didn't? A. It must be another witness.

Q. Can you tell us or indicate to us just where decency ends and indecency begins in connection with pictures? A. No, because that, I think, is a personal matter and you can't draw a nice line; at least I have never seen it done—by anyone—that could support the position he took. If you are asking whether there is a specific line by which you can

set up certain criteria, I don't believe that is possible, Mr. Hassell. 2797

Perhaps I didn't understand your question.

Q. I think so.

Would you say that nude photographs of men and women, are decent for general distribution? A. That nude photographs of men and women—are you lumping them together in the same picture?

Q. Either way—separately first. A. I wouldn't say that it is necessarily indecent any more than I think some of the pictures in the Metropolitan Museum are indecent because they have no clothes.

My answer is that nudity in and of itself is not indecent. 2798

Q. Do you accept the philosophy of the nudists that the commingling of the sexes in the nude— A. Do I accept that philosophy?

Q. Yes. A. No. If I understand the philosophy—I am not sure I do—it seems to me it would be a very uncomfortable kind of procedure.

Q. Can you draw the line between decency and indecency in jokes relating to sex? A. For myself, yes. I wouldn't attempt to draw it for you or for another person. Again, I think that is a relative matter and it depends to a considerable extent on whether there is humor.

There are so-called jokes that are without humor whose obvious purpose is to gloat over certain attitudes and ideas that some people who, for my point of view, have a perverted point of view, have. 2799

Q. The opinions you have expressed here are your own opinions? A. Yes, sir; as much as any man's opinions are his own opinions. They are formed from my reading and contacts with other people, and out of my personal backgrounds which have been fairly respectable.

2800 Q. You don't contend that the opinions you have expressed here with respect to these matters represent the general opinion of the American public, do you? A. I don't see how anyone can pretend to speak for the general public of America. I think you can indicate that certain sectors of American life have certain ideas, but I would be rather brash to indicate I can speak for the general public.

Q. Doctor, as a general rule, do pupils confide in their teachers as to things which impel them to commit so-called secret vices? A. I don't get the question, I am afraid.

Q. Is it a common and ordinary and usual thing for a
2801 pupil at the age of puberty, or a young man in the period after puberty, to confide in his college professor or his high school teacher or his grammar school teacher as to the effect that things of this sort have on him, or her, in a sexual way? A. No, I think unfortunately not. The American teachers today have not built, for a variety of reasons into which I would be glad to go if deemed necessary or valuable to you—have not built up the kind of consulting relationship with the young people that they work with that is devoutly to be desired.

They don't confide in teachers because they show so little understanding in their attitudes and relationships. I am
2802 looking forward to the time when the attitude will be in the affirmative, as it is in some instances. In the good teachers that is so.

Q. The "Dog's Worst Friend," the verse or doggerel—A. Yes.

Q. In the April issue of Esquire, page 141, can that be properly characterized as coarse writing? A. Coarse writing?

Q. Yes. A. Not for me. I think it has an element of humor in it. It is not very pleasant, but it is one other illustration of making the punishment fit the crime in a rather direct kind of way.

Q. Would you say that verse, or whatever it may be called, could be characterized— A. Doggerel may be? 2803

Q. As filthy? A. As filthy?

Q. Yes. A. No, I don't believe that it is filthy.

Q. You recall "The Savage Beast In Us," at page 32 of the May, Esquire? A. Is that Paul Gallico?

Q. It has to do with burlesque. A. Oh, yes, that is Paul Gallico.

Q. And the illustrations throughout the article? A. Yes, I remember it.

Q. Would you say that the illustrations in this article could properly be characterized as disgusting. A. Disgusting? 2804

Q. Yes. A. I don't think the women are particularly good looking, if that is what you mean. They are not disgusting. The feeling I got was that of sympathy. I don't think they are disgusting. I don't see that they are drawn clearly enough or definitely enough to be disgusting. I don't think they are very good looking women, from my point of view. Now, others may have a different opinion.

Q. Would you think they are disgusting when taken in connection with the textual matter and the article describing in some detail what the bump is, and the other movements of burlesque and strip tease? A. No. I say that article and one other that is cited is not disgusting: the Court of Lost Ladies is a type or an example of the thing I discussed this 2805 morning. That it is a pretty factual kind of description. I imagine there are a good many people who would think I am being captious, but I am not at all. It has a certain moral tone to me; it doesn't excite me. After reading that article I didn't get excited enough to go to a burlesque show as would a low or moronic type of person that is sexually titillated.

Q. After reading that article did you have such thoughts

2806 as you did before reading it? A. No, I had somewhat the same opinion. It just substantiated my opinion and it was done very effectively by Mr. Gallico, I thought.

Q. As a matter of fact, it didn't change your opinion at all, did it, Doctor? A. It confirmed it, it didn't change it. I am fairly mature in years and I have established certain opinions which are open to modification, but being in the field I am if I hadn't come to some opinion on the place of burlesque in American life I would be derelict.

Q. Do you think it would change the opinion of any so-called burlesque fan, or reader, after seeing this article
2807 in Esquire? A. I think it is quite possible, yes. I think it gives a certain perspective to the thing. Again I am speaking hypothetically. I haven't inquired or asked anybody whom I knew was a burlesque fan whether it acted as a dose of cold water on them, but it seems to me it would have that effect; it doesn't seem to me to be exciting or interesting.

Q. Do you recall the story or article "Home Sweet Ruby Street" on page 77 of the February issue? A. Yes.

Q. Dealing with Harlem? A. Yes.

Q. Would you agree that that story is sordid and in bad taste? A. That depends upon your point of view again, Mr. Hassell. I am a member of a local selective service board
2808 which has a good many Negroes,—about half of our registrants are Negro registrants, and I am working with a social service group in Harlem.

I am sure that what is described there is not described as being desirable, but I think it is a fairly accurate picture of some of the relationships that exist in Harlem. It has an economic and sociological background entirely. I can't help but feel that that story was not written to develop anything like a feeling for an undesirable thing; no, I think it is a sociological article and pretty well done,—fictional, of course.

Q. You have in mind the cartoon on the second page of that article, or story? A. The illustrations? 2809

Q. Yes. A. Yes.

Q. Showing Mrs. Finn, the supposed-to-be social worker, seated in the room at the time the young colored people or man and woman get out of bed and dress in front of her? A. They have gone through that part of that already, as far as the picture is concerned; they are not unclad.

Q. They are in the process of dressing, aren't they? A. Yes.

Q. There is a reference to Radiant, the young Negro man or character in the process of dressing, giving a slow wink to Mrs. Finn as he catches her wandering eye? A. Yes. 2810

Q. You say you think that is the usual customary scene in Negro homes in Harlem? A. Well, I wouldn't have been present in enough to make a generalization of that sort, no, but I think it is quite in character with many individuals that you find in such a group.

Q. Would you characterize this article, or story, as uplifting? A. No, not particularly. I don't assume that the editor is entirely in the business of being a moral uplifter.

Q. You don't understand that to be the function of this magazine, do you? A. I wouldn't say it was the primary function. As I have already pointed out, I think in some instances, —I don't know whether constantly or not,—it has been done with that purpose, but I wouldn't think it was or would be the primary objective that Mr. Gingrich would have. I haven't discussed his philosophy with him. 2811

Q. Doctor, you referred previously to having conferred with a United States District Attorney in New York. A. That is right.

Q. With respect to some pictures. A. That is right.

Q. Of nudes? A. That is right.

Q. Do you recall the name of the defendant or the individual involved? A. No, I don't.

2812 Q. Can you otherwise identify the case? A. No. The only thing I remember is that this man had advertised, as I suppose many of them do, in certain publications saying that there would be sent by mail pictures that would be helpful in the field of sex education, but I don't know whether I could be sure if his name was mentioned. That was some four or five years ago.

John Cahill was the attorney. I remember the pictures fairly well. I also read a book of the kind that dealt with certain forms of female perversion and was asked to give an opinion on that, which I was willing to do.

2813 Q. Have you ever appeared and testified in any court, federal, local, or state, as an expert on obscenity? A. No, not as an expert on obscenity.

Q. Have you ever appeared and testified in any court, federal, state, or local, as an expert on obscenity? A. As an expert on obscenity?

Q. Yes. A. I don't know as I have ever been characterized as that. I have testified on one other occasion, some years ago, in a suit brought in Bronx County by the District Attorney, on a picture, stills from the moving picture "Birth of a Baby." That is the only other occasion.

Q. Was a question involved in that case as to whether the
2814 pictures were scientific or artistic or what? A. The point the prosecution was trying to make was that they were obscene, as I remember it, and I don't believe that there was any question raised as to their scientific validity—at least not when I was cross-examined.

Q. Did you testify for the defense or for the prosecution? A. For the defense in that instance, with a completely good conscience, and without fee.

Mr. Hassell: I see. That is all.

Redirect Examination by Mr. Bromley:

2815

Q. Even though Esquire is designed for adults, you find nothing in the magazine which in your opinion would morally hurt or be detrimental to any class of persons in any age group in this country? A. No, I couldn't answer that in the affirmative because you didn't include the phrase "any normal person," which I think must be included because there are individuals whose whole background has been so warped that it takes very little to set them off.

A fully clothed woman can be an exciting thing to them, but so far as what we would roughly call a normal individual, I would answer in the affirmative.

2816

Q. You say you would answer in the affirmative? A. I am sorry. How did you ask the question?

Q. It ended up with, "You would not find anything in the magazine which would morally hurt— A. No. It should be answered that way. I am sorry.

Q. Coming to the "Esky" picture strip in the July issue— A. That is the one with the mermaids?

Q. That is the one with the mermaids. Does the fact that the textual material contains the question, "I have often wondered about mermaids," and the answer, "I wouldn't know," in your opinion render the strip, or any part of it, obscene or indecent? A. I think not, no. It could be interpreted obviously by a person who wished to interpret it, or whose job it was to look for dirty meanings—it could be interpreted that way, but I see nothing objectionable about it.

2817

Q. Do you think of any worse interpretation than that the question was intended to mean he wondered how mermaids had babies or how they had intercourse? A. That would be the worst interpretation, in my opinion.

2818 Q. The fact that that interpretation could be placed upon those sentences by a reader would not render the reference indecent or obscene, in your opinion, would it? A. Not as far as my standards of decency are concerned.

Q. Referring to the August issue, the "Paste-Your-Face Here" cartoon, do you think that the inference which I understood counsel to draw when he emphasized the word "face" in "Paste-Your-Face Here" is to any extent negatived by the textual reference contained on the opposite page in which it is stated in the second column "To be a Don Juan for a day you need only to paste your own likeness
2819 in the indicated blank space." A. It seems to me that that kind of a statement would make it a little more difficult for a dirty-minded individual to think that the only reason for the picture is to get some perverted meaning from it. Is that your question?

Q. That is right.

Do you think any normal person would ever come to the conclusion that what was intended was cut out the picture of his face and paste it face down on the picture? A. That is a little hard for me to conceive. I have a different attitude towards human nature than that.

Q. Do you think that the textual reference further down
2820 on page 88 to the effect: "What you eventually decide to do with the seascape is your own problem. If you go in for whimsy you might air mail it to your family and tell them you are engaged"—do you think that to some extent negatives any possible dirty implication from the legend on the picture? A. Yes, I think that is a reasonable supposition.

Q. You would not consider it to be an unreasonable or exaggerated interpretation for the publisher of this picture to think that service men might like, as a joke, to paste

their pictures here and send it to their families and say "Look at the gal I became engaged to"? A. That is the point I tried to make this morning, only a little different approach. 2821

Q. Did you read in the October number the article "Wise Men Pick Pyknic girls"? A. Yes, I did.

Q. What is your opinion of that article? A. From the standpoint of its scientific validity or its tendency to arouse indecent, obscene, lewd, or lascivious thoughts?

Q. The latter standpoint. A. The latter?

Q. Yes. A. I didn't see how it could possibly do that.

Mr. Bromley: That is all. 2822

Recross Examination by Mr. Hassell:

Q. Doctor, will you define this normal individual we have been talking about? A. Normal individual?

Q. Yes. A. Again, Mr. Hassell, I think that is a somewhat difficult explanation to give, but I think most of us would agree that while there is a considerable range of normality, the individual who can meet life's experiences of all kinds, psychological, social, and personal, and adjust to them and live with them in such a way as to maintain a fairly objective happy kind of life, who does not have to 2823
concentrate so extremely on one phase or another that he becomes off-balance, would be a definition of normality. It would have some proximation or reaching toward it.

I realize that isn't very precise, but I would be glad if you want to question me in detail.

Q. What age would this normal individual be? A. I think that would be true from the first year of life right through, a developmental thing. I think there are some

2824 two-year-olds whose family attitudes have perhaps some other environmental factors who have begun to develop the beginnings of abnormality, but I don't think you can give one description for all age groups.

Q. Do you think the same thing that would excite an 18 or 20-year old would be calculated to excite a mature man 50 or 60? A. No, I would assume that as one lives through his life he would develop somewhat different attitudes and different points of view.

One that might take us back to this business of normality —it seems to me one can accurately say that an individual
2825 who carries over into his mature middle life some of the same immature, infantile attitudes that he has gotten out of his experiences, might be called somewhat abnormal. I know a number of mature persons who are still rather infantile in their attitudes toward many things, not only in this thing but in others.

I think there is a broadening of perspective—I don't want to sound too much as though I'm in the class room—

Q. Is there a difference with respect to these normal individuals, growing out of the sex of the individual? A. Would you make that more explicit, please? I don't quite get the implication.

2826 Q. Is there a difference between the male and the female sex— A. I think there are certain obvious differences.

Q. As to how they are affected by matter such as that we have been talking about? A. I think there probably is, Mr. Hassell. Males and females are really subjected to different experiences in a variety of ways and that is a long story.

Girls are supposed to be nicer, more restrained, and so forth, more modest or more neat, less aggressive. We set up some very artificial expectations and some natural ones.

I think there is a difference in masculine and feminine psychology. 2827

Q. Yes. What might be indecent or filthy to a female might not to a male of the same age? A. That is right except that I wouldn't make so much a point of the sex differences as of the individual differences, that is, between person and person rather than between men and women.

But I think there are certain basic background experiences that tend to take women on the average—which is a very loose way of saying the thing—to a different attitude.

But that is a theoretical differentiation. There are so many differences between individuals, whatever their sex, that that is the important thing. 2828

Q. Can you divide the population on the basis of normality, say 95 percent are normal and 5 percent are abnormal, or something of that sort, or vice versa? A. I would hesitate to make any generalization in terms of a numerical statement. I would say the great majority are normal.

Q. You wouldn't undertake to divide the 700,000 readers of Esquire on that basis either, would you? A. I would have no statistical data at all. My only answer to that question would be based on the kind of people that I know who read it, the kinds of places in which it is found.

Again, that is from a very limited personal experience. I don't know what the statistical data is which I am sure the magazine has or has collected for purposes of this hearing. 2829

Mr. Hassell: That is all.

Mr. Bromley: That is all.

(Witness excused.)

2830 Chairman Myers: Call your next witness.
Mr. Bromley: Mr. Bristol.

Whereupon,

LEE HASTINGS BRISTOL, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Bromley:

2831 Q. Will you give us your full name, please, sir? A. Lee Hastings Bristol.

Q. And you reside where? A. Westfield, New Jersey.

Q. What is your business, Mr. Bristol? A. Manufacturer, Bristol-Myers Company.

Q. And what kind of company is that? A. Manufacturers of medicines and toilet articles.

Q. Will you give us some of the better known products produced by your company? A. Ipana toothpaste, Sal Hepatica, Vitalis, Mum, Double-Duty Tooth Brush, Minute Rub, Touche, Ingram's Shaving Cream. That's about the list.

2832 Q. And what position do you occupy with the Bristol-Myers Company? A. I am vice-president.

Q. For how long a time have you been connected with that company? A. For 20 years.

Q. Can you tell us something of your business experience and background, Mr. Bristol? A. It would largely be concerned with the responsibility for the public relations and the advertising, promotion of the products.

Q. Have you had any business experience in connection with any other company or field of activity? A. Yes. I

have served for two years as president of the Association of National Advertisers. I am currently a director of the 2833
Advertising Research Foundation. Those are the two active organizations or associations at one time or another.

Q. What is the nature of each of those organizations? A. The Association of National Advertisers is a group of those manufacturers who advertise and who in the association concern themselves with matters having to do with public promulgation and use of advertisements and protecting their collective interests.

Q. Does the Bristol-Myers Company advertise its products nationally? A. They do.

Q. For how long a period have they done so? A. Since 2834
1921.

Q. What do they spend a year, about, in national advertising? A. About $5,000,000, a little in excess of that.

Q. Are you married, sir? A. I am.

Q. Have you children? A. I have two.

Q. What are they? A. Two boys; men, I should say.

Q. How old are they now? A. One is 20 and one is 26.

Q. Are they in the service? A. They are, both of them.

Q. At my request, have you looked at the matter which I told you has been complained of in the eleven issues of Esquire? A. I have.

Q. In your opinion, is there anything obscene, indecent, 2835
lewd, lascivious or filthy about any of the Varga drawings or verses which accompany them in any of those issues?

Mr. Hassell: I object. The same objection I made before.

The Witness: Overruled?

Chairman Myers: Yes.

The Witness: No.

2836 ***By Mr. Bromley:***

Q. Have you read the textual material, the articles, and the armed services jokes? A. Yes, I have.

Q. What would your opinion be to the same question with respect to them? A. The same.

Q. Have you looked at the Sultan cartoons in these eleven issues, Mr. Bristol? A. Yes.

Q. What would your answer be to the same question with respect to them? A. Amusing, not obscene.

Q. Have you found anything, Mr. Bristol, in any of the
2837 eleven issues to which your attention has been called as having been complained of which, in your opinion, is obscene, indecent, lewd, lascivious or filthy? A. No.

Q. Does your company advertise in magazines and newspapers generally? A. It does.

Q. About how many magazines and periodicals do you use? A. We use a list for different products of probably 50, 50 different magazines.

Q. Do you use Esquire? A. We do.

Q. For how long a time have you used it? A. My recollection would be about five years.

Q. Before you place advertising in a magazine or periodi-
2838 cal, do you make any investigation as to its standing or reputation? A. We do. We don't buy casually.

Q. What standard do you operate under in the selection of magazines as advertising media? A. Well, primarily, we are jealous of the type of company we keep, both as to advertising and as to the editorial content. The character of the magazine as reflected through its appeal has a bearing on our willingness or unwillingness to select it for use.

Q. Have you ever believed that Esquire has ever been of such a character as to reflect upon your company or its products?

Mr. Hassell: I object, Mr. Chairman.

Chairman Myers: Yes, expressing a belief would not be competent evidence. 2839

Mr. Bromley: I will withdraw it.

By Mr. Bromley:

Q. What can you tell us about the general reputation of Esquire so far as it has one?

Mr. Hassell: I object to testimony as to general reputation.

Chairman Myers: That is one of the issues here, as I understand it. Objection overruled. 2840

The Witness: Well, we make our selection based on the type of audience that we believe it reaches, the character of that audience, its circulation, and their receptivity to our advertising appeal. In the case of Esquire, which I assume you asked for specifically, we felt it had a quality of modernity, a freshness and alertness that made it a desirable audience to reach with anything where the appeal was based on modernity and up-to-dateness.

By Mr. Bromley: 2841

Q. Would you say that it had a reputation as a hush-hush magazine in any sense of the word? A. I believe not, because we would not advertise in it if we did think so.

Q. Do you think it has a reputation as a risque magazine? A. No. I am not certain of my definition of risque, frankly.

Q. Well, do you think it has a reputation as a spicy magazine? A. No.

2842 Q. From your knowledge of it, would you say that it customarily and regularly carried articles of an informative nature and fiction, both of which are of a high class? A. A great deal of it.

Q. Do you subscribe to it? A. I do.

Q. For how long a time have you had it in your house, Mr. Bristol? A. Since its inception, I believe.

Q. Have you ever had any complaints from any of your customers about the fact that you regularly used it as an advertising medium? A. No, indeed.

2843 Mr. Bromley: That is all.

Cross Examination by Mr. Hassell:

Q. Now, is the address of your concern carried in the advertising that you place in Esquire? A. It varies in some of our advertisements. I think in a majority of cases I believe it is.

Q. So that a person reading your advertisement in Esquire would not know where to write to if he wanted to, would he? A. Oh, I am sure he could. He could at least get it from the package or the product.

Q. Would you say that Esquire has the reputation of
2844 being a sophisticated magazine? A. Yes.

Q. But not spicy? A. Yes, I should say so.

Q. If letters from readers of Esquire reproduced within the columns of the magazine itself characterize Esquire as being spicy, you would disagree with them, wouldn't you? A. Well, there is only one such letter, isn't there? I wouldn't call it letters.

Mr. Hassell: Well, one letter.

Mr. Bromley: It makes a lot of difference.

By Mr. Hassell:

2845

Q. A letter which was published by the publisher. A. I should not consider as little evidence as that as conclusive.

Q. Why would you think the publisher would publish it if he though it was a calumny or reflection on his magazine, sir? A. It is a hypothetical situation, because I don't recall the specific letter in the situation.

Q. Mr. Bristol, do you set yourself up as an expert on obscenity or lewdness, sir, or lasciviousness and filth? A. Probably only in an indirect way, that anyone advertising to a mass market is pretty jealous of his reputation and where he advertises and what he advertises.

2846

Q. The opinion you have expressed here with respect to the matter generally in Esquire and the particular material called attention to in this case is solely your own opinion, is it not? A. Oh, yes, sir.

Q. And others might disagree with you, might they not? A. Oh, they could. I think I have a sense of a fairly broad group feeling, but, after all, it is only my own opinion.

Q. They would be entitled to their opinion, would they not? A. Indeed they would, sir.

Q. Do you agree, Mr. Bristol, that the family is the foundation of our social system? A. I do.

2847

Q. You think jokes questioning or dealing flippantly with the sex relations in marriage are entirely decent? A. I would ask you, if you don't mind, sir, to just define it a wee bit further, to clarify me on that. Then I think I could answer you.

Q. For instance, a joke that would imply that a perfectly respectable married man with a reputation in his community for morality would get into bed in a Pullman berth

2848 with a luscious blonde, a joke on that scene. Would you say that is entirely decent? A. It would depend, in my mind, on, frankly, the casualness or the flippancy with which it was treated and whether or not the person so seeing it was able to treat it in the lightness with which it might be presented.

Q. You recall the joke or alleged joke that I refer to? A. I would have to refresh myself on that, sir. Could you identify it for me?

Mr. Bromley: Here (handing magazine in question to witness).

2849 The Witness: My feeling is that it could not be read with a thought or imputation of it being a practice nor one to be encouraged in any sense. That is the reason I would accept it in the lighter way in which it was presented; personally, that is my own opinion.

By Mr. Hassell:

Q. You don't think that deals with illicit sex relations in a flippant manner? A. I don't feel it deals with that relationship unless by inference.

2850 Q. Would you say that the words "behind," "ass," and "son-of-a-bitch" are current in ordinary polite society, Mr. Bristol? A. I would question it.

Q. You would question that very much, wouldn't you? A. It is the vernacular but probably not very currently used. It has vulgarity.

Q. In decent, polite society? A. I have heard it used in a quoted way, in what I thought was very polite society, but it was only a quoted way, it was not used directly.

Q. Do you recall the instances in which those words are used or one of them is imputed in this magazine? A. I don't think I recall it, sir. 2851

Q. How much time did you spend reading this magazine in preparation for your testimony here? A. I saw the points pointed out, marked as indicated here, and read those. I had previously seen in the course of each of those issues as I had passed through them lightly. They had not impressed themselves upon me at the time.

Q. You didn't spend very much time going over this material to make up your mind before you testified, did you? A. Yes. I have an over-all opinion and was quite sincere about it. 2852

Q. I am not imputing something you did, but I am asking you whether you spent very much time in reading this material and giving thought to the cartoons and the pictures. A. Frankly, no, sir, because my treatment of all this in the humor form is that it does not invite analysis. The humor is gone if you try to dissect it. It is like a story that is broken down into too fine a refinement.

Q. Do you recall the full page color cartoon showing the milk delivery woman, rather buxom, at the back door, and a man in an apron? A. I know the one you mean.

Q. Which states or tells her to come back later when the wife has gone to the factory. A. I do. 2853

Q. Do you think that is dealing in a rather flippant manner with marital fidelity, so called? A. I didn't analyze it in that way. I thought of it in terms of the flippancy of the story, the exaggeration of a scene. I think fundamentally it is an old joke. It has been reversed for modern consumption. I don't think it is very original.

Q. A good many of these jokes are corny, aren't they? A. I suspect quite a few.

2854 Q. You would not say, however, that that would in every instance remove their objectionable character if that was so, would you? A. Oh, I expect our own folk stories by repetition have lost their old kick.

Q. Do you recall the full page color cartoon in one of these issues of Esquire showing what appears to be the wife with a rather fulsome bosom, seated in the lap of the red-haired fuel oil man, dressed in overalls, and a cocktail table in front of them and cocktail glasses? It is the October issue, page 49. A. Yes.

Q. Do you think this is dealing in a rather flippant 2855 manner with the marital ties? A. I think it is more a travesty on the scarcity of skilled labor, personally.

Q. You are speaking now of the point of view of an employer, Mr. Bristol? A. I should say so.

Mr. Hassell: That is all.

Mr. Bromley: That is all.

(Witness excused.)

Chairman Myers: Call the next witness.

Whereupon,

2856

EDITH B. COOK, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Bromley:

Q. Will you give us your full name, please, Mrs. Cook? A. Edith B. Cook.

Q. You live where? A. In New Haven, Connecticut.

Q. Are you married and have you a family? A. I am married and have one daughter 12 years of age. 2857

Q. Now, will you tell us what connection you have with any public welfare or children's associations, please? A. I am the executive secretary of the Connecticut State Welfare Association and I am at present the chairman of the Committee on Children and Youth in Wartime of the Connecticut War Council.

Q. Will you tell us the function of the Connecticut Child Welfare Association, please? A. That is an organization composed of a large number of citizens of the State which does educational and research work in the field of uncared for, neglected, and delinquent children. The organization was the chief factor in establishing the State Juvenile Court a few years ago, and we have done considerable work in cases of delinquency, and so on. 2858

Q. For how long a time have you been connected with that organization, please? A. For over ten years.

Q. Does the Committee on Children and Youth in Wartime advise communities in your locality concerning children? A. Yes. The chief interest of the committee at present is in a prevention-of-delinquency program and we are engaged in planning for a conference which we hope will help the community in a campaign for the prevention of delinquency, particularly in the teen age group. 2859

Q. Do you have any connection with any State hospital for the insane? A. I am the chairman of the board of directors of the Norwich State Hospital, which is one of the three State hospitals for such.

Q. That is located in Norwich, Connecticut? A. Yes.

Q. It is a State institution? A. It is a State institution.

Q. For the care of the insane? A. Yes.

2860 Q. Have you any connection with the Connecticut League of Women Voters? A. Well, I was for four years, until about two years ago, the president of the Connecticut League for Women Voters and I am now the vice-president.

Q. Are you a subscriber to the magazine Esquire? A. No, I am not.

Q. Has it ever been in your home, so far as you know, Mrs. Cook? A. Yes, I have seen it, but I saw it off and on and I see it in the homes of friends and in my sister-in-law's home.

2861 Q. Now, have you at my request made an examination of the material contained in the eleven issues of Esquire for 1943 which has been specifically pointed out to you as having been complained of by the Post Office Department? A. Yes, I have.

Q. And have you with some particularity looked at the Varga girl drawings and their accompanying verses? A. Yes, I have.

Q. Would you tell this Board, please, whether in your opinion you have found anything obscene, lewd, lascivious, or indecent about the Varga girl drawings or accompanying verses? A. I have not.

2862 Mr. Hassell: I object.

Chairman Myers: Objection overruled.

By Mr. Bromley:

Q. Would you care to give us the basis or the reasons for your opinion, Mrs. Cook? A. I think they are very attractive pictures and I see nothing at all that would upset the morals of any people who looked at them.

Q. Have you also at my request read such articles and

pieces of fiction as "The Court of Lost Ladies", for instance? 2863
A. Yes, I have.

Q. Will you tell us your opinion about that article particularly? A. Well, that particular article, of course, I think is a very excellent piece of reporting on a night court. I think it is almost like a Greek tragedy.

I think it is not only not offensive but personally I wish it could be published in a pamphlet because I think it is the best lecture on social hygiene that I have ever read.

Q. Do you see any objection to its circulation in a magazine which is read generally or is available generally to all classes of our society in this nation? A. Not at all. 2864

Q. Did you read Mr. Paul Gallico's article on burlesque entitled "The Savage Beast In Us"? A. Yes, I did.

Q. In your opinion, is there anything obscene or detrimental about that article or the illustrations which accompany it? A. No, I don't think so.

Q. Did you read the piece of fiction, the story entitled "Portrait Above the Fireplace"? A. Yes.

Q. Did you find anything obscene, lewd, lascivious or filthy or indecent about that? A. No, I did not.

Q. Did you find anything which you considered to be detrimental to the morals of any class of society in George Jean Nathan's theatrical column, and especially where he 2865
referred twice, I believe, either to a "St. Louis sporting house" or "bawdy house"? A. I didn't get the beginning of your question.

Q. Do you remember those two references? A. Yes.

Q. In your opinion, is there anything obscene or indecent in the use of such words by Mr. Nathan in that article? A. Why, no.

Q. Did you look at the series of four, I believe, Sultan cartoons which depict in various phases the sale, loan or

2866 dealing in women as related to some current American phrase or idea? A. Yes, I did.

Q. In your opinion, is there anything obscene or indecent about those cartoons or their sub-titles? A. No.

Q. Did you read the two-page spread entitled "Gold bricking with Esquire", in which excerpts from Army service men's camp papers are reproduced? A. Yes, I did.

Q. Did you find anything obscene or indecent in any of those jokes? A. No.

Q. Let me ask you generally whether following your consideration of all of the material which has been objected to

2867 in this magazine, you found any of it which in your opinion was obscene, lewd, lascivious, filthy or indecent? A. No, I did not.

Q. Do you think there is any part of it which would have a tendency to corrupt the morals of the youth of this nation? A. No.

Q. Or lower their standards of right and wrong with relation to sexual matters? A. No. I shouldn't be here if I did.

Mr. Bromley: That is all.

Cross Examination by Mr. Hassell:

2868

Q. Mrs. Cook, do you think you are an expert on obscenity, indecency, filthy and lascivious matter? A. I think I am a normal ordinary person and I think I have had considerable experience with young people and with young people who became delinquent, and to that extent I think that I would be an expert in knowing what was obscene, that is, in knowing what would affect their morals, because I am particularly interested in that.

Q. Do the young people who become delinquent confide fully and truthfully to you as to what induced them to be delinquent? Is that what you mean? A. I have done a good deal of studying on the subject, and I believe, therefore, that I am an expert in that sense. 2869

Q. Have you examined a great deal of questionable matter, printed matter, pictures, and so forth? A. Oh, I have examined some. I have examined the magazines that the high school youngsters read, at least that are available for them.

Mr. Hassell: Mr. Chairman, I have to confess that I am perhaps rather provincial, or I don't know what you call it, but I feel a delicacy in questioning a woman about this matter involved in this case. 2870

Of course, there have been women present when I have been examining men, but in view of the broad general answers to the questions that she has submitted here I guess I have no other alternative.

I want the record to show that I approach the task with a great deal of embarrassment.

By Mr. Hassell:

Q. Now, let's take the January issue of Esquire, please. 2871

On the editorial page, page 6, boxed in, there is the title "Shor Nuff".

In the first paragraph of this material it is stated:

"Esquire, the four bit magazine which is always busy as a little beaver sandwiching good advice between its spicy cartoons, comes up this month with a male Dorothy Dix who tells you how to pick a war bride."

2872 Would you agree with the statement of the writer of this article that Esquire is always as busy as a little beaver sandwiching good advice between its spicy cartoons? A. Well, I think there is a good deal of material in Esquire, as I have looked over it recently, that is not spicy as they indicate here. At the same time, there are cartoons and jokes which might be called a little coarse, which aren't quite nice, perhaps.

Q. I see. Not quite nice. Would you call those spicy or do you think that is what this writer means by "spicy"? A. I presume it is—perhaps a little coarse.

2873 Q. Going further down in this article, the last paragraph, first column, you will see beginning in the fifth line of that paragraph:

"Comes it then breeding (no, not that)".

Q. What do you think that means in that article? A. Breeding—I suppose that means intellectual background or something like that.

Q. I see. Going up to the top of the next column, the first full paragraph there, we find:

"The pay-off on what kind of a guy this Woodhead is comes quick. He figures a gal's dancing ability is worth 20 points. Sex he gives 10.

"So he'd rather dance—"

2874 Do you know what that has reference to? A. Why, yes, most anyone would.

Q. What does it have reference to? A. Well, I suppose he would rather dance. He is more interested in dancing than he is in sex.

Q. So the connotation to be derived from that would be that Woodhead was a dead man practically, so far as sex was concerned. Is that correct? A. I hadn't thought of that, but I suppose you could give that connotation to it.

Q. Now, in the item further down in that column, numbered 7, we find: "Juking—a. That's right. Just what you're thinking about . . . 400 points." 2875

Q. What does that mean? A. Well, I suppose it means a good many things that young people do, go out to night clubs and dance. The way it is put here, of course, I think it has some reference to sex also.

Q. Would you characterize this article "Shor Nuff" as ribald humor? A. Well, I think it is a little stupid. It might be amusing enough. It is perhaps a trifle coarse or off color, but after all, one sees that in everything. It is not indecent. 2876

Q. There is nothing in it that is indecent? A. I don't believe so; nothing that I think would affect anyone's morals.

Q. Now, let's refer to page 83. You read this article by Gilbert Seldes? A. Yes, I read it.

Q. Had you seen this show? A. No, I did not.

Q. Star and Garter? A. No.

Q. You haven't seen that? A. No, I have not seen it.

Q. In the first paragraph of this article Seldes refers to Gypsy Rose Lee being a defendant against whose navel Clark finally blows a paper tickler.

Do you think that is an indecent reference, lady? A. No. Of course, everyone knows who Gypsy Rose Lee is if you read the newspapers, and she very likely—it talks about a strip tease here—so it is very likely she hasn't anything on. 2877

Q. If it had been testified heretofore by another person who has appeared here that that is one of the parts of the anatomy that Miss Lee keeps covered, would that change your opinion of this? A. No, I don't see any reason why it should.

2878 Q. Now, in the second paragraph of this article, down below the middle of the paragraph, is this statement and it starts: —the sentence is quite lengthy—it begins "Years ago he did a seduction step around Mary Boland." And going down it says:

"Weaving and winding his frame around tall show girls, peering through his non-existent glasses into the bosoms he isn't tall enough to see unless he jumps."

Do you think that is an indecent description of this article? A. I think it is a bit off-color. I don't particularly care for it myself, but I don't think there is anything in

2879 it that would upset the morals of young people.

Q. The next paragraph, the second sentence:

"Burlesque patrons are single-minded, if that's the right word."

Do you know what that refers to? A. I would suppose that it means that burlesque patrons go to see girls and go to see their legs and things like that.

Q. In other words, single-minded means sex doesn't it? They are interested in sex? A. Not necessarily. It means that they are interested in seeing girl's legs or girl's forms. I suppose in a way that is sex.

Q. Did you ever see a burlesque show, lady? A. I don't

2880 believe so.

Q. Going further down in that paragraph, it says:

"So you have girls stripping to a riotous dance or you have girls stripping not to a dance."

Do you think that is a decent matter to write about? A. I think you see it almost everywhere. Of course, the situation it seems to me is quite different nowadays. When I was young I didn't go to burlesque shows and I was brought up in the Victorian method or manner where everything was kept under cover, and, therefore, it was in a way more seductive than it is now.

The young people today—I know my own child and older boys and girls—are brought up so they knew most everything. 2881

We don't wear as many clothes as we used to. I think it is a good deal better and a purer way to bring them up, and I don't think this kind of stuff or even a burlesque show, perhaps, upsets people's morals as much as it might have.

Q. Are you speaking from your own experience when you say the way you were brought up and the way your child was brought up? A. I know how I was brought up. My mother, who is over 70, said to me the other day: "I think the way I brought you up you were protected too much, and I think the way you are bringing your child up is much better." 2882

In general, we are a great deal franker these days, and, therefore, sex isn't necessarily impure and isn't thought of as impure.

Q. I see. But the point I want to call your attention to in that connection is that so far as you are concerned as compared to your child's upbringing, yours is more proven than your child's because your child is only 12 years old. Isn't that true? A. Perhaps, but I have lived for a good many years and I, therefore, have been able to see both kinds of upbringing. 2883

Q. Going ahead with this article, after the place where I stopped, reading:

"And since this is uptown stuff, you have the odd spectacle of Gypsy Rose Lee stripping awkwardly and self-consciously, which may be a novelty, but isn't very good fun. Certain little gestures as she fluffs the ruffles on her jacket are enticing; but the major part of her strip she does from under the cover of a bouffant dress, working

2884 strings and letting petticoats drop—and down to the planted scream in the audience and the laugh Miss Lee manages every night after the scream—it is just this side of the simple honest denudation she was capable of five years ago."

Do you see any indecency in that detailed description of Miss Lee's act in this burlesque show? A. I don't particularly. I think the whole thing is a little boring and stupid and it attempts apparently—or I think it does—to more or less debunk the burlesque show, which is exactly what I mean.

2885 There is nothing very exciting about it and I think this article attempts to indicate that is so.

Q. Doesn't the article, in fact, refer to very amusing and very entertaining parts of this show? A. Well, it may. I wouldn't say it wouldn't absolutely—

Q. Let's go ahead with it. The first full paragraph in the center column, page 83:

"Between Bobby Clark who appears in a long funny scene wearing flannel drawers and Miss Lee whose specialty is being dressed in three well placed, presumably provocative flowers, you have the essence of burlesque. In this particular show there is also a young slender dancer named

2886 Leticia who does a wonderful trick ballet dance—a trick because it is actually erotic"—

Do you know what that means, lady? A. Yes, I know what that means.

Q. That is sexually stimulating or exciting, isn't it?

". . . whereas so many of the hip grinds are not. There is also a character from the night clubs who makes her breasts jiggle."

Do you think that is an entirely decent matter to be in print? A. I think it is coarse and not in good taste.

Q. "And this is considered funny, but I didn't think so, even at night clubs where her frankness was greater, her skill no more engaging. A stripper who does an orgiastic dance verges on the erotic." 2887

Do you know what "orgiastic dance" is? A. Yes, I suppose so.

Q. Continuing:

"But the entertainment value isn't high. In fact, the burlesquers learned long ago that the strong emotions they wished to arouse are quenched by the cold water of comedy."

Then, in the next column he refers to Lamberti:

"Lamberti plays what he calls the 'ixilphone' with many a flourish; and as he goes into his big number ("Wishing") a tall cutie saunters in behind him and begins to strip; she sheds a garment just as Lamberti finishes a chorus; applause recalls her and starts him again; his bland and leering ignorance of why the piece is so popular (he played 103 choruses of it once at a Legion convention, he says) is masterly; he smacks his lips and flutters his tongue and waves his toupe and rolls his eyes—purely as a virtuoso of the xylophone. And even the old, sad, faithful lechers of the audience prefer him, I think, to the naked strip, so to speak, of some of the other acts." 2888

Do you see anything indecent in that? A. No, I think that is all in the same vein. It is debunking these burlesque shows, describing this one, and I think some of it is, as I say, a little coarse or a little off-color. 2889

Q. I see. A. But I don't see that there is anything in here that would be likely to contribute to the delinquency of any young people.

Q. You don't think there is anything in this article where it describes an erotic dance, that would induce a young person to go there and see that show? A. I wouldn't

2890 say it wouldn't; it may. But I think probably all the time they would be thinking of this particular article and it does debunk the whole thing a good deal.

Q. Going ahead with the article where I left off:

"The business of getting comedy out of the sexual appetites isn't an easy one. Infinite variety sex may have; but it's singleness of purpose dulls the brilliance of its techniques."

That wouldn't change your mind as to the general character of this article, would it? A. No, I read it all and, as I say, I think that is all it does, and there are parts of it that are a bit coarse and I think it is rather uninteresting.

2891 If left to myself I would never read it from beginning to end.

Q. In referring to the Varga girl characters from page 97 of this number, would you say that these characters are revealing of the feminine form? A. Yes, I think they are revealing. I think the girls are very lovely.

Q. You think they would be objectionable? I understood you to say none of them were objectionable from a decency standpoint. A. No, they are not objectionable.

Q. Do you think any of them would be objectionable if the filmy garments they had on would be entirely removed? A. I think it would be very much like the things you see

2892 in art galleries. They certainly are covered.

Q. These Varga girls don't purport, nor are they offered in this magazine, to be art, are they, lady? A. Well, I think they are very attractive girls.

Q. Referring to the August number and the verse "August".

"I find a cool, secluded beach
A perfect August shelter
But all the men who pass my way
Just look at me . . . and swelter!"

Do your think that costume conceals any part of her anatomy? A. Well, it certainly covers her. 2893

Q. But it is transparent, isn't it? A. Yes, I think it is transparent, more or less.

Q. You can see all of the lines and the curves of her body, can't you? A. Yes, as you can in a bathing suit.

Q. You mean you have seen a bathing suit that is as revealing as this costume, if it may be called— A. I have seen bathing suits which certainly revealed the figures of the girls who were in them, revealed almost every curve, too. I mean, we are used to seeing those things. That is the difference, I think.

Q. I am comparing this costume, if it may be called such, with a bathing suit. Is that what you are doing, lady? A. Yes, I think that is what I am doing. I think a bathing suit would perhaps have something more in the back to hold it up, but she certainly is covered. And it would probably have an open midriff and be about the same on her legs. 2894

Q. You can see through this costume, can't you? You can get the tint of the flesh? A. Perhaps. I haven't especially noticed that.

Q. You have never seen a bathing suit just quite that thin have you, lady? A. Probably not. As I say, I have seen costumes which appeared to me to reveal the figure just as much as this, and we are used to seeing them on the beaches every summer. 2895

I happened to be talking to a friend of mine the other evening, a widow with two daughters, 14 and 15, and I asked her if she saw Esquire, because I was interested in her point of view, and she said, "Yes, once in a while", and I told her about the case down here and that the Varga

2896 girl seemed to be the thing objected to and she said, "My goodness, my daughter has them pinned all over her room".

Everyone's figure is revealed in a bathing suit. Nowadays we are a good deal more frank and I don't think it arouses at all the emotions that even a few inches of leg perhaps used to arouse in Victorian days.

Q. Do you think that pictures of this sort would be expected to or calculated to arouse the same sexual emotions in girls or women as they would in young men or men? A. Young men and young women are entirely different I suppose, or fairly different. They might arouse sex emotions,
2897 but so would almost any advertisement of a brassiere which you see in magazines very day.

Q. You admit that the young boy or young man or man might have a different reaction to these pictures than a young girl or woman would have, do you? A. Yes, I do. I think the young men might have their sexual emotions aroused by a good many things, as I say, by advertisements that you see in every newspaper and magazine, like brassieres.

Q. But they are not in colors, are they; they are not embodied in natural colors, are they? A. I think they are.

Q. In newspapers? A. Advertisements of stockings in
2898 magazines, like the Woman's Home Companion, the Ladies' Home Journal, and I think that type of magazine; things that occur in a fashion magazine like perhaps Vogue or something like that.

Q. But these pictures are so arranged that they are easy to put upon the wall to gaze at, aren't they, without being contaminated by any commercialism or advertising? A. Yes, that is true. But I still don't think it would upset the morals of most young people.

Q. It wouldn't? A. No.

Mr. Hassell: I have some more questions, but I don't want to ask those questions of this witness. I haven't the nerve to do it. 2899

Mr. Bromley: Well, I object to that.

The Witness: I don't think—I didn't object so far.

Mr. Bromley: I don't think it is fair to take that attitude. If you have any—

Chairman Myers: No, I don't think so. If you have any questions ask them.

Mr. Bromley: You feel perfectly free to ask Mrs. Cook any questions you want to.

2900

Mr. Hassell: After all I want to present the Government's case properly, but I think that while I still have some more of these questions, there are some of these words involved in this case that I don't want to go over with with this woman.

Chairman Myers: Well, you don't need to. Some wise man said that beauty lies in the eyes of the beholder but I guess there are some people that have other things than eyes in their head.

Mr. Hassell: Well, I have heard that philosophy too; obscenity lies entirely in the mind of the individual, but I don't know as I subscribe to it.

2901

Chairman Myers: Well, we will take a recess for ten minutes.

(Whereupon, a brief recess was taken.)

Chairman Myers: You may proceed.

2902 *By Mr. Hassell:*

Q. Mrs. Cook, will you admit that there are many indelicate cartoons and jokes in these issues of Esquire? A. I would say that there are some cartoons and jokes which are a bit off-color, perhaps, but I think no more so than the jokes you see in a great many magazines or sometimes the jokes you hear at dinner parties.

Q. Would you say that there is a substantial amount of coarse material in this magazine? A. Well, there is matter as I say that is off-color, that is a little coarse perhaps in

2903 part.

Q. You mean what? A. It is in poor taste.

Q. You mean coarse in poor taste? A. It is in poor taste, but nothing in my opinion that would at all affect the morals of ordinary persons whether young or old, and I suppose that is the purpose to keep up the morals of the community, of attempting to ban magazines.

Q. Do you in your welfare activity advocate that girls emulate some of the things portrayed in the jokes in Esquire involved in this case? A. Why, of course not, no.

Q. What are you being paid to testify here, please? A. I don't know. I hadn't thought of it. I expect to be reimbursed for my time, naturally I expect to have my

2904 expenses paid, but otherwise I don't know, I haven't discussed it.

Q. You haven't been promised anything to come here to testify? A. No. I have been promised nothing. As I say, I expect to be reimbursed for my time naturally.

Q. Are you testifying here in the capacity of a crusader for the type of material that appears in Esquire. A. I am testifying here because I am interested particularly—I am especially interested in freedom of the press and at the

same time I am also interested in the prevention of delinquency, and if I thought that any young people would become delinquent from reading Esquire or similar jokes anywhere else or similar pictures which I think there are in a good many places, why I shouldn't be here to testify in favor of Esquire on the side that I am. 2905

But as I say I am interested primarily in the freedom of the press and not as an attempt to make us moral by edict, because I don't think it works.

Q. In other words, you don't subscribe to the enforcement of the non-mailable provisions of the postal obscenity statutes, do you? A. Yes, I do in that, I would be interested, as I say, in having magazines kept out of circulation that would contribute to the delinquency of young people, but I don't believe that Esquire will. 2906

Q. Do you think printed matter may contribute to the delinquency of young impressionable persons? A. I think some kind of printed matter might. Of course, as I said before, young people nowadays are brought up in a very frank way which it seems to me is a very good way, because I don't believe that they get the kick and the upset to their emotions out of a lot of these jokes that a lot of other people might that are brought up in a different way.

Q. Do you contend that the young adolescent man or boy would get the same reaction from the jokes and cartoons dealing with sex in these magazines that young girls would get from it? A. They might. I have never been a young boy so that I don't know, but I don't think it would be too different. Of course, I think that most of these jokes, most young people whether boys or girls would not analyze them to the same extent in that article. I mean, wouldn't analyze them to the same extent you have. I think they might whistle in seeing some of the pictures or something 2907

2908 and say "Well, that's very good" or something but I mean they would simply pass over it. It wouldn't mean any more to them than any of the jokes they see anywhere else.

I don't really think if you banned all reference to sex at all, for example, I think you would have to ban almost everything including the Bible probably. Sex in itself is, of course, not impure.

Q. The dealing with sex relations in a flippant joking manner you think is not objectionable? A. No, I think it never has been considered so. We have had the old jokes about married people and the old mother-in-law jokes. I 2909 think most mother-in-laws are very sensible people. It doesn't make them any worse or better, and we still have the old mother-in-law joke, and after all if you can't have a laugh at things once in a while you wouldn't have any humor. I don't believe jokes about marriage or even about the sex relation would at all make a girl or boy feel any differently about the person he was going to marry, for example.

Q. You think all dirty jokes, told by men to their men friends are not objectionable and not calculated to incite them sexually? A. No, I don't suppose so. I suppose most men do tell such jokes to each other and they are 2910 all human beings and in their family relations they seem to be pretty good people.

Q. You refer to young people passing over this type of material. You know that some young men pin up these Varga girls and they are held out as pin-ups, aren't they? A. Yes, and girls do too, as I see.

Q. In the March issue, page 10, there is a letter to the editor on putting Esky in a cap and gown in which this high school teacher refers to the Varga girls as "Varga-vistas of forbidden fruit". Do you know what he means by that? A. Yes, I know what he means, of course.

Q. Do you think that he refers to the sexual stimulation that may be procured by the men and young men from viewing such pictures? A. Well, that is evidently what he means. 2911

Q. And down further in this letter he refers to the cover of Esquire as disturbing small town codes of conduct. Do you see anything objectionable in the covers of Esquire? A. No, I think they are rather silly.

Q. That one you are looking at now shows some African women peeping over a hedge at Esky who is supposed to be the symbol of Esquire, in the nude, taking a bath in a tub, doesn't it? A. Yes.

Q. You think that has no indecent connotation? A. Well, I thought when I looked at it and from the fact that one of them is here holding her hand in front of her nose that probably she didn't like the odor of the pine bath salts, and that is what I thought it connoted. 2912

Q. She wouldn't be adjusting her nose stick that she has inserted through the septum of the nose? A. I didn't even see that. I don't know. Of course, as I say, I doubt very much if the ordinary person, the very young person in looking at these pictures would analyze them in that way.

Q. These black people behind the hedge are goggle-eyed, aren't they? A. Yes; I should say they would be. 2913

Mr. Hassell: That is all.

Redirect Examination by Mr. Bromley:

Q. Turning again to the March issue, page 10, looking at the end of the second column, don't you think that letter indicates very clearly that the writer thinks that Esquire

2914 is just as good as any magazine such as Harpers or the Atlantic except for the cover?

I call your attention to this sentence: "I am tempted time after time to bring a copy of Esquire to my senior literature class, and give my pupils the benefit of the excellent criticism of Mr. Phelps and the high-grade fiction of Manuel Komroff, Jesse Stuart and others. The only way in which this could be done, without disturbing small town codes of conduct, would be to somehow camouflage that bulge-eyed master on the front of each issue and make it appear like the front of, let us say, Harpers or Atlantic."

2915 Mr. Hassell: It reads "masher" doesn't it?

Mr. Bromley: What did I say?

Mr. Hassell: Master.

Mr. Bromley: The word is masher. I meant to say masher.

Mr. Hassell: All right.

The Witness: Yes, I thought that is the tone of the whole thing and when it refers to small town codes of conduct, why I think the writer is simply indicating that it is a small town and they perhaps have a Victorian code of conduct perhaps.

Mr. Bromley: That is all I have.

2916 Mr. Hassell: That is all.

(Witness excused.)

Chairman Myers: Call the next witness.

Mr. Bromley: I should like to have the consent of the Board and the agreement of Mr. Hassell to put Mr. Gingrich, the editor, on, whom I would like to ordinarily produce for my last witness, with the

understanding that since he is long I may interrupt him when I get other people available. 2917

For instance, I have nobody here and won't have in the next five or ten minutes.

Chairman Myers: Is there any objection, Mr. Hassell? It might save some time.

Mr. Hassell: All right.

Mr. Bromley: Mr. Gingrich.

ARNOLD GINGRICH a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows: 2918

Direct Examination by Mr. Bromley:

Q. Will you give us your full name, please? A. Arnold Gingrich.

Q. You live where? A. Algonquin, Illinois.

Q. How old are you? A. 39.

Q. Married? A. Yes.

Q. What family have you? A. Three boys.

Q. How old are they? A. 15, 9 (is this Wednesday?) and 7.

Q. Where were you born and brought up, sir? A. I was born in Grand Rapids, Michigan, December 5, 1903. I was brought up there. My parents both came from Canada although my father's family has been in this country, in Pennsylvania, in Colonial times, and later moved to Canada. 2919

My father was a Mennonite who married outside the Mennonite Church, married a Methodist, and upon their moving to Grand Rapids he adopted the Baptist faith, and I was brought up as a boy in the Baptist Sunday School.

2920 Q. Where did you get your elementary education? A. The grade schools in Grand Rapids, Michigan. I attended Central High School there and graduated from that school.

Q. What did you do thereafter? A. I went to the State University at Ann Arbor, University of Michigan, and was graduated from there in 1925.

Q. With what degree? A. Bachelor of Arts.

Q. Did you have any other education? A. I had a little private tutoring in languages. I had a little additional education in the sense that while at the University I was employed in the University Library. There were four full time library positions open to students. I held one of those.

2921 Full time meant 54 hours a week. Many of those hours, however, were more or less the student's own. That is, he could use them to read or pursue any interests of his own as long as he was available on call for the various professors who might need his services for the gathering of materials for work in which they were engaged.

With that job went a few privileges that I would call additional educational advantages. For instance, we four who held those full time library jobs enjoyed a faculty rating. That is, we were considered members of the faculty and as a result we were able to attend all faculty functions.

2922 able to belong to faculty clubs, and you might say it gave an undergraduate some of the advantages of contact with the professors that might not be normally enjoyed by the average undergraduate.

Q. In your school career did you have any connection with the editorial boards of school or college magazines? A. I was the humor editor, I believe, of the Central High School Helios, and in college I enjoyed a very brief career as editor for a matter of weeks of a revived magazine at Michigan called the Inlander. It had gone out of existence

some years prior to my time and I was given the editorship of it when a movement among the undergraduate students was begun to revive the old Inlander, to restore it as a Michigan tradition. 2923

I believe I contributed to the first issue of the revived Inlander to the extent of only contributing one poem in which my name was misspelled, and did not continue beyond that point. As a matter of fact, I don't recall now how long this revivified publication of Michigan tradition continued. I think only for a few issues, but other than that and an occasional contribution to the various student publications that were then in existence, that is, to the Michigan Daily and, I believe, to the literary magazine called Chimes, and one or two other campus publications, I had no active editorial participation in the student publications. 2924

Q. What did you do after your graduation? A. Well, I would like to say that before my graduation I got married which influenced what I did after graduation.

Q. Well, after having gotten yourself married what did you do? A. Hot-footed to look for a job that would earn fifty dollars a week because I had that necessity upon me in order to prevail upon my mother-in-law to allow my wife to live with me.

I went to Chicago and looked for work in the advertising field, feeling that it was a short-cut to one's enjoyment of cakes and ale as opposed to the longer route that I had expected to follow if I had pursued literary activities. 2925

That had, of course, always been my end aim, but I wanted to get ahead substantially in a financial way, so I looked for work in advertising.

Q. Did you get it? A. Yes, I got it. I got 34 jobs in something under 45 days, in all of which they were happy to hire me until they discovered that I really meant it

2926 when I said fifty dollars a week and I was 20 years of age. After that length of time had gone by I finally managed to get a job that did pay fifty dollars a week in a group of trade publications, serving as the manager of the advertising service department. I had had just enough experience in writing ads during my days in school.

I forgot to mention that I had written some ads for one of the local Ann Arbor haberdashers, Greenwood & Kilgore, and based on that experience managed to get this job in charge of the preparation of the advertisements for this group of trade magazines, engineering journals most of

2927 them, and I held that job for about a year and a half, mainly looking for an opportunity to get into something that would be at least more congenial subject matter.

The engineering journals were quite foreign to all my training and natural inclinations.

Q. What did you do then? A. So then I got a job at Kuppenheimer, maker of men's clothing, who I believe were at that time the second largest advertisers of men's clothing, next only to Hart Schaffner & Marx.

Q. Is that in Chicago? A. That was in Chicago, both of these jobs. I should have said this was in Chicago. I went into the Kuppenheimer advertising department as one of

2928 their alleged bright young men, who dealt with dealer service. That is, it was our responsibility to prepare advertising and in fact handle the advertising appropriation for dealers in various assigned territories.

The situation in the advertising department at Kuppenheimer developed quite rapidly, in a fortunate manner in my favor, really just a lucky break, but the advertising manager was taken away from that department to be utilized on the road as sales promotion manager, so I was allowed to function as acting advertising manager after

really a short time in their employ, and I functioned as acting advertising manager for about a year and a half, during which time I wrote the style books, the Saturday Evening Post ads; in fact, all the Kuppenheimer national advertising. 2929

Q. How long did you stay there? A. I stayed there until the end, very near the end of 1928.

Q. Then what did you do? A. Well, toward the end of 1928 I had a phone call from a man who said his name was Smart, S-m-a-r-t, and he identified himself as a young fellow just trying to get along in our field, in the field of men's clothing. 2930

He said that he and a partner of his were going to get out in the field of men's apparel some very ambitious advertising publications. That term is something of a paradox in itself and I had better explain it.

They were launching a magazine, the outward semblance of a magazine, which contained color reproduction of men's fashions, men's apparel, accessories. In addition to these direct color presentations of merchandise there were a few articles fore and aft of the real catalogue-like merchandise wherein the store would put its own imprint on the cover. In other words, such a store as John David in New York would issue the "Gentlemen's Quarterly" as being published by John David and sent free to its charge account customers. 2931

I was asked to come over and join them because they intended to expand and get out other publications of a comparable type for other large clothing chains. For instance, they contemplated one for the various stores of the Hart Schaffner & Marx franchise and another comparable one for the Fashion Park accounts, and I thereupon left Kuppenheimer to go into this then very new venture.

Mr. Smart had enjoyed a spectacular success as a sales-
2932 man of syndicated advertising materials, such things as posters displayed in banks to encourage the opening of savings accounts and things of that sort, and Mr. Weintraub came to him with this idea; in fact, with a predecessor publication called "Men Today" and getting together with Mr. Smart as the production end of it they restyled it, gave it a new name, and intended to bring out the magazine and broaden out the field in which Mr. Weintraub had begun alone.

I joined them at about January 1, 1929, and we then, according to the plan, launched these additional publica-
2933 tions, and during the years—during the next year and a half, we added two more. One was a comparable magazine, a syndicated magazine, which really was a catalogue of merchandise and fashion offerings presented by the store over its own imprint, this one in the boys' field, "The Etonion", presenting boys' clothing; and in addition we had a few other specialties which were sold to various stores. One was called "The Observer Broadside"; so for the next year and a half, say, we were active in this field as publishers, or perhaps we might properly be called producers of fashion advertising and fashion merchandising.

We built up in conjunction with the production of the
2934 syndicated magazine a fashion reporting service. We had men in the various style centers in this country and corresponding arrangements with the fashion reporters in the various fashion centers abroad whose activities were reflected in the styling of the pages presented in the fashion merchandise publication.

The matter was extremely expensive, very high grade color work reproductions. You might say our chief stock in trade was our ability to produce within commercial

limits of expenditure the kind of four color work that had not prior to that time been commonly produced in this country. 2935

Some European houses had produced things of this character, but they were a novelty in this country.

For example, the publication "Gentlemen's Quarterly" which we supplied to these high grade men's stores cost them $200 a thousand. Does that work out to 20 cents a piece? It was actually 20 cents a piece, and in the bank failure, that is, in the Black Friday of 1929, the bottom began to shake in this business. The day particularly arrived when no matter how high grade a store it simply was not economically justifiable to send out 20 cents at 2936 one mailing to one charge account customer, no matter how valuable his patronage might have been in the past; say, by the middle of 1930, we could plainly see that as successful as this venture had been, and as successful as it was going to be to the end of our contract year, the end of 1930, we would be to all intents and purposes out of business as at the end of 1930, because stores right and left were notifying us that after serving out their contract for this type of expensive advertising material they were not going to be able to go on with it.

Q. What did you do next? A. We next tried to figure 2937 out how to preserve this fashion reporting service which we had built up in conjunction with these publications and turn it to some other use where we would not be hooked to such expensive productions as those I have mentioned.

It occurred to us that with the depression increasing in its severity, not only would stores find it difficult to spend 20 cents a piece to send out such catalogues of luxury merchandise, but they might even find it hard economically to replenish their stocks, so quite possibly as an off-depres-

2938 sion substitute for new merchandise, new fashions, they might be able to display in a trade paper which in the same colorful manner would show the new merchandise and then if they were able to get a new customer in and convince him of the quality of their mechandise they might probably get him to order, all this without having to stock merchandise of this character, so we spoke about the creation of a trade magazine which was in the format of Fortune, which was then a new magazine.

This was in 1930. Fortune, as I recall, began with the January, 1930, issue.

2939 We created this trade magazine called "Apparel Arts" in the size and format of Fortune and the nucleus and the most important part of it was its fashion pages.

This with, just as the predecessor syndicated publications had been, full cover photographic life-like depictions of articles of apparel that had been selected by our fashion scouts in their various centers, and this magazine served in lieu of a stock of merchandise for many of the stores throughout the country.

They would keep it on their counters and when a man came in and asked for something in the way of a shirt or a tie that he didn't see in stock, they would say "Possibly

2940 you can see what you want in this magazine, Apparel Arts, and if you like something here we will endeavor to get it for you."

That magazine was launched in the early fall of 1931. It was very successful. It caught on instantly.

It also, in the advertising field, employed the same line of argument with the advertisers that we had in mind for the retailers themselves, that is, to be able to show by a full-color representation of the merchandise what they had that was new, and that quite possibly in depression circum-

stances they could not afford to have a salesman take around to the retailers. 2941

So this magazine enjoyed what you might call a two-way stretch in meeting those emergency depression conditions.

Q. Has that magazine been published ever since? A. Oh, yes. In its inception it was a quarterly. It came out at $1.50 a copy four times a year.

As that magazine prospered our organization grew. I perhaps should have said that as of the beginning of 1929, when I came to the organization, we numbered nine people, including our principals and the switchboard girl, and the office boy. After we had launched Apparel Arts, our organization began to multiply in size. We had perhaps 30 people in our organization by this time and we decided to follow up this successful formula of publication by adding another trade magazine, also in a field that was being very severely hit by the depression, and that was the field of home decoration. We called that Home Furnishing Arts. 2942

Also following up on the initial success of Apparel Arts we gave it a companion publication which we called Fabrics and Fashions. We then divided the four retailing seasons into wholesale and retail seasons, so that the same stores would have Apparel Arts as the trade magazine giving them their merchandise presentation for the wholesale spring season, let us say, followed by Fabrics and Fashions for the retail spring season. 2943

In Fabrics and Fashions we added swatches, which is the technical name for a snipping or clipping of the actual fabric, and these were mounted into position on the pages of Fabrics and Fashions so that pursuing this original line of counter display, the customer could not only see the full colored drawings of the various fashions, but could even feel the goods as well.

2944 Q. Now, will you come down to Esquire? A. I can't come down very quickly, because it is related both to the demise of the original publications "The Gentlemen's Quarterly", "Observer" and "Club and Campus", after the development of Apparel Arts, that we arrived at the birth of Esquire.

I will make it as fast as I can. I am trying to fix the date in mind.

Apparel Arts, having begun in 1931, I would say that it was toward the end of 1932 that we began to get an occasional inquiry from some of the stores to whom we had
2945 originally sold these syndicated magazines for their customers, asking us if we didn't think there was some way in which we could provide them with some counterpart of those no longer existent publications.

In particular, we had two inquiries, one from Rogers Peet and one from John David, in New York, both of whom had been clients for these old magazines, no longer distributed, asking if we could not, in some way adapt the large fashion pages in Apparel Arts to their use as a small magazine to be sent out to their customers—I mean small in the sense of relatively few pages.

As far as page size was concerned the format was large.
2946 it was that of Fortune.

We began studying this question with an eye to somewhat adapting these color pages in Apparel Arts to the use of the retail stores for their customers, and we began making up dummies, trying to see if we could evolve a man's fashion magazine out of these full color fashion pages in Apparel Arts, and perhaps a wrap-around of the central nucleus of fashion pages in the form of a few articles fore and aft, devoted to articles on subjects primarily of interest to men.

Our first concept was that these features would be confined entirely to care of one's wardrobe and to fashion information. 2947

Our first dummy—upon figuring costs we thought it might be possible to produce such a magazine at a price of 15 cents per copy—but on appraising it rather severely as a venture it occurred to us that men being so much more self-conscious than women in their attention to clothes, such a magazine was foredoomed to failure. Whereas it is a perfectly normal thing for a woman to evince an interest in a magazine that is concerned with nothing but the matter of clothes, men would feel a little bit sissyish to be seen carrying away from a store a magazine that had in it no other content whatever than, let us say, a foppish devotion to the subject of clothes, so without offering that first dummy to the stores, we began to restyle it with the idea of sugar-coating this fashion pill a little more heavily than we had in this first dummy. 2948

We made up a second dummy in which the outer wrapper of general textual material was diluted from the point of view of its attention to men's fashions exclusively, and we also incorporated a few non-fashion items into the color forms; so that this magazine for men would not be confined entirely and exclusively to the subject of men's fashions.

However, in this respect we saw the production costs mounting and it began to be apparent to us that the magazine we had in mind could not possibly be distributed free by the stores, nor could it even be sold for a quarter, let us say. 2949

We thereupon refigured the entire project in terms of a fifty cent magazine, planning it as a quarterly to be sold by the stores at fifty cents to their customers, we to sell it to the stores at a normal wholesale differential between

2950 the price they paid to us and the price they would expect to get from their customers.

The magazine was sold to the stores from a dummy. We presented it to them in the light of our previous record with fashion merchandising and told them quite frankly that we didn't even intend to produce this magazine in any quantity at all unless we would get from the stores throughout the country a sufficiently substantial mass order, in total that is from the various stores, to justify our taking such a risk in a time of depression, as to produce this quantity of very expensive color pages.

2951 The stores ordered the magazine on an outright purchase basis in quantity, just as they would order so many dozen suspenders or garters or sets of jewelry or any of the things they usually sell in the stores.

They bought from us X quantity of copies of the new proposed quarterly for men, which by that time we had given the name "Esquire".

We chose that name as being the approximate equivalent of "Mister", but at the same time as having rather a smart overtone of meaning, that is, that in the original sense of the term "Esquire", as I recall the dictionary definition, is the next rank below knighthood, and we thought of

2952 Esquire as meaning a little more than "Mister" and yet not being quite such a self-conscious word as "Gentleman".

The magazine was launched, or, let us say, presented in dummy form, to its prospective market on March 4, 1933. That is, we sent our salesmen out to visit the stores with these dummy copies of this fifty cent magazine under their arms, and they all had to come back home because they couldn't get carfare on that day. It seemed like a rather inauspicious beginning for the fifty cent magazine, the fact that it happened to be launched on the day when every one was scrambling around for carfare.

The total number of orders from the retail stores ran up to approximately—within a matter of 1,000 or so either way—100,000 copies of the first issue, and since these orders were based on the entire series of four for the first year, this magazine began its existence with an assured circulation at fifty cents a copy of 100,000 copies. 2953

Before the time came actually to launch the magazine—I should say to publish the first issue of the magazine as the arrangements for the purchase by the stores had been made some months ahead—it occurred to us to put a limited number of copies on the newsstands.

We did not honestly expect to sell very many, but we thought it might assist the stores in their efforts to sell a magazine devoted to the development of the fashion consciousness of men, to be able to point out that it was at least a familiar sight. 2954

A man coming into a store and being asked by the clerk "Do you want to buy a magazine" might react a little more favorably if he had at least passed it a few times on the newsstands, than if he were approached cold and had never seen it before and was not prepared for the idea that it was a magazine.

We wanted to put on the newsstands about 25,000 copies, even though we knew, or had been told, at least, by experts in the circulation field, that there was not much chance in 1933 to sell any appreciable number of copies of a fifty cent magazine on the newsstands, but the news company would not handle that many so we compromised at a figure somewhat lower than that—I don't recall the exact figure—but somewhere between 3,000 and 10,000 copies, which were originally assigned to the newsstands of this first issue. 2955

2956 Counter to all our expectations, when the magazine appeared for the first time, just about ten years ago—it was October 15, 1933—the stores managed to sell somewhere between 5,000 and 10,000 copies and the newsstand copies sold out like snowballs on a hot stove, and the news company immediately began calling for additional copies which we got back from the stores and supplied to the newsstands, with the result that we wound up with our first issue just about opposite from what we had expected to be the result.

2957 That is, where we thought we would sell between 5,000 and 10,000 possibly on the newsstands, and 100,000 through the stores, we sold between 5,000 and 10,000 in the stores and 100,000 on the newsstands.

The news company officials advised us to make it a monthly matter, said that this was a very rare occurrence in the magazine field, to strike what they called "a natural" and urged us to get out another issue as quickly as possible.

With our small organization we had a very hard time getting out the first issue and were looking forward with some consternation to the thought of getting it out again in three months and we argued that we couldn't possibly get out another one in anything like 30 days.

2958 However, in view of their urgency and insistence upon it, we compromised with them and managed to get out the second edition in 45 days, the second copy appearing on December 5, 1933. That second issue was distinct from the first issue in two respects. First, it read "Esquire, The Magazine for Men" on the top of the cover, where the first issue had read "Esquire, The Quarterly For Men", and it also carried the legend "Now issued monthly."

Also with the second issue we featured the first appear-

ance of the little Esky character. We did not call him Esky at that time—in fact; we never called it anything,— but the public began referring to it as Esky and we rather reluctantly at long last began referring to it that way ourselves. 2959

We thought it was a rather sissy appellation and never wanted to use it ourselves.

We had hoped in the first issue to have such a character on the cover, bearing in mind the fashion background of the publication and the fact that we had expected it to be almost entirely a magazine sold through men's stores— we had hoped to get some distinctive device for the front cover that would suggest smartness in the same way that Saks Fifth Avenue advertisements were characterized by a little character called "The Major". 2960

We didn't want to copy Saks Fifth Avenue, but we wished we could find some little symbol of smartness and distinction that would be to Esquire what The Major was to Saks Fifth Avenue.

We had begun our endeavors to create or settle upon such a character during the period of the inception of the magazine, but never had managed to get one to our satisfaction in time for the first issue.

So for the first issue we had a sporting scene. It was a painting done by an advertising artist named Edward Wilson, depicting two hunters alighting from a private plane on a lake somewhere in the Canadian woods. I can best characterize it by saying it looked like very much what you would expect to see on the cover of a catalogue of Abercrombie & Fitch. That was its general nature. 2961

However, in our search for a cover character that would be distinctive, that would be different from any existing magazine, that would, we hoped, become a symbol for

2962 smartness in the field of men's fashions, we had any number of little caricatured figures and sketches made, all of which were disappointing to us in that they either too closely resembled the Major in the Saks Fifth Avenue advertisements or didn't suggest anything in the way of smartness and distinction. That is, if not too close to the Major, they became low comic characters and that, of course, was anything but what we were after.

We had managed, however, in time for our second issue, to get a little actual figurine or statuette of this character made, and it occurred to us that a new departure in magazine covers would be to let this little figure, who was going
2963 to become our cover symbol, be photographed in full color from an actual display of the set up of the objects themselves, rather than utilize a pictorial cover design.

This character, we were anxious to preserve as our own, because we wanted it to stand for the magazine and we didn't want it to be the property of any one artist, or, as it turned out, sculptor. We had this character first made in sculpture by a sculptor named Sam Berman, who had done some caricatures in sculpture for the magazines at that time—that is how we happened to first see his work—and we had a composite made of the various sketches that
2964 we liked best.

We combined the features of the figure as sketched by John Groth and as sketched by E. Simms Campbell, and placed them in one character and had them done in sculpture three-dimensionally, by Sam Berman, so the Esky character or what was later called the Esky character made its first appearance with the first monthly issue of the magazine.

Mr. Bromley: With the Board's permission, I would like to interrupt and call Mrs. Weissman.

Chairman Myers: Very well.

2965

(Witness temporarily excused.)

MRS. RAE L. WEISSMAN a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Bromley:

Q. Mrs. Weissman, will you give us your full name, please? A. Mrs. Rae L. Weissman.

Q. And where do you live? A. 7 Spruce Street, Great 2966
Neck, Long Island.

Q. Are you married? A. I have been married. I am not married at the present time.

Q. Have you any children? A. No.

Q. What is your present occupation or activity now, please? A. I am engaged now in research for the New York City Committee on Mental Hygiene.

Q. Will you tell us something about that committee, please? A. Well, the New York City Committee functions as the authorized committee on mental hygiene for New York City as a whole and for the State.

Q. What has been your training and educational back- 2967
ground, please? A. I am a graduate of New York University, also a graduate of the Smith College School for Social Work, which is a graduate school.

Q. And since your graduation from the Smith College Graduate School, what have you done? A. Well, I have engaged in all forms of social work. I have done psychiatric clinic work, I have done public work, I have done family case work, research—other forms of research. I

think that about covers it. I have been working all these
2968 years with children.

Q. With what associations or organizations have you been connected? A. American Association of Psychiatric Social Workers and American Association of Social Workers.

Q. And for how many years since your graduation have you been engaged in this work? A. Oh, I would say about 18 years.

Q. Are you an Esquire subscriber? A. No, I am not a regular subscriber, though I do read the magazine from time to time.

2969 Q. For how long have you been familiar with it? A. Oh, a number of years. I would say I have known the magazine for at least five or six or seven years.

Q. At my request, have you examined the eleven issues for the year 1943 of Esquire? A. Yes, I have.

Q. And have you paid particular attention to those parts of those issues which have been objected to by the Post Office Department as we have informed you? A. Yes, I have.

Q. Can you tell us whether or not with special reference to the Varga girl drawings, and the verses accompanying them, there is anything therein contained which
2970 in your opinion is obscene, filthy, lewd, lascivious, or indecent?

Mr. Hassell: I object. It appears, Mr. Chairman, this testimony is cumulative, somewhat similar to the testimony of the other lady who preceded this witness.

Chairman Myers: This is a little different character of work. Here we have a social worker who

is qualified as such. The objection is overruled unless you want to make some agreement as to that testimony. 2971

Mr. Hassell: I will be glad to stipulate she will testify substantially as the other lady.

Mr. Bromley: I think this testimony goes beyond that. I had hoped tonight to get up a stipulation with regard to other witnesses in this field, but I feel this testimony goes beyond that.

May we have the last question read, please?

(Question read.)

2972

The Witness: No, I don't think that I would agree with any of those terms as describing the Varga girls.

Q. What is your opinion about the Varga girl drawings, Mrs. Weissman? A. Well, on the contrary, I see the pictures of the Varga girl as a representation really of the type of physical perfection that I think few, if any, women are fortunate enough to possess.

To me, I would prefer to look at something which is represented as beautifully as that is than to some of the ugly and grotesque drawings that some of the artists produce. 2973

Q. Do you find in these drawings or in the verses which accompany them, anything which in your opinion would tend to corrupt the morals of youth or of any class of society with which you are familiar? A. No, I don't think so, because they simply are pleasing to the eye and I think to a normal, healthy mind that is all that can possibly be interpreted from those drawings.

2974 Q. Do you find anything in them which in your opinion would tend to lessen standards of morality toward the sex relation? A. No. I repeat again that an individual who is developed normally and healthily can not be corrupted by something that is inanimate and that, moreover, simply presents a piece of life, something that is natural and commonly seen by everybody and known as something which is perfectly within one's knowledge, and so forth.

Mr. Hassell: May the witness speak a little louder? I didn't hear all of that answer.

2975 Chairman Myers: Will you read the answer, please?

(Answer read.)

The Witness: I just want to add there that that would be the reaction of a person again who is normal and healthy and perfectly sane, and so forth.

By Mr. Bromley:

Q. Have you read the pieces of fiction and the articles which have been pointed out to you in these eleven issues
2976 as having been objected to by the Post Office Department? A. Yes, I have.

Q. I draw your particular attention to Gallico's article on burlesque, entitled "The Savage Beast in Us."

Did you read that article? A. Yes, I did.

Q. Did you find anything in it that was either indecent, filthy, obscene or lascivious? A. No.

Q. What is the basis of your opinion that that is a perfectly decent article? A. To me it merely describes a situation which unfortunately exists.

I have been in night courts, I have witnessed the procedure, I think the article is a very faithful reproduction of what goes on— 2977

Q. I am not talking about the night court. I am talking about the burlesque article. A. I beg your pardon? That article simply meant to me an exposure really of a form of entertainment which is pleasing to some people but, what it has exposed is the fact that this form of entertainment necessarily provokes erotic stimulation and, from that point of view, I think it is sound and important too, a demonstration that it is not necessarily the form of entertainment which corrupts or impairs the morals of people, but rather situations themselves, and the reporting of it, moreover, is a factual one, and I can't see anything immoral in reporting a fact. 2978

Q. Do you think there is anything in the Gallico article by way of sly or leering reference to what goes on in a burlesque house which would cause the readers of this article to decide to go there and see for themselves the performances on the stage? A. Not necessarily. That might arouse curiosity in some people.

One appears at certain places in accordance with one's moods or interest or particular motivation at the time, but I don't think it will necessarily draw someone for immoral stimulus or erotic stimulus. 2979

Q. Do you think the publication of an article like that in a magazine of general circulation would have any tendency to corrupt the morals of youth? A. No.

Q. Now, coming to the article about the night court, which is called the "Court of Lost Ladies," what is your opinion with respect to it? A. As I started to say before, I feel it is a faithful representation of an unfortunate situation which exists in our society today and as such I think it is an important sociological document.

2980 Q. Do you think there is anything obscene or filthy about it or any references contained in it? A. No, I don't.

Q. Did you read the piece of fiction entitled "Portrait Above the Fireplace"? A. Yes.

Q. What is your opinion with respect to it? A. Well, I liked that article very much. I thought it sustained a quiet mood of inspiration to a particular individual who, through it and by it, bettered himself in life.

Perhaps it was only an illusion but nevertheless it helped that particular person to achieve something which he might not otherwise have achieved.

2981 Q. Do you think the conclusion of the story, especially in its development of the fact that the portrait was that of a madam in a red light district, rendered the story or that particular part of it, indecent or obscene? A. No, because it was treated as something that was inspiring rather than degrading; it added to the dignity of the man rather than the degradation of the man.

Q. Do you find anything which in your opinion would tend to corrupt morals of youth in Mr. Nathan's references to bawdy houses or St. Louis sporting houses, in his dramatic criticism column in one of these issues? A. No, I don't think so.

2982 Q. Do you think current standards of morality, as you know them, sanction the use of terms such as that in print in magazines of general circulation today? A. Yes. I think one runs across them in every publication, pieces of literature, newspaper, magazines and books. They are quite acceptable terms.

Q. Did you notice the four so-called Sultan cartoons in these magazines? A. Yes.

Q. Did you find anything in the obvious reference to the eastern practice of selling slave or harem girls which, in

your opinion, would tend to lower standards of right and wrong on the part of the readers of this magazine? A. No. 2983

Q. Did you find anything in any part of the material, Mrs. Weissman, whether it be pictorial or textual, which in your opinion was filthy, obscene, lewd or indecent? A. No.

Q. Do you think any of this material would have any effect toward corrupting morals or lowering moral standards of any class of our society with which you are familiar? A. No.

Q. Have you ever had any association with any mental hygiene clinic of any hospital? A. Yes, I have.

Q. Where was that? A. Mental hygiene clinic at Michael Reed Hospital in Chicago. 2984

Q. And with any other hospitals? A. Mental hygiene clinic—this is not a hospital—it was a community center, mental hygiene clinic.

Q. Where? A. At Philadelphia.

Q. Any others? A. No, not any other hospitals.

Q. Have you had any connection with the Jewish Social Service Association of New York City? A. Yes, I have. Excuse me, Mr. Bromley. I omitted one hospital I did have association with, and that was the New York State Psychiatric Hospital and Institute in New York City.

Q. Have you ever been connected with the Department of Welfare of the City of New York? A. Yes, I have. 2985

Q. In what division? A. Case supervisor in a large district office in Brooklyn, the Home Relief Division.

Q. A department of the City of New York? A. Yes.

Q. For how long were you there? A. Almost three years.

Q. Have you had any connection or done any work in connection with Bellevue Hospital? A. Not in the mental hygiene clinic. However, I have been connected with Bellevue in regular medical social work.

2986 Q. And have you done any work in connection with the New York School of Social Work? A. Yes, at the Psychiatric Institute and State Hospital.

Mr. Bromley: That is all.

Cross Examination by Mr. Hassell:

Q. Mrs. Weissman, you said you had been married. What is your marital status just now? A. I am divorced.

Q. How long were you married? A. Approximately seven years.

2987 Q. Do you contend that the Varga girl pictures and verses in these eleven issues of this magazine would be calculated to have the same effect from a sexual stimulation standpoint on girls as they would on boys? A. If you mean the absence of erotic stimulation, yes.

Q. Do you think the reaction a girl, a young woman, or a woman, would have to those pictures and verses would be identical to that to be obtained from them by an adolescent boy or young man or man? A. I'm afraid I didn't quite get your question, Mr. Hassell.

Mr. Hassell: Will you read the last question?

2988

(Question read.)

The Witness: Why, I believe that there are different reactions in different people to many things. I don't think that two people have the same reaction to the same thing, necessarily.

Q. And as to matters of this kind, do you think there is any distinction as to the sex of the individual, as to

the reaction that he or she will get? A. In connection with looking at a picture? 2989

Q. Yes. A. Perhaps there might be this difference. I think that in spite of the fact that perhaps very few women, as I indicate before, possess the physical perfection that the pictures indicate, that most women would derive a deep sense of gratification in the thought that the female form is so beautifully portrayed.

I think that might be the reaction in a woman looking at something that is beautiful and which is perhaps a symbol which she might read into it.

Q. Do you think adolescent boys, young men or men, derive any sexual stimulation from looking at pictures of nude women or near nude women? A. No, I don't think so. My own experience, whenever we have had to deal with sexual problems in children, is that whatever distortions exist have come about through the inner development of the child, rather than the external stimulus. 2990

In other words, if there is misinterpretation or extreme reaction of a sexual nature, that is considered a distortion and is something which is related to other problems of the child, not necessarily to viewing a picture of a woman partially clothed.

Q. Do you say that it is impossible to get any erotic stimulation, that is, on the part of a man, from looking at the picture of a nude woman? A. I don't say a man might not get an erotic stimulation. Whatever stimulation a man gets from viewing anything is purely a subjective thing. That is, he reads into it or he reacts in relation to his own need. 2991

In other words, if he has extreme erotic needs, perhaps he would derive unusual or extreme satisfaction from looking at a picture, but I think that is an abnormal situation.

2992 I don't think that a normal person will have that kind of an extreme reaction.

Q. Isn't it a fact that most of the individuals you have had to deal with are abnormal cases? A. Not necessarily I think there are degrees of normalcy.

Q. Degrees of normalcy, and these abnormal cases have come up in your experience? A. Yes. I have had experience with a range of problems, perhaps from dealing with minor difficulties to perhaps rather extreme ones, yes.

Q. You have never done any police work, have you? A. No, I have not.

2993 Q. Have you ever learned in the course of your social work that a large majority of criminals arrested have obscene pictures on their persons? A. I think those people are sick people to begin with, Mr. Hassell.

Q. But you have heard that is a fact, have you not? A. Yes, but they are decidedly sick, abnormal people.

Q. And by far the greater majority of the people you have had experience with in these insane asylums and these other places, are people that are abnormal. They are below the average, are they not? A. Yes, the people who are confined are pretty extreme, yes, but I have also had considerable experience with people who are living in the

2994 vicinity with children, who are not in any way overtly sick. That is, they may have minor difficulties of one kind or another but they are not preventing them from attending to the usual routines, that is, going to school or attending to the normal functions in life.

Q. But they have shown some indications of abnormality or you would not be called in to help, would you? A. Yes if you want to consider that social maladjustment, for example, is a real abnormality.

Q. What did you mean by your statement that the normal individual can not be corrupted morally by anything that is inanimate? A. We were discussing the drawings, the pictures. To me they are inanimate. They don't possess flesh and blood. 2995

Q. That would apply to filthy pictures, the French post card type? A. Yes.

Q. And you think that would not corrupt the average normal individual? A. I don't think the average normal individual would be interested in looking at so-called filthy pictures. They would hold no interest.

Q. Now, what age would that individual be? A. I think any age. 2996

Q. He might just have arrived at puberty or he might be a year or so older or he might be graduating from high school and entering college? A. Yes.

Q. Or he might be at that age and never have had the educational advantages I have indicated. Is that true? A. That is right.

Q. Whether male or female? A. Yes.

Q. Have you noted any what we might denominate as dirty words in Esquire? A. No.

Q. Any immodest words? A. Immodest, no.

Q. Any off-color words? A. No. 2997

Q. Any indecent words? A. No, sir.

Q. Are you sure you have read all of this material to which attention has been called here? A. Yes, I have.

Q. You have read all of the material in each of the eleven issues? A. Yes.

Q. But you would not call any of the words to be encountered in that material in any way immodest, off-color, or indecent? A. I would not, no.

Q. You would not? A. No.

2998 **Q. Do you happen to have in your mind the words that I am thinking about, without expressing them here, out of a sense of delicacy?**

Mr. Bromley: Do you mean can she read your mind?

Mr. Hassell: I am asking the lady if she knows what I am talking about.

The Witness: I only know what words you express, Mr. Hassell. I don't know what you have in mind.

By Mr. Hassell:

2999 **Q. For instance, the word here, shall we say, describes the parentage of the mother of the individual addressed as being a female canine?**

Mr. Bromley: He means "son-of-a-bitch."

The Witness: Thank you, Mr. Bromley.

By Mr. Hassell:

Q. Do you think that is an entirely decent word, commonly used and accepted in polite, decent society? A. It is
3000 **a very common form of expression. I wouldn't say it myself; I don't think it is polite.**

Q. You don't think it is polite? A. I don't think it is polite.

Q. You think it is coarse? A. I think it is a bad choice of words.

Q. Mrs. Weissman, do you consider the family the foundation of society? A. I do.

Q. Do you consider jokes dealing lightly with the sexual relations in marriage as indecent? A. If I understand you

correctly—do you mean there is a connection between jokes on marriage and the— 3001

Q. I mean the sexual relation between man and wife, fidelity and that sort of thing. A. Do I consider them indecent?

Q. Jokes of that sort? A. No, I don't.

Q. You do not? A. No.

Q. So a joke in the form of a cartoon which would indicate that a man was going to have some relation with a woman after his wife got away, you wouldn't think would be indecent?

Mr. Bromley: I wish you would produce the cartoon and not your own summary of it, Mr. Hassell. 3002

By Mr. Hassell:

Q. Do you recall the full page color cartoon of the man leaning out of the kitchen door and the rather buxom milkmaid, and his apparently whispered remark to her to return after the wife had gone to the factory?

(Book containing cartoon handed to witness.)

A. I don't see that this has anything to do with sexual relations. 3003

Q. Do you recall the full page color cartoon in the October issue at page 49? A. Yes.

Q. And the man shown there is apparently the indignant husband, isn't he? A. He doesn't look indignant particularly, I think.

Q. The eyes are rather glaring. A. He may be the husband but he doesn't look indignant to me.

Q. His eyes are glaring, aren't they? A. Yes, they are prominent.

3004 Q. Do you think he shows great pleasure at seeing his wife seated in the lap of the fuel oil man? A. I don't think there is much of any kind of emotion registered in his face. It is just a joke to me, that is all I see in the whole cartoon.

Q. You don't think this joke would reflect on the sanctity of marriage and the marriage vows? A. Oh, no.

Mr. Bromley: Doesn't it depend on how much fuel oil he has got in the house, Mr. Hassell?

Mr. Hassell: I object to counsel's facetious remarks.

Mr. Bromley: I will withdraw it.

3005

By Mr. Hassell:

Q. The legend underneath the cartoon "Hello, dear—this is the gentleman who sells us our fuel oil," the cocktail glasses, the shaker on a table in front, and a rather buxom, that is the young lady seated on the fuel oil man's lap, has rather oversized breasts, does she not? The expression on the fuel oil man's face as he embraces her, the attitude of the figure who we will call, for convenient and ready reference, the husband.

3006 You say that there is no off-color or objectionable or indecent connotations to be derived from this cartoon? A. I don't see any. I think it is merely a commentary on what is a very touchy situation today, that is, fuel rationing. I think it is a joke on an actual situation.

Q. Where does the joke come in? A. Well, that is the way I see it. It is merely a humorous comment.

Q. Well, how is it a joke to you? Apparently you don't view it as I do, or others have done here. A. Well, all it means to me is that perhaps a little petting or a little neck-

ing is the way one gets by with the emergency situation today on fuel. 3007

Q. The cocktail glasses and the shaker, the attitude of the male and female figures there seated on the couch would not convey any different idea? A. It would not to me. It simply means that she has also offered him a drink in order to ease the general situation. That is to get a little oil.

Q. Did you read the story on page 77 of the February issue "Home Sweet Ruby Street"? A. Yes, I did.

Q. Did you note the cartoon in the lower part of the page 77, and the textual descriptive matter in conjunction therewith? A. Yes. 3008

Q. Would you say that this story or article could be described as somewhat sordid and in bad taste? A. I don't see it that way at all.

Q. You think it is perfectly proper to describe a scene depicted in that illustration in conjunction with the language descriptive of the scene in the article? A. Well, to me it is not an extreme or an unusual case. I know that what this depicts is an actual situation in life. I know that in crowded Harlem tenements families live together in close proximity and this is a natural occurrence in that particular status of life. That also goes on in white sections, in communities where the sociological conditions are very poor, and so forth.

Q. You would say the fact that it may depict or does depict a true scene in life makes it decent to publish it and spread it on the pages of a magazine distributed all over the United States? A. I think it is decent from this point of view: That this is an actual situation that exists and it is serious. 3009

Q. In other words, you don't think any obscenity can be derived from truth? A. That is right, I do not.

Q. Anything that is true is not obscene? A. That is right.

3010 Q. No matter into how much detail it goes as to sexual relations between the sexes, is that right? A. Well, that is a sweeping statement. In general, I would subscribe to it. I don't think that anything that is naturally, biologically and commonly accepted in practice is obscene.

Q. And the writing in detail about such a biological function and depicting it by figures would not be obscene or indecent? A. Are you inferring that it was actually reproduced in such detail?

Q. No, I am going back to our original question and your answer.

3011 Mr. Hassell: Mr. Reporter, will you read the question?

(Record read.)

By Mr. Hassell:

Q. Anything that is true is not obscene. Now we get a little closer to cases and go into a little more detail into truth.

Do you want to amplify your original answer? A. No, I don't.

3012 Q. What are you being paid to testify here, Mrs. Weissman? A. The arrangement that was made was that my expenses would be taken care of and I would be paid for my time.

Q. Paid for your time? A. Yes.

Q. At what rate? A. My usual salary rate.

Q. How much is that a day? A. Well, I haven't really figured it out. My salary is $3,600 a year.

Q. Did you get a leave of absence from your employment to come down here to testify? A. Yes.

Q. How did you happen to come here to testify, Mrs.

Weissman? A. Mr. Doran came to see me and told me about the— 3013

Q. Who is Mr. Doran? A. Who is he?

Q. Yes. A. Mr. Doran is—

Mr. Doran: I am—.

Mr. Hassell: I wanted to identify him.

The Witness: Came to see me and explained the situation concerning the charge that the Esquire magazine was obscene and that the possibility was that the second-class mailing privileges would be withdrawn, and on that basis he asked me whether or not I thought in my opinion any of the articles, any of 3014 the drawings or any of the cartoons in Esquire were obscene or lewd. I told him I did not think so and he asked me then if I would testify.

Q. This is all in one interview Mr. Doran had with you? A. Yes.

Q. You told him you didn't think any of these matters in these eleven issues would fall in that category at that time? A. Well, the question was first asked generally whether or not I considered the magazine obscene and I said no, and then he asked me about the specific drawings and stories and cartoons cited as obscene; whether or not I had the same 3015 opinion about those.

Q. He went over all those matters with you at that time, did he, Mrs. Weissman? A. No, he merely mentioned some of these articles and asked whether I knew them or not, and so forth.

Q. He mentioned some of them? A. Yes.

Q. And then you told him you would appear and testify and the arrangement was made: is that right? A. Yes; since

3016 I felt that the magazine as a whole could not possibly be classified as lewd or obscene. As a matter of fact, in my estimation the magazine as a whole represents to me a superior brand of literature. I enjoy the stories and the cartoons, and so forth.

Q. Does it have a reputation for being risque, Mrs. Weissman? A. I wouldn't call it risque.

Q. Do you know what position Mr. Doran occupies with Esquire? I want to get this on the record. A. No, I don't know that.

3017 Mr. Bromley: He is an associate of mine. He is an investigator. He has no connection with Esquire.

Mr. Hassell: All right; that is all.

Redirect Examination by Mr. Bromley:

Q. When you used the word truth, Mrs. Weissman, when you and Mr. Hassell used the word truth in the questions which were asked you and which you answered, was your reference intended to be a report of true conditions? A. Yes, the factual truth as it is in reality; actually a literal definition of the word truth.

Q. When you were connected with the Department of Wel-
3018 fare of the City of New York, was its commissioner Mr. Hodson? A. He was.

Q. Did that department have a very large number of people who were on home relief under the New York State laws? A. Yes.

Q. So your contact was, was it not, with people in the poorer, if not the poorest, classes in the City of New York? A. Yes.

Q. Do you think you are reasonably well aware of their moral standards and of their moral conditions and of the conditions in which they live? A. I believe so.

Q. Do you think that there is anything in any of this complained of material in Esquire which if called to their attention or made available to them would have an adverse moral effect on them? A. No, I don't believe so. 3019

Q. By the way, did you ever see Esquire very much in the homes of people on home relief? A. No, not very much; they couldn't afford it.

Q. So far as conditions in Harlem are concerned, this story about this family of Negroes living in one room is not an exaggeration, is it? A. Not by any means.

Q. You know, do you not, that among other things it is fair to say that the reform in the jail system in our country was brought about largely, if not primarily, by long continued publicity with respect to such conditions? A. Yes. 3020

Q. Would you not say that it was a socially desirable thing, so far as conditions in Harlem are concerned, if more articles like this were brought to the attention of the public, the conditions under which these people live? A. Yes, indeed. That was the reason I used the word or term important sociological document in connection with the story on night court. I think there is a similarity there.

Q. Those of us who reside in the City of New York and had a recent experience with almost, if not a near race riot which originated in Harlem? A. Yes.

Q. You are aware, are you not, that it has been openly charged that one of the causes of that disturbance was the fact that unscrupulous landlords gouged on tenants to the extent that families were forced to eat, sleep and perform natural functions all within the limits of one four-walled room? A. That thing is coming out from time to time in various studies that are carried on by various commissions from time to time, and the report has brought out all this material substantially. Unfortunately, nothing much has 3021

3022 been done about it. All I know is that these situations exist; I know it intimately because I have visited and worked with these people that lived under those conditions.

Q. Now, coming back to the so-called nasty words in these issues. You said you did not approve of the word son-of-a-bitch. Do you have any objection to its use in descriptive literature, remembering that it was used once in these 11 issues in connection with a story of a rough and ready merchant marine sailor? A. No, I don't react strongly to the word. I just wouldn't use it myself. I think it is simply a reflection of a person who is in a particular stage of life.

3023 Merchant marine seamen use the word freely. I have seen it in other stories, I have seen it in magazines, have heard it coming from the lips of soldiers and sailors, and it does not invoke any particular reaction.

Q. Do you remember Mr. Nathan's quotation from one of the "Dead End" boys which occurred in one of his columns, in which the words "Jesus Christ" are used and the word "crap" is used? That article in which Nathan lists things to which he objects. A. Yes.

Q. Do you think it is morally corrupting for a magazine of this kind to publish in a column like Nathan's a quotation like that used by one of the "Dead End" kids? A. No, I

3024 don't think it is morally corrupting. I think again it is taken from actual life and those words were actually used by those people.

Q. Mr. Hassell had reference also to the use of the word "behind" in the story "Offensive on the Home Front."

Did you find anything morally corrupting in the use of the word "behind" in describing a woman's posterior? A. No, not at all. I think it is a literal anatomical description.

Q. Is it offensive when applied to a woman? A. No, women use it very frequently.

Q. You mean, you have no objection to it? A. No.

Q. I think I have mentioned all the dirty words. No, there is one other, asterisk. The asterisk sign was used in connection with a quotation from a Far Western paper. The story about the libels that Dave Day went through in his paper. Do you remember that article? A. Yes. 3025

Q. That has been read here to indicate that asterisk means ass-to-risk. Did that occur to you? A. No, it didn't at all.

Q. Now that you know that possible interpretation, does that change your opinion with respect to that article? A. Not one bit.

Mr. Bromley: That is all. 3026

Recross Examination by Mr. Hassell:

Q. These people you refer to on home relief in New York, did they confide in you the very things that induced them to be erotically stimulated? A. No.

Q. As a matter of fact, people on home relief are largely interested in shelter and food, are they not? A. That is right.

Q. Now, with respect to your further definitions of truth, assisted by counsel, it is true that the sexual act takes place, is it not? A. Yes. 3027

Q. Do you mean to say that it is not obscene to portray it or describe it in detail? A. No, it is not obscene.

Mr. Hassell: That is all.

Mr. Bromley: That is all.

(Witness excused.)

3028 **Chairman Myers:** Well, I hope that counsel will be able to get together on the stipulations talked about. It may do a lot to shorten up the hearing.

Mr. Hassell: We might meet at ten o'clock in the morning to allow us to do that.

Chairman Myers: Very well. We will adjourn until ten o'clock tomorrow morning.

(Whereupon, at 5:00 o'clock p. m., the hearing was adjourned until Thursday, October 28, 1943, at 10:00 o'clock, a.m.)

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HEARING OF OCTOBER 28, 1943.

3031

PROCEEDINGS RESUMED

Chairman Myers: All right, gentlemen. I hope we have some satisfactory stipulations.

Mr. Bromley: We have, Your Honor, as a result of this morning's recess. I think we have accomplished a very considerable saving in time, and with the Board's permission I would like to read the stipulations we have entered into in the record.

Chairman Myers: All right.

3032 Mr. Bromley: In view of possible ambiguity which existed as to the position taken by the Post Office Department with respect to whether the publication Esquire complied with the fourth condition of the statute relating to second-class mailing privileges (39 U. S. C. 226) and in view of the further fact that this ambiguity was clarified only after the witnesses, Smith and Croteau, had completed their testimony before this Board and left the jurisdiction, it is hereby stipulated and agreed that each of said witnesses had they been asked the following question would have given an affirmative answer:

3033 Question: Based upon your examination of the eleven cited issues of the magazine Esquire for the period January through November, 1943, will you state whether in your opinion said magazine is devoted to the dissemination of information of a public character or to the arts, literature or sciences and whether the distribution of such magazine is in the public interest.

It is further stipulated that the record be and

3034 hereby is amended to insert said question and answer with the same force and effect as if the same had been contained in the respective examinations of the two above-mentioned witnesses.

It is hereby stipulated and agreed by and between the Post Office Department and the Respondent herein, with the approval of the Hearing Board, that the following persons whose names, addresses and qualifications appear in the record pursuant to this stipulation would, having agreed to appear and testify before this Board, give substantially identical tes-

3035 timony on examination both by the Post Office Department and Respondent as that already given by the witnesses identified in said statements of qualifications or as indicated hereafter in said statements, and that their testimony may be considered by this Board and by any subsequent tribunal before which the record of this hearing may be presented with the same force and effect as if each of said persons had personally appeared and actually given such testimony.

3036 DR. WILLIAM ALLEN NEILSON, College president, author and educator. Born March 28, 1869. M. A., University of Edinburgh, 1891; M. A., Harvard, 1896; Ph. D., Harvard, 1898; LL. D., Harvard, Brown, Amherst, Edinburgh, Dartmouth, Princeton, Oberlin, Mt. Holyoke; L. H. D., Williams College; Litt. D., Yale; President Emeritus of Smith College; Associate Editor of the Harvard Classics; Editor-in-Chief Webster's New International Dictionary.

Would have given substantially the same testimony with respect to college age groups as that of Herbert Smith of

3037

Francis W. Parker School, Chicago, Illinois, and that of Professor Ernest Osborne of Teachers College, Columbia University; is of the opinion that none of the objected to material is in any way deserving of any of the Post Office Department's accusations of lewdness, obscenity, lasciviousness, indecency or filth, and that the worst that he could possibly bring himself to say about any single item of the cited material is that some of it might be considered as lacking in taste.

3038

CLARKE SHAUGHNESSY, Graduate of University of Minnesota; Head Football Coach of Tulane University, New Orleans; University of Chicago; Stanford University, Palo Alto, California; Present Head Football Coach at the University of Pittsburgh.

Mr. Shaughnessy would have given substantially the same testimony as that given by Congressman Samuel Weiss both to the effect that there was nothing whatsoever objectionable in any of the cited issues of the magazine and as to the positive value and excellent quality of the regular sports features of the magazine.

3039

MAJOR JOHN L. GRIFFITH, Commissioner of Athletics for the Western Collegiate Conference Association comprising Universities of Michigan, Illinois, Iowa, Indiana, Purdue, Wisconsin, Minnesota, Ohio State and University of Chicago; Secretary-Treasurer of the National Intercollegiate Association; former President of the National Collegiate Athletic Association; Former Coach Drake University; Director of Drake Relays; Prominent Athletic Officer in First

Depositions of George Jean Nathan and Mary Ellen Chase—for Respondent.

3040 World War; Member of Nation's Physical Fitness Committee.

Major Griffith would have given substantially the same testimony as that given by Congressman Samuel Weiss both to the effect that there was nothing whatsoever objectionable in any of the cited issues of the magazine and as to the positive value and excellent quality of the regular sports features of the magazine.

3041 GEORGE JEAN NATHAN, Editor, author, critic. Regular contributor to Esquire magazine. Generally recognized as one of the ranking authors in the American theatre and a dramatic critic of forty years standing; author of approximately 30 volumes, chiefly concerned with the theatre; for many years has campaigned against "dirt" on the American stage, and, like Mr. Channing Pollock, would have testified to the lack of any indecency in the objected to material and as for affirmative testimony, would have given substantially the same testimony as that of Mr. Channing Pollock concerning the literary value of the magazine's contents.

3042

MISS MARY ELLEN CHASE, Educator and author; Professor of English Literature at Smith College, Northampton, Massachusetts; Member Modern Language Association of America and American Association of University Professors; B. A., University of Maine, 1909; M. A., University of Minnesota, 1918; Ph.D., University of Minnesota, 1922; Litt. D., University of Maine, Bowdoin College, Colby College. Born: Blue Hill, Maine, February 24, 1887; Author of 20 books.

Miss Chase, based upon her experience with girls of col-

lege age, as indicated by her qualifications and employment, would testify that in her opinion none of the material complained of is obscene, lewd, lascivious, filthy, or indecent, or would have any harmful effect upon girls of college age as she has known them at Smith College since 1926. 3043

BENNETT ALFRED CERF, Book Publisher. Born: New York, N. Y., May 25, 1898. A. B., Columbia, 1919; Litt. B., Columbia School of Journalism, 1920. Vice-president, Boni & Liveright, publishers, 1923-1925; founded Modern Library, Incorporated, 1925, and since president; founded Random House, Incorporated, 1927, and since president. Served in O. T. C., Camp Lee, Virginia, 1918. Member Pi Lambda Phi, Phi Beta Kappa, Pi Delta Epsilon. Clubs: Dutch Treat, Overseas Press (N. Y. City). Editor: Bedside Book of Famous American Stories, 1936; Great German Short Stories, 1933; Bedside Book of Famous British Stories, 1940; Anthology of American Plays, 1941. Contributor to Saturday Review of Literature, Publishers Weekly, New York Tribune, etc. 3044

Mr. Cerf would have testified substantially the same as Mr. Channing Pollock. 3045

FELIX M. MORLEY, President Haverford College. Haverford, Pennsylvania, A. B., Haverford College, 1915; Rhodes Scholar, Oxford University, 1919-1921; A. B., 1921; Hutchinson research fellow, London School of Economics and Political Science, 1921-1922; Ph.D., Brookings Institution, 1936; Litt. D., George Washington University, 1940; LL.D., Hamilton

3046 College, 1941, University of Pennsylvania, 1941. Reporter Philadelphia Public Ledger, 1916-1917; Washington Bureau United Press Association, 1917; Washington Bureau Philadelphia North American, 1919; Member Editorial Staff Baltimore Sun, 1922-1929; Correspondent in Far East, 1925-1926; Geneva, Switzerland, 1928-1929; Lecturer on current political problems, St. John's College, Annapolis, Maryland, 1924-1925; Director Geneva office of League of Nations Association of U. S., 1929-1931; became member of staff of Brookings Institution, Washington, D. C., 1931; Editor Washington Post, 1933-1940; President Haverford College
3047 since September 1, 1940; Director National Metropolitan Bank of Washington. Ambulance work, British Army, Flanders, 1915-1916; R. O. T. C., 1917; Special Service, U. S. Department of Labor, 1917-1918. Awarded Pulitzer Prize for editorial writing, 1936. Cutler Memorial lecturer, University of Rochester, 1941. Fellow Royal Economic Society (Great Britain); Member Phi Beta Kappa, Council on Foreign Relations, American Council, Institute Pacific Relations, American Political Science Association, Public Affairs Commission, Member Society of Friends. Author: Unemployment Relief in Great Britain, 1924; (Hart, Schaffner and Marx prize essay) Our Far Eastern Assignment, 1926; The Society of Nations, 1932.

3048 Mr. Morley's testimony would be substantially similar to that of Professor Ernest Osborne of Teachers College, Columbia University. Mr. Morley has stated it to be his opinion that there is nothing obscene, lewd, lascivious, filthy or indecent in any of the cited issues, and that although some of the material, including the article entitled "The Unsinkable Sailor" on page 95 of the February issue, does not appeal to him personally from either an aesthetic or literary viewpoint, he does not find even that article out of place in a sophisticated magazine of the type of Esquire.

Depositions of J. Halsey Gulick and Marjorie Hope Nicolson —for Respondent.

3049

J. HALSEY GULICK, Headmaster of Proctor Academy, Andover, New Hampshire, and Director of Luther Gulick Camps, South Casco, Maine. Member Northeastern Association of Secondary Schools and Colleges, Northeastern Association of Camp Directors (Past President), New Hampshire Headmasters Association, Northeastern Vocational Guidance Association. Born Springfield, Massachusetts, December 27, 1899,

His testimony is substantially the same as that of Herbert Smith and, insofar as camp experience in particular, substantially the same as Professor Ernest Osborne of Teachers College, Columbia University.

3050

MISS MARJORIE HOPE NICOLSON, Educator, Professor of English Literature at Columbia University and former Dean of Smith College (1929-1941). A. B., University of Michigan, 1914; A. M., University of Michigan, 1918; Ph.D., Yale University, 1920; Litt. D., Mt. Holyoke College, 1933, University of Michigan, 1937; Member of Modern Languages Association of America and Member of its Executive Council since 1929, Member of American Association of University Professors, History of Science Society, Senator of Phi Beta Kappa since 1927, Contributor to Studies in Philology, Philological Quarterly, Modern Language Notes, Modern Philology, Studies in Philology, Annals of Science.

3051

Has studied all of the objected to material and based on her knowledge and experience is of the opinion that it is in no way obscene, lewd, lascivious, filthy or indecent, has no tendency whatever to corrupt the morals of girls of college age nor to affect their standards of right and wrong as regards the sexual relation.

Depositions of Stephen Jerome Hannagan and Philip Wieting Lennen—for Respondent.

3052 STEPHEN JEROME HANNAGAN, Advertising expert. Born Lafayette, Indiana, April 4, 1899. Student Purdue University, 1917-1919. Began as reporter, Lafayette Morning Journal while attending high school, became sports editor and city editor; with Indianapolis Star, 1918-1919; with Russel M. Seeds Co., advertising agency, Indianapolis, 1919; became director of publicity Indianapolis Motor Speedway, 1919; with United Press, New York, 1920, later feature writer and New York columnist for Newspaper Enterprise Association and United Feature Syndicate; became head of own 3053 publicity organization, 1924, and conducted public relations for International 500-mile motor race at Indianapolis, City of Miami Beach, Florida, Gene Tunney, Jack Dempsey, Gar Wood; vice president Lord & Thomas, advertising agency, New York, Chicago, 1933-1935; publicity officer under own name, N. Y. City, since August, 1935, conducting publicity for Sun Valley, Ida., Coca-Cola Co., Union Pacific R. R. Co., City of Miami Beach, Fla., etc. Member Sigma Delta Chi. Contributor to Cosmopolitan, Colliers, Liberty, etc.

Mr. Hannagan's testimony would have been substantially the same as that given by Lee Bristol and Raymond Gram Swing.

3054 PHILIP WIETING LENNEN, Advertising expert. Born Syracuse, N. Y., June 30, 1887. Student Trinity Chapel Preparatory School, N. Y. City. Began as junior copywriter, mail sales department, A. W. Shaw Co., Chicago, sales manager, 1907-1910; vice president Royal Tailors, Chicago, 1911-1923, Erwin-Wasey Co., Inc., Chicago, 1923-1924; President, Lennen & Mitchell, Inc., New York, since 1924. Member St. Nicholas Society.

Mr. Lennen's testimony would have been substantially the same as that given by Lee Bristol of Bristol-Myers Co. and Robert Orr of Lennen & Mitchell, Inc.

Chairman Myers: I think you both ought to be congratulated on getting so much testimony out of the way. 3055

Has the Respondent any further witnesses?

Mr. Bromley: Yes, sir; we have, Mr. Chairman; we have Mr. Hall.

LLOYD H. HALL, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Bromley: 3056

Q. Will you give us your full name, Mr. Hall, please. A. Lloyd H. Hall.

Q. Where do you live? A. Garden City, N. Y.

Q. What is your business, Mr. Hall? A. I have an advertising agency and market research organization, and as part of our organization conduct an editorial analysis of some thirty leading magazines which is published on a monthly basis in a report form.

Q. For how long a time have you been in the advertising business? A. I have been in my own business in the advertising business since 1931.

Q. And this editorial analysis bureau of which you speak, what is its corporate name? A. We have simply established it as the Editorial Analysis Bureau of the Lloyd H. Hall Company. 3057

Q. What is the Lloyd H. Hall Company? A. It is a proprietorship.

Q. And what is its business? A. Its business is advertising and market research and editorial analysis.

Q. And it has a department or bureau which is called the

3058 Editorial Analysis Bureau; is that right? A. That is right.

Q. What does that bureau do? A. That bureau classifies the editorial material in the magazines covered, measures the lineage under each classification, and issues a report each month with that statistical data.

Q. What magazines does it cover? A. It covers some thirty magazines, national weeklies such as Saturday Evening Post, Colliers, Liberty, Look, News Week, Time, and we have the New York Times magazine section; we have the woman's group magazines, like Good Housekeeping,
3059 Ladies Home Journal, McCalls, Parents Magazines; general monthly magazines such as American, Cosmopolitan, Red Book, Esquire; fashion magazines such as Mademoiselle, Vogue, Harpers Bazaar; the home magazines, such as American Home, Better Homes and Gardens, House and Garden, House Beautiful; national farm papers such as the Country Gentleman, Farm Journal, Successful Farming—I would have to refresh my memory—

Q. That is enough. That gives us an idea.

What kind of reports do you issue, and how frequently? A. Each month.

Q. In printed form? A. In printed form.

3060 Q. And is it the only one of its kind in this country? A. In so far as we have ever known, yes.

Q. What is its purpose? A. Its purpose is to furnish information on one factor which is important in the selection of media to carry an advertising message.

It is designed to show the advertising setting that the magazine furnishes for that advertising message, to break down the editorial material into some nineteen main classifications.

Q. Such as what? A. National affairs, foreign affairs, business and industry, children, health, home furnishing— 3061

Q. Fiction? A. Fiction, general interest material, cultural interest material, and other classifications of that ilk.

Q. Now, you show the analysis of each one of these magazines, so far as editorial content is concerned, each month, do you? A. We do.

Q. And you break it down both as to numbers of lines and percentage of the total content of this magazine? A. That is true to this extent: The percentages given for the various editorial classifications are based upon the total editorial as 100 percent, and then we show the number 3062 of lines for the complete magazine, including advertising, and allot a figure to the editorial matter that that bears to the total.

Q. Is that commonly accepted in the publishing and in the advertising field as an authoritative analysis of editorial content of magazines? A. Yes. I believe that it is. It has been encouraged by publishers in the field because they felt it filled a niche which was necessary and needed, and we never had our authority questioned on that particular.

Q. For how long a time has this been issued month by month? A. Since 1938. 3063

Q. This is a commercial venture, I take it? A. That is true.

Q. Who are your customers? A. Our customers are publishers and advertising agencies and advertisers.

Mr. Bromley: Will you mark this book entitled "Editorial Analysis Bureau, October, 1943," for identification.

(The book referred to was marked for identification as Respondent's Exhibit No. 46.)

3064 *By Mr. Bromley:*

Q. Is Exhibit 46, for identification, the last issued monthly editorial analysis book for the year 1943? A. Yes, it is.

Q. Does it show the editorial content of the magazines you have mentioned, and others, not only for the month of October but for all of the year of 1943? A. To date.

Q. To date? A. Yes.

Q. What is the charge, if you don't mind telling us, to your customers for this book furnished monthly over a year? A. Eight hundred dollars for the annual service
3065 to publishers who have more than one publication that we classify or analyze. Five hundred dollars a year for publishers where they have only one magazine that is represented for the service.

Q. How many advertising agencies are your customers? A. We have about 21 or 22 agencies who buy a little bit shorter service than that. It is issued twice a year instead of monthly.

Q. Are they, generally speaking, the more prominent advertising agencies? A. Yes, sir. Batten, Barton, Durstine and Osborn; Erwin Wasey and Company; The Compton Company; Benton and Bowles Company; and many
3066 others.

Q. All of them clients of yours? A. Yes, and others of that character where they have a wide enough diversity of accounts to be interested in such an item.

Q. If I wanted to get your estimate of how much of the textual material of Esquire in the month of October was devoted to national affairs, could I find a sheet in here which analyzes the October issue of Esquire which would give me the textual percentage devoted to national affairs? A. Yes.

Q. Could I find it for foreign affairs? A. Yes. 3067

Q. And for sports? A. Yes.

Q. Is that found on page 27 of this Exhibit 46, for identification? A. Yes, it is.

Q. Page 27 is the page which analyzes the editorial content of Esquire for October; is that right? A. Yes, that is true.

Q. Does that give the same analysis for the preceding ten issues of Esquire for the year 1943 in a different column? A. Yes, a cumulative figure.

Mr. Bromley: I offer the exhibit in evidence. 3068

Mr. Hassell: I object, Mr. Chairman. This is manifestly, from counsel's description, a summary of matter that under this classification we already have in evidence in this proceeding. I did not catch counsel's reference to it, whether it covers more than these eleven issues, or covers all of these eleven issues, or a part of them, or what part of them. It is not clear what he means by editorial matter. I assume he means all textual matter outside of the advertising.

Mr. Bromley: That is right.

Mr. Hassell: But I submit this simply serves to further muddy the waters here. We have these eleven issues that are involved here before you. You can very easily glance through them and see what the whole magazine is. There is no controversy, so far as the Government is concerned. The only question is as to whether this magazine contains other material or other matter that may be of interest to the readers. 3069

MICRO CARD
TRADE MARK ®
22
45
679 2
MATTHEW BENDER & COMPANY
MB
83
microcard

3070 **Chairman Myers:** Wouldn't that stipulate out this question raised on "b" in the notice, dissemination of information of a public character?

Mr. Hassell: No, it would not.

Mr. Bromley: This I think the Board will find to be a most helpful aid in an analysis of what kind of magazine it is, which I do not believe any human being can do without an expenditure of a tremendous amount of work. I mean if you undertake to do the job you could get a general idea, but it would take you quite some time.

3071 **Chairman Myers:** Is this addressed to the point that is raised on the dissemination of information of a public character?

Mr. Bromley: Yes, sir.

Chairman Myers: Objection overruled.

(The book heretofore marked for identification "Respondent's Exhibit No. 46," was received in evidence.)

By Mr. Bromley:

3072 **Q.** In connection with the preparation of this analysis, did you have the assistance of an independent advisory board of gentlemen in no way connected with publishers? A. Yes, we had.

Q. Do they supervise your work and pass upon the classification of material generally? A. Yes. We question them when it comes to a matter of classification, or the inclusion of publications in the service. Any matter of general policy which has to do with the service.

Q. Now, who are those gentlemen who composed that

committee for the year 1943? A. Well, Mr. H. H. Dobberteen of Benton Bowles Agency. I believe he is the immediate director of Benton Bowles. 3073

Mr. W. J. O'Donnell of Batten, Barton, Durstine & Osborn Agency. Mr. T. N. Tveter, who is the immediate director of Erwin Wasey, Inc.

Mr. Guy Richards, who is the vice-president of the Compton Agency in New York.

Incidentally, we consulted these gentlemen at the time we were starting this thing, and it is partly because of their interest in the thing that we went ahead with it and developed it as we have.

3074

Q. Now, on pages 1 and 2 of Exhibit 46, there is a table which classifies the magazines for which this service is covered, isn't there? A. There is.

Q. And magazines like Good Housekeeping, Ladies Home Journal, McCall's, Woman's Home Companion, True Story, Parents Magazine, and Household are classified as women's magazines; is that right? A. That is true.

Q. I notice you have a classification, general magazines, and in that classification appears American Magazine, Cosmopolitan Magazine, Red Book Magazine, and Esquire Magazine? A. That is true.

Q. Is Esquire of the type of magazine which you call "general"? A. Yes, it is. 3075

Q. And you have classified on those two pages all of the magazines either as farm, fashion, general, home, woman's or weeklies; is that right? A. That is true.

Q. Now, on page 27 of Exhibit 46 is the page devoted to Esquire Magazine, isn't it? A. Yes.

Q. And, all the other pages in the book are devoted to other magazines? A. That is true.

3076 Q. Will you tell us on the basis of the first ten issues in 1943 of Esquire, because this is all this exhibit covers just through October—the November issue isn't out yet? A. That won't be out until the 15th of November.

Q. On the basis of the first ten issues of 1943 of Esquire how much of the editorial comment of the magazine was devoted to fiction? A. We have a total of 11.3 percent for the first ten issues.

Q. That is what I am talking about. A. Yes.

Q. And how much of it was devoted to matters of general interest? A. We have a total of 37.2 percent.

3077 Q. And how much of it to matters of cultural interest? A. 8.8 percent.

Q. And how much of it to wearing apparel and accessories? A. A total of 7.7 percent.

Q. And how much of it to travel and transportation? A. A total of 2.7 percent.

Q. And how much of it to sports? A. A total of 10.1 percent.

Q. And how much of it to food? A. A total of 2.5 percent.

Q. And how much of it to amusement? A. A total of 7.1 percent.

Q. And how much of it to foreign and international affairs? A. A total of 4.1 percent.

3078 Q. And to national affairs? A. 4.5 percent.

Q. Can you tell us generally over these ten issues how much of each issue is advertising and how much is editorial context, and when I say "editorial context," I include pictures. How is that broken down, do you know? A. I can read the figures right off there.

Q. Does it show here? I want to know how much is advertising over the first ten issues and how much is other than advertising. A. We carry the total editorial figure

and the figure for the total magazine which includes editorial and advertising. We don't actually give an advertising percentage, but it may be had from deduction. 3079

The total editorial material amounted to 64.1 percent of the magazine for the first ten issues this year.

Q. That means that 35 per cent of each issue was advertising and 65 percent, roughly, was editorial content? A. That is right; yes, sir.

Q. Can you give us any idea generally how that runs for other magazines? A. Well, we have a comparison, as shown in there.

Q. And what page is that? A. Pages 3 and 4, I believe. 3080

Q. Take any magazine. What about the Saturday Evening Post? A. The Saturday Evening Post for the issues for the corresponding period—

Mr. Hassell: What page is that?

The Witness: Pages 3 and 4—has 50.2 percent total editorial. In other words, it is about a fifty-fifty balance.

Q. The Saturday Evening Post is half advertising? A. Yes, that is what it shows.

Q. What about Life? A. Life editorial content represents 52.1 percent of the magazine. 3081

Q. Do you have that magazine—what is it called—Newsweek? A. Yes.

Q. How does that run? A. 43.1 percent total editorial.

Chairman Myers: What about Vogue?

The Witness: Vogue shows 49.9 percent total editorial.

3082 *By Mr. Bromley:*

Q. Well, now, you haven't hit any magazine that is as low in advertising as Esquire yet. A. Red book.

Q. Take Red Book. A. Red Book is 72.4 percent editorial.

Q. Red Book is 75 percent editorial and 25 or 26 percent advertising, roughly? A. Yes.

Mr. Bromley: That is all.

Cross Examination by Mr. Hassell:

3083 Q. Do you have form or stock or general classifications and apply them to every magazine?

For instance, national affairs, amusements, beauty culture, and so forth? A. Yes, we do.

Q. So this analysis of these ten issues of Esquire Magazine has all of your regular classifications, whether or not there is anything of that sort in Esquire? A. That is true.

Q. I notice here on page 3 under "Esquire," you have "Beauty, 960 lines, 1.1 percent." Then on page 10, devoted to Esquire, you show "Beauty——." A. Page 10?

Q. Page 10. You don't show any percentage on beauty. A. Page 10 is the individual report on Newsweek. Page 27

3084 is Esquire.

Q. I beg your pardon—I see. You carry that over? A. Yes, pages 3 and 4 show main classifications and the other pages of the book are what we term our individual magazine report and they show the main classifications with further breakdowns under each.

Q. Now, this 960 lines on beauty culture in Esquire—was that advertising? A. No, editorial matter.

Q. Beauty culture for men? A. I am sorry; I don't

remember just exactly what that covered. I would have to check on it. 3085

Q. Could you state in what category or classification here in this Respondent's Exhibit 46 you have included the matter in the February, 1943, issue of Esquire entitled "The Unsinkable Sailor"? A. Could I refresh my memory? I can't tell you from memory but I can tell you from the fact that I found out by calling the office and checking our market copies where that was classified. I can't tell you from memory. I can refer to a report which I have. Shall I do that?

Q. Yes, that's all right. A. Is that page 95, the story of "The Unsinkable Sailor"? 3086

Q. Continued on page 95. It begins on page 30. A. That was put in our classification 1608 under "General Interest."

Q. General Interest? A. Yes.

Q. You have got 1608 "Unclassified Editorial Material." A. That is true. That is general interest material which does not fall in stated classifications that we have on the report.

Q. I see here you have an item under "Cultural Interests," 1501, animals and birds and fish. A. That is true.

Q. Did you include the mermaids and Esky in that? A. I think I can say from memory that we did not. 3087

Q. What would you include that in? A. What would we include Esky in?

Q. Esky Strip cartoons and textual matter. A. Those would go in our classification 1602, Humor and Cartoons.

Q. Humor and Cartoons? A. Yes.

Q. How do you classify the Varga girls under this classification? A. The Varga girls have gone under 1602 also.

Q. Do you measure the lineages on the fourth column pages the same as on the three column pages? I mean, is

3088 the measurement the same? A. Yes, a page has a certain number of lines and it makes no difference whether it has three or four columns. Where we have to break up a page then it is done on a fractional basis, depending upon how many columns there are to the page. If there is more than one item on the page, and they fall into different classifications, we would then break up that page according to the ads.

Q. Is there more lineage on the four-column page than on the three-column page? A. No. You see we are dealing not with typed lines but what is termed agate lines. It is the unit of measurement. In other words, it is calculated to 3089 be about 14 agate lines to the inch, and we use the standard page size as given by the publisher.

Q. Now, will you look at page 30 of the February issue of the story "The Unsinkable Sailor." Look at that drawing which takes up a large part of the lower left-hand corner of that page. A. Yes.

Q. How would you measure the lineage on that page? A. I can't tell from memory, but I can tell you from practice, sir.

If this drawing or illustration bears any relationship to the text in the story then it would be included in that 3090 story. In other words, that page would be measured. If it has no relationship to the text then it would be taken out and credited to some other classification, wherever it might apply.

Q. Suppose it is impossible to tell whether it has any relationship to the text or not. A. Well, there are some things about this service of ours that can't be absolutely a hundred percent perfect, but in that instance where there might be some tie-up, we would probably include it with the story on the basis of a little spot illustration which

might brighten up the headlines, or include it with pieces of fiction, or whatever other articles it might illuminate. 3091

Q. Now, I notice, referring to that matter of "The Unsinkable Sailor," on page 95, it has boxed in, near the center, in the upper part of the page, some matter headed "Our Military Strategy Comedy Strip Department." Would you say that that would have been measured in the lineage of this article or not? A. Without having read the whole thing, I should say that it probably would be our policy to take that out.

Q. To take that out? A. In other words, this material, which is considered extraneous, even though it might be a part of an article, very frequently like magazine notices are put in an article like that, and those are taken out. 3092

Q. You have a way to measure the agate lineage of that whole page, and of this particular boxed-off material which you deduct from it? A. That is true. In other words, this page is divided into columns of type. Each column would be one-fourth of the lineage of the page. That little box measures two columns, and you simply estimate the depth of it and calculate it on that basis.

Mr. Bromley: And take it out?

The Witness: And take it out or classify it in whatever classification it goes. 3093

By Mr. Hassell:

Q. The full-page cartoons in this publication would be estimated on the same basis for lineage as you would boxed material? A. That is true of any material in the magazine that we measure. We make no differentiation between photographs as against illustrated material or text.

3094 Q. I notice referring back to page 27 of this exhibit you have "Home Furnishing and Management, Lines 2622—3 percent." You don't break that down as to the 1100, Home Furnishing and Management Department, under that, Appliances and Equipment, and 1121, Miscellaneous, each of which has 56 lines? A. You see we use what might be termed a decimal system. The 1100 classification is Home Furnishing and Management. Then 1110 is appliances and equipment, and in that we have 56.

Q. You break it down? A. And then it goes 11, 12, 13, 14, 15, 16, and so forth, all divisions under the 1110, which
3095 is Appliances and Equipment. Now, we say that it has 56 lines in Miscellaneous, Appliances and Equipment. In other words, there were other items than electric ranges or those that were illustrated.

Q. And this would not include advertising material? A. No, it does not in any of these figures or classifications include any advertising, and that takes in either paid advertising or house advertising.

Mr. Hassell: That is all.

Mr. Bromley: That is all. Thank you.

(Witness excused.)

3096

Chairman Myers: Call the next witness.

Mr. Bromley: Mr. Allen.

BENJAMIN ALLEN, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows: 3097

Direct Examination by Mr. Bromley:

Q. What is your name? A. Benjamin Allen.

Q. Where do you live? A. In Malvern, Pa.

Q. What is your business? A. I am with Curtis Publishing Company, Philadelphia.

Q. In what capacity? A. As director of all circulation, and vice-president of the company, and a member of the board of directors. 3098

Q. For how long a time have you been connected with the Curtis Publishing Company? A. Twenty-two years.

Q. What are your duties as circulation manager? A. I have charge of the distribution of our own magazines. That is the magazines that we publish,—or the company,—and of certain other magazines that we distribute for other publishers, and the sale of subscriptions of certain other magazines for whom we sell subscriptions.

Q. How long has the Curtis Publishing Company been in existence, Mr. Allen? A. About 55 years.

Q. And it publishes, itself, what magazine? A. The original publication was the Ladies Home Journal, which 3099 was started by Mr. Curtis, the founder of the company. About the turn of the century he acquired the Saturday Evening Post, the oldest weekly magazine in continual circulation. As a matter of fact, it was started in 1728 by Benjamin Franklin, the first postmaster general.

In 1915 we acquired the Country Gentleman, the oldest agricultural paper in the country; and in 1938 started a juvenile magazine called Jack and Jill.

3100 Q. What magazines do you distribute as distinguished from those you publish yourself and distribute? A. Well, we distribute Esquire, Coronet, and The Woman, and several other small juvenile publications.

Q. When did you commence distribution of the magazine Esquire? A. July, 1940.

Q. You have done it since that time right down to the present time? A. Yes, sir; continuously.

Q. And are doing it now? A. Yes, sir.

Q. What can you tell us about the magazine Coronet? A. Well, Coronet is a magazine that is also published by
3101 Esquire, Incorporated, the publishers of Esquire. We have been distributing that ever since the same time, June, 1940. You understand when I say "distributing" I am referring not to subscription copies but to copies distributed for resale at newsstands.

Q. You handle, then, do you, the matter of making arrangements with retail outlets, granting franchises, making contracts, and carrying out the physical distribution? A. That is right, in all cases except sales through the American News Company, which they handle directly.

Q. I understand the monthly circulation, then, which you handle for this magazine on a monthly distribution basis
3102 is about 400,000 copies? A. It averages about that; yes, sir.

Q. What is the general circulation for all of the magazines over which you exercise distribution and control? A. About 12,000,000 an issue; about 275,000,000 copies a year.

Q. Now, as circulation manager of the Curtis Publishing Company, is it also a part of your duties to read competitive magazines? A. It is a part of the duty of my department to keep posted continuously on editorial content of other magazines.

Q. Do you keep posted, yourself? A. Yes, I do.

Q. About how many magazines other than your own do you keep informed of as a matter of current interest? A. Well, all the competing magazines, you might say magazines of the better class: Colliers, Woman's Home Companion, Good Housekeeping, Cosmopolitan, McCalls, Red Book, Life, Time, Newsweek. That about covers the group. 3103

Q. What can you tell us generally about the change, if any, which has occurred in the editorial content of the magazines which you have mentioned over the last 20 years? A. Well, I would say that they have all become much broader and franker. That is especially true, I think, since the advent—or, rather, not the advent but the perfection of four-color printing which has added a lot to color work in books and illustrations which we consider to lighten up the book and have much more reader interest. 3104

Q. Have you tried to keep yourself abreast of the trend of public opinion with respect to this new frankness which is characterizing magazines today? A. Yes.

Q. What can you tell the Board as to whether or not you think public opinion accepts generally and approves of the frankness and forthrightness of present-day publications? A. Well, naturally, we carry on contacts with the public. We have several methods of contact, our own department contact with the public, our editorial mail, research contacts, and so on, and in my opinion it is apparent that the public is continuously accepting broader and more frank editorial treatment in the content of magazines. 3105

Q. Is there any magazine today which you know of which would not publish the words "son-of-a-bitch," for instance, about which we have had a great deal of discussion? A. Do I know of any that would not?

Q. Yes. I don't know if you do or not. A. Yes, I think I do.

3106 Q. Would a magazine like Harper's— A. I don't think Ladies Home Journal or Woman's Home Companion would publish it.

Q. Would a magazine like Life, Time, Fortune? A. Yes, I don't think there is any doubt about it.

Q. What about a magazine like Harper's Monthly? A. I believe Harper's Monthly would. As a matter of fact, I have seen the word in print in several magazines, Time, for instance, and the New Yorker.

Q. I asked you about Harper's because I was sitting here a minute ago and I picked up a Harper's magazine from
3107 the table and I slipped over the pages to page 317, purely by accident, of this issue which I hold in my hand, for September, 1943, and I noticed an article by Lt. Edward L. Smith of the Marine Corps, entitled "Marine, You Die." And I purely by accident found this sentence in the middle of the second column on page 317.

Would you read those three or four sentences into the record?

Mr. Hassell: I object to taking a sentence or so out of a magazine without any context, and I object to this testimony in general.

3108 Chairman Myers: What is your purpose, Mr. Bromley?

Mr. Bromley: As bearing on the validity of the charge that Esquire's publication of the word "son-of-a-bitch" is obscene, that being directly cited as obscene material.

Chairman Myers: The objection is overruled.

The Witness (Reading): "Over the radio we would hear the announcer describe the latest developments in Africa; then he would turn to the Pacific theatre

and in a mournful voice tell us that we were in grave danger, that Washington was deeply concerned about the plight of the men on Guadalcanal. The little island fortress might fall at any time. This announcement would be greeted with laughter, and some private would pipe up, 'Well, I'll be a sad son-of-a-bitch! Don't they know we got Marines on this island?' " 3109

Mr. Bromley: I ask to be marked for identification this issue of Harper's Magazine for September, 1943.

(The magazine referred to was marked for identification as Respondent's Exhibit No. 47.) 3110

The Witness: I think particularly since the war started and a great many magazines have been publishing these true experience stories that words such as "son-of-a-bitch" have become much more generally used in magazines.

By Mr. Bromley:

Q. What about the use of such words as "fanny" and "behind"? A. I don't think you would see that quite as often as you would see words like "son-of-a-bitch," but undoubtedly they do appear. 3111

Q. What about such a word as "prostitute"? A. Well, I think you would see "prostitute" used in quite a few articles.

Q. What about such a phrase as "bawdy house" or "sporting house"? A. Yes, I have seen that a number of times.

Q. What about the current accepted standard of publishing either drawings in black and white or color photographs of the undraped female figure? A. They have become much

3112 more common, particularly since the advent, I think, of picture magazines.

Chairman Myers: Before we get off too far, may be you had better let Mr. Hassell see that exhibit. You have had it marked. I don't know what you are going to do with it.

Mr. Bromley: Very well.

(Exhibit No. 47 was handed to Mr. Hassell.)

Mr. Bromley: Will you mark for identification
3113 the issue of Life for February 23, 1942?

(The magazine referred to was marked for identification as Respondent's Exhibit No. 48.)

By Mr. Bromley:

Q. Referring to this Exhibit No. 48, for identification, I ask you whether or not the colored picture appearing on page 64 thereof is or is not typical of the kind of illustration now currently and commonly used in current magazines of the undraped female form? A. I would say it is.

3114

Mr. Bromley: I offer the exhibit in evidence.

Chairman Myers: What about the other exhibit? Did you offer the Harper's in evidence?

Mr. Bromley: No. I offer Exhibit No. 47, for identification, in evidence.

Chairman Myers: Any objection?

Mr. Hassell: The same objection.

Chairman Myers: Same ruling; overruled. 3115

(The magazine heretofore marked for identification "Respondent's Exhibit No. 47," was received in evidence.)

Mr. Bromley: I offer in evidence Respondent's Exhibit No. 48, for identification.

Mr. Hassell: Same objection.

Chairman Myers: Overruled.

(The magazine heretofore marked for identification "Respondent's Exhibit No. 48," was received in evidence.) 3116

Mr. Harding: May we have the same stipulation on that, Mr. Hassell, continuing on all of these issues?

Mr. Hassell: I don't understand the stipulation you are talking about.

Mr. Harding: The same stipulation about substituting copies.

Mr. Hassell: Yes, that's all right.

Mr. Bromley: May I have marked as Exhibit 49 for identification the issue of October 7, 1940, of Life. 3117

Mr. Cargill: Are we going to go into all of these magazines like we did the other day?

Mr. Bromley: I don't understand, Mr. Cargill, what you mean.

Mr. Cargill: Is that whole stack supposed to go in like this one on the desk?

Mr. Bromley: Yes, sir.

3118 "Chairman Myers: That is going to make a terribly big record. Do you suppose you could take some out that are typical?

Mr. Bromley: I have cut the number down as low as I can, to about 40 illustrations. Maybe I can cut it more.

Chairman Myers: Are you offering the illustration or the entire magazine?

Mr. Bromley: Of course, I would like to just offer the illustration. I have been offering the magazine on the theory that is what Mr. Hassell would want.

3119 I am calling attention to the page.

Chairman Myers: You may give us a nice winter's reading.

Mr. Hassell: I believe when we started on this the other day I withdrew a certain objection as to proof with the understanding that the entire issue of the magazine would go in.

Chairman Myers: That is right.

Mr. Hassell: And I would like to have that adhered to, if the Board is going to admit this.

Chairman Myers: All right. Then proceed.

3120 Q. Is the illustration of the nude which appears at page 65 of Exhibit 49 typical of that class of illustration? A. Yes. I would say it was.

(The magazine referred to was marked for identification as Respondent's Exhibit No. 49.)

Mr. Bromley: I offer Exhibit 49, for identification, into evidence.

Mr. Hassell: Same objection.

Chairman Myers: Same ruling; overruled.

(The magazine heretofore marked for identification "Respondent's Exhibit No. 49," was received in evidence.) 3121

Mr. Bromley: Will you mark for identification the issue of Life for July 29, 1940, please.

(The magazine referred to was marked for identification as Respondent's Exhibit No. 50.)

By Mr. Bromley:

Q. I show you the illustration in Exhibit No. 50, for identification, at pages 50 and 51, particularly the top one on 50 and the outside one on 51, and ask you whether or not those are typical examples of the type of undraped females now currently appearing in modern magazines? A. Yes. 3122

Mr. Bromley: I offer Exhibit 50 in evidence.

Mr. Hassell: Counsel refers to undraped females—

By Mr. Bromley:

Mr. Bromley: I withdraw it—females.

Chairman Myers: Same ruling. 3123

(The magazine heretofore marked for identification "Respondent's Exhibit No. 50," was received in evidence.)

Mr. Bromley: Will you mark for identification the issue of Life for May 6, 1940?

(The magazine referred to was marked for identification as Respondent's Exhibit No. 51.)

3124 Mr. Bromley: And the issue of June 3, 1940.

(The magazine referred to was marked for identification as Respondent's Exhibit No. 52.)

Mr. Bromley: And I ask that the issue of June 24, 1940, be marked for identification—this is Life.

(The magazine referred to was marked for identification as Respondent's Exhibit No. 53.)

By Mr. Bromley:

3125 Q. In Exhibit 51, for identification, I call your attention to pages 88 and 89 and ask you whether or not those are typical examples of pictures of pin-up girls currently appearing in magazines today? A. Yes.

Mr. Hassell: May I see those?

Mr. Bromley: I will show them to you in a minute. They are all in one volume here.

By Mr. Bromley:

3126 Q. In Exhibit No. 52, for identification, at page 4, I call your attention to the two pictures of a mother nursing a baby and ask you whether that is a typical example of similar subject matter which sometimes appears in current magazines? A. Yes, sir. It could hardly be called anything else.

Q. And in Exhibit 53, for identification, I call your attention to pages 50 and 51, the four pictures with the strip teasers undressing, and ask you whether that is a fair and typical example of that type of picture in current magazines? A. Yes.

Mr. Bromley: I offer all three exhibits in evi- 3127
dence.

Mr. Hassell: Same objection.

Chairman Myers: Suppose you note it in each case. Note the same objection, same ruling, and an exception in each case. That will save time.

Mr. Hassell: Does counsel object to having the record show that these so-called pin-up girls are in black and white and not in colors?

Mr. Bromley: All right, sir.

(The magazines referred to were marked "Re- 3128
spondent's Exhibits Nos. 51, 52, and 53" and received in evidence.)

Mr. Hassell: And that the picture on page 52 is about two and a half inches tall and a couple of inches wide in black and white. That the Margie Hart strip tease pictures in Respondent's Exhibit 53 are in black and white.

Mr. Bromley: Yes, sir.

Chairman Myers: Proceed.

Mr. Bromley: Will you mark for identification the issue of Life of April 21, 1941.

Mr. Cargill: Are these repetitions of the same thing 3129
that you are putting in or do you expect those to be comparisons of different pictures in the magazine or is this an accumulation of the same thing over and over again?

Mr. Bromley: No. I have tried to select, if the Board pleases, examples of the same sort of thing which has been attacked by the Post Office Department. For example, this next one is a line drawing

3130 very similar to the fashion page in Esquire of the girl lying on her back with her leg up in the air and the woman painting her stockings.

Chairman Myers: "Hew to the line, Bertha; let the skirts fall where they may".

Mr. Bromley: That is right. I am trying, Mr. Cargill, to be sure I get into the record examples of each one of the complained of illustrations in Esquire and that is all I am trying to do. I am not trying to go beyond that. I would like to get enough in the record to show that this is a continuing practice and not

3131 a mere isolated instance. I mean, if Life published one naked woman I don't think that that would be very persuasive. I would like to get enough illustrations from Life to show that it is a regular practice and I would like to get enough illustrations from the Woman's Home Companion to show that it is a regular practice.

Mr. Cargill: But we have that.

Mr. Bromley: I would like to get some jokes, articles and pictures to show each one of those things.

Mr. Cargill: But we have to read all of this stuff.

Mr. Bromley: No, you don't. You look at it when

3132 it is received in evidence, and I believe that is all you will have to do with it. Maybe not, but I want to show it to you when I put it in.

(The document above referred to was marked Respondent's Exhibit No. 54 for identification.)

By Mr. Bromley:

Q. In Respondent's Exhibit 54 for identification, I show you a two-page spread, on pages 12 and 13, entitled "Speak-

ing of pictures. This is a day in Babe's life", and ask you whether that is typical of the pen and ink illustrations of that type? A. In my opinion, yes. 3133

Mr. Bromley: I offer Exhibit 54 in evidence.

Mr. Hassell: Same objection.

Chairman Myers: The same ruling. It is admitted.

(The document heretofore marked Respondent's Exhibit No. 54 for identification was received in evidence.)

Mr. Bromley: Will you mark for identification, please, the issue of Life for June 23, 1941, and the issue of Life for June 30, 1941? 3134

(The documents above referred to were marked Respondent's Exhibits Nos. 55 and 56 for identification.)

By Mr. Bromley:

Q. I call your attention in Exhibit 55 for identification to the illustration on page 55 of the article: "New York Gets Biggest Jive Joint" and ask you whether those illustrations and photographs of disrobing females are typical of the times? A. Yes. 3135

Mr. Bromley: I offer Exhibit 55 in evidence.

Mr. Hassell: Same objection.

Chairman Myers: Same ruling. It is admitted.

(The document heretofore marked Respondent's Exhibit No. 55 for identification was received in evidence.)

3136 *By Mr. Bromley:*

Q. In Exhibit 56 for identification I call your attention to pages 59, 60 and 61, and ask you whether those photographs of girls in bathing costumes are typical of what is currently published in magazines? A. Yes.

Mr. Bromley: I offer Exhibit 56 in evidence.

Mr. Hassell: Same objection.

Chairman Myers: Same ruling. It is admitted.

3137 (The document heretofore marked Respondent's Exhibit No. 56 for identification was received in evidence.)

Mr. Bromley: Will you mark for identification, please, the issues of Life for July 21, 1941, and August 11, 1941?

(The documents above referred to were marked Respondent's Exhibits Nos. 57 and 58 for identification.)

By Mr. Bromley:

3138 Q. In Exhibit 57 for identification I call your attention to page 55 and 56 and ask you whether that is another typical example of the photographs of girls in bathing suits? A. Yes, it is typical of that type of material.

Q. Is that true of the pictures on page 58 in that issue? A. Yes.

Q. And in Exhibit 58 for identification I call your attention to page 33 and ask you whether that is a typical example of a photograph of a movie star in an evening dress

or night gown? A. I don't think it is an evening dress. I think it is a night gown. 3139

Q. I would say it is an evening dress. A. I would say it is typical.

Q. Is that cover of Exhibit 58 for identification, being a picture of a movie star in a bathing suit, a typical example of the kind of bathing suit pictures now published in large size? A. Yes.

Mr. Bromley: I offer Exhibits 57 and 58 in evidence.

Mr. Hassell: The same objection. 3140

Chairman Myers: The same ruling. They are admitted.

(The documents heretofore marked Respondent's Exhibits Nos. 57 and 58 for identification were received in evidence.)

Chairman Myers: We will take a recess for ten minutes.

(Whereupon a brief recess was taken.)

Chairman Myers: Proceed, gentlemen. 3141

Mr. Bromley: Will you mark for identification, please, the issues of Life for September 1, 1941, September 22, 1941, September 29, 1941 and October 13, 1941?

(The documents above referred to were marked Respondent's Exhibits Nos. 59, 60, 61 and 62 for identification.)

3142 *By Mr. Bromley:*

Q. In Exhibit 59 for identification, the issue of September 1, 1941, I call your attention to pages 8 and 9 which are reproductions of favorite post-cards with the Army and Navy. Is that a typical example of what is published in service papers, post-cards, or pictures? A. I would say.

Q. From Exhibit 60, I call your attention to the cover, being a picture of Brazil's top dancer. Is that a typical example of photographs widely published in current magazines? A. It is.

3143 Q. And in that Exhibit 60 for identification at page 37 I call your attention to a panel of nine pictures of Brazil's Eros Veluzia doing a Negro witch dance.

Is that typical of the pictures of bizarre dancers which are currently published in current magazines now? A. Yes.

Q. In Exhibit 61 I call your attention to pages 36 and 37 showing pictures of a soldier having his picture taken in a trick fashion, standing behind a woman's naked legs, with drawers on.

Is that a typical example of that kind of photography? A. Yes.

3144 Q. And another woman doing a split up against a hotel wall in a hotel room. Is that a typical example of photographs of that kind? A. Of that type.

Q. In Exhibit 62 I call your attention to pages 8 and 9, being examples of Peter Arno cartoons, and I ask you if those illustrations are typical? A. They are typical examples of Arno cartoons.

Q. And on page 143, is that a typical illustration? A. Yes, I would say so.

Mr. Bromley: I offer Exhibits 59, 60, 61 and 62 in evidence. 3145

Mr. Hassell: Same objection.

Chairman Myers: Same ruling.

(The documents heretofore marked Respondent's Exhibits Nos. 59, 60, 61 and 62 for identification were received in evidence.)

Mr. Bromley: Will you mark for identification, please, the issues of Life for November 16, 1942, December 14, 1942, and December 28, 1942?

3146

(The documents above referred to were marked Respondent's Exhibits Nos. 63, 64 and 65 for identification.)

By Mr. Bromley:

Q. In Exhibit 63 for identification is the illustration appearing on pages 104 and 105 typical of the publicity which Varga girls generally are receiving in current magazines? A. Yes.

Q. And is that likewise true of page 108? A. Yes.

Q. In Exhibit 64 is the colored photograph of the strip teaser, Gypsy Rose Lee, a typical colored photograph? 3147

Mr. Hassell: At what page, counsel?

Mr. Bromley: At page 91.

The Witness: A typical photograph of an actress, yes, that type of actress.

3148 ***By Mr. Bromley:***

Q. And in Exhibit 65 for identification are these typical pictures of sailors posing with girls and pictures designed for the purpose of sending home or otherwise?

Mr. Hassell: What page?

Mr. Bromley: Pages 4 and 5.

I offer Exhibits 63, 64 and 65 in evidence.

Mr. Hassell: Do you mind having the record show that the Varga girl examples in Exhibit 63 are in black and white, counsel?

3149 Mr. Bromley: No, sir.

Mr. Hassell: Very well. Same objection.

Chairman Myers: Same ruling.

(The documents heretofore marked Respondent's Exhibits Nos. 63, 64 and 65 for identification were received in evidence.)

Mr. Bromley: Will you mark for identification, please, the issues of Life for October 19, 1942 and October 26, 1942?

3150 (The documents above referred to were marked Respondent's Exhibits Nos. 66 and 67 for identification.)

By Mr. Bromley:

Q. In Exhibit 66 for identification, I call your attention to pages 51 to 56, inclusive, being a review and description of "The Eve of St. Mark," with pictures, and ask you whether or not that is a typical review of that New York play? A. I believe it is.

Benjamin Allen—for Respondent—Direct.

Q. In Exhibit 67 for identification I call your attention to pages 10 and 11 and ask you whether those are typical examples of colored photographs? A. They are rather unique, but I would say they are typical, yes. 3151

Mr. Bromley: I offer in evidence Exhibits 66 and 67 for identification.

Mr. Hassell: Same objection.

Chairman Myers: Same ruling.

(The documents heretofore marked Respondent's Exhibits 66 and 67 for identification were received in evidence.) 3152

Mr. Bromley: I ask that the issue of Life for January 6, 1941 be marked for identification.

(The document above referred to was marked Respondent's Exhibit No. 68 for identification.)

By Mr. Bromley:

Q. I call your attention in Exhibit 68 to pages 18 and 19 and ask you whether those photographs are typical? A. Yes. 3153

Mr. Bromley: I offer Exhibit 68 for identification in evidence.

Mr. Hassell: Same objection.

Chairman Myers: Same ruling. It is admitted.

(The document heretofore marked Respondent's Exhibit No. 68 for identification was received in evidence.)

3154 Mr. Bromley: I ask that the issue of Life for July 27, 1942, be marked for identification.

(The document above referred to was marked Respondent's Exhibit No. 69 for identification.)

Mr. Bromley: Also the issue for August 3, 1942.

(The document above referred to was marked Respondent's Exhibit No. 70 for identification.)

Mr. Bromley: The issue for August 24, 1942.

3155

(The document above referred to was marked Respondent's Exhibit No. 71 for identification.)

By Mr. Bromley:

Q. Exhibit for identification No. 69, let me ask you whether the "Star and Garter" review and the photographs accompanying it are typical of reviews in current magazines of that play? A. Yes.

Mr. Hassell: What page?

Mr. Bromley: They appear on pages 61 to 63 in-

3156 clusive.

By Mr. Bromley:

Q. And Exhibit 70 for identification, let me ask you whether the matter appearing on pages 42 to 46, inclusive, under the title of "Girls of Hollywood" are typical of that type of article? A. Yes.

Q. In Exhibit 71 let me ask you whether the illustration appearing on pages 57 and 58 in connection with an article

on "Venezuelan Volcano" are typical of that type of material? A. Yes. 3157

Mr. Bromley: I offer Exhibits 69, 70 and 71 in evidence.

Mr. Hassell: Same objection.

Chairman Myers: Same ruling. They are admitted.

(The documents heretofore marked Respondent's Exhibits Nos. 69, 70 and 71 for identification were received in evidence.)

3158

Mr. Bromley: Will you mark for identification, please, the issue of Life for May 25, 1942?

(The document above referred to was marked Respondent's Exhibit No. 72 for identification.)

By Mr. Bromley:

Q. I call your attention in Exhibit 72 to page 18 and ask you if that is an example of the use of the Sultan type of cartoon in connection with advertising? A. Yes.

3159

Mr. Bromley: I offer Exhibit 72 in evidence.

Mr. Hassell: Same objection.

Chairman Myers: Same ruling. It is admitted.

(The document heretofore marked Respondent's Exhibit No. 72 for identification was received in evidence.)

Mr. Hassell: Do you want to have the record show that it is a black and white advertisement?

Mr. Bromley: Yes.

3160 Mr. Hassell: A shoe advertisement.

Mr. Bromley: Will you mark for identification the issue of Life for June 7, 1943.

(The document above referred to was marked Respondent's Exhibit No. 73 for identification.)

By Mr. Bromley:

Q. In connection with Exhibit 73 for identification, pages 82 to 85, inclusive, are those illustrations under the title 3161 of "Betty Grable's Legs" typical illustrations in that field? A. Yes.

Mr. Bromley: I offer Exhibit 73 for identification in evidence.

Mr. Hassell: Same objection.

Chairman Myers: Same ruling. It is admitted.

(The document heretofore marked Respondent's Exhibit No. 73 for identification was received in evidence.)

Mr. Bromley: Will you mark for identification the 3162 issue of Life for June 21, 1943?

(The document above referred to was marked Respondent's Exhibit No. 74 for identification.)

By Mr. Bromley:

Q. In Exhibit 74 for identification are the illustrations on pages 74 and 75 typical of the type of illustration carried

by current magazines in relation to the show "Star and Garter"? A. Yes. 3163

Mr. Bromley: I offer Exhibit 74 for identification in evidence.

Mr. Hassell: Same objection.

Chairman Myers: Same ruling. It is admitted.

(The document heretofore marked Respondent's Exhibit No. 74 for identification was received in evidence.)

Mr. Bromley: Will you mark for identification the issue of Life for September 27, 1943? 3164

(The document above referred to was marked Respondent's Exhibit No. 75 for identification.)

By Mr. Bromley:

Q. I call your attention in Exhibit 75 for identification to the picture appearing at page 130, and ask you whether or not that is a typical photographic example of the modern woman's bathing suit? A. Yes, sir.

Mr. Bromley: I offer Exhibit 75 for identification in evidence. 3165

Mr. Hassell: It is also in black and white?

Mr. Bromley: Yes.

Mr. Hassell: You are specifying when they are in color, counsel?

Mr. Bromley: I am not, no.

Mr. Hassell: Same objection.

Chairman Myers: Objection is overruled.

3166 (The document heretofore marked Respondent's Exhibit No. 75 for identification was received in evidence.)

Mr. Bromley: Will you mark for identification, please, an issue of Look for September 7, 1943?

(The document above referred to was marked Respondent's Exhibit No. 76 for identification.)

By Mr. Bromley:

3167 Q. I call your attention in Exhibit 76 for identification to a color photograph and ask if that is a typical example of a color photograph of a woman in a bathing suit? A. It is.

Mr. Hassell: What page?

Mr. Bromley: Page 34.

I offer Respondent's Exhibit 76 for identification in evidence.

Mr. Hassell: Same objection.

Chairman Myers: The objection is overruled.

3168 (The document heretofore marked Respondent's Exhibit No. 76 for identification was received in evidence.)

Mr. Bromley: Will you mark for identification, please, an issue of Look for June 1, 1943?

(The document above referred to was marked Respondent's Exhibit No. 77 for identification.)

By Mr. Bromley:

3169

Q. In Exhibit 77 for identification is the photograph which appears at page 47 in connection with an article on Betty Grable, another typical example of the publication of a woman in a bathing suit? A. Yes.

Mr. Bromley: I offer Exhibit 77 for identification in evidence.

Mr. Hassell: Same objection.

Chairman Myers: The objection is overruled.

3170

(The document heretofore marked Respondent's Exhibit No. 77 for identification was received in evidence.)

Mr. Bromley: Will you mark for identification an issue of the Reader's Digest for September, 1943?

(The document above referred to was marked Respondent's Exhibit No. 78 for identification.)

By Mr. Bromley:

3171

Q. In Exhibit 78 for identification, at page 21, I would like to ask you whether the following joke is not typical of some of the jokes published in magazines like the Reader's Digest, as follows:

"Sir James Barrie's favorite story was about the professor of biology who explained to his class the spawning of fish. 'So you see,' he concluded, 'the female fish deposits her eggs, the male fish comes along and fertilizes them, and later the little fish are hatched.'

"One of the girls held up her hand. 'You mean, Professor,

3172 that the father and mother fish—that they—that before that nothing happens?'

"'Nothing,' said the Professor, 'which doubtless explains the expression, "poor fish"'". A. That is typical.

Mr. Bromley: Will you mark for identification Reader's Digest for July, 1943?

(The document above referred to was marked Respondent's Exhibit No. 79 for identification.)

By Mr. Bromley:

3173 Q. In Exhibit 79 for identification at page 85 is a story entitled "A Birth Control Pioneer Among Migrants". Have you read that article? A. No, I have not.

Mr. Bromley: I offer in evidence the article which appears on page 85 and 88 in the Reader's Digest in Respondent's Exhibit 79 for identification.

Chairman Myers: How did the witness answer that question?

Mr. Bromley: He said he hadn't read it. He hasn't done all his home work.

3174 Mr. Hassell: Same objection.

Chairman Myers: The objection is overruled.

(The document heretofore marked Respondent's Exhibit No. 79 for identification was received in evidence.)

Mr. Bromley: I ask that the issue of the American Mercury of July, 1943, be marked for identification.

Mr. Hassell: Might I interrupt in connection with

this last Reader's Digest? Will counsel stipulate that both sides of the birth control question has been shown in the article from the Reader's Digest? 3175

Mr. Bromley: Yes, sir.

(The document above referred to was marked Respondent's Exhibit No. 80 for identification.)

Mr. Bromley: In Exhibit 80 for identification, beginning at page 17, is an article entitled "Sex Goes To Church". It goes over through page 24.

I offer in evidence the issue of the American Mercury for July, 1943, Respondent's Exhibit 80 for identification. 3176

Mr. Hassell: Same objection.

Chairman Myers: Same ruling. It is admitted.

(The document heretofore marked Respondent's Exhibit No. 80 for identification was received in evidence.)

Mr. Bromley: I desire to call the Board's attention particularly from this article to passages such as these, the introductory paragraph:

"Satisfactory physical relations between husband and wife should be encouraged by the church if the church is to play a genuine role in the life of its congregation. Such relations, unspoiled by ignorance or fear of the unwanted child, can help to build warm, effective families, and only such families can form a proper basis for a modern democratic society. To assume that the sex life of people is no concern of the church is to condemn it to ineffectuality." 3177

178 On page 18, the first whole paragraph:

"Dr. Burkhart and I were having dinner at the Athletic Club in Columbus. I confess I was startled. Frigidity has been so long associated with Godliness in church circles that the 'frigid' phrase on a preacher's lips came as a shock.

"The frigid woman or man is a menace to a democratic society', he continued. 'If the church is going to promote the democratic concept, then it must be the helper and the extoller of the individual. The church must help the individual to achieve the
179 fullest expression of both his body and his mind. The frigid person can't possibly bring any warmth to a family. I think one of humanity's greatest tragedies is the young wife who is not sexually adjusted.'"

And finally, on page 19, the second column in the middle:

"'What about promiscuity', I asked, 'aren't you afraid of it if you dispense all this sex knowledge?'

"'No, I'm not,' he answered. 'In our pre-marital classes we teach both boys and girls to refrain from pre-marital sex relations, not because they will go to hell if they don't and not because they might have
180 a baby, but because it is better for them if they don't. We try to show them out of human experience that life will be more satisfactory to them if they adopt certain disciplines for themselves. We tell them about human dignity and the necessity for self respect; and we tell them what effect the violation of rules has upon men and women.'"

Mr. Hassell: Did the witness answer whether he read the article or not?

Mr. Bromley: I didn't ask him.

By Mr. Bromley:

3181

Q. Did you read it, Mr. Allen? A. No, I didn't.

Mr. Bromley: Will you mark for identification the American Mercury for December, 1941?

(The document above referred to was marked Respondent's Exhibit No. 81 for identification.)

Mr. Bromley: I offer in evidence Exhibit 81 for identification and call particular attention—

3182

Chairman Myers: The witness has not testified with respect to it.

By Mr. Bromley:

Q. Is this a copy of the American Mercury for December, 1941? A. Yes.

Mr. Bromley: I offer in evidence Exhibit 81 for identification, and call particular attention to the article: "Sex in the Army", pages 661 and following.

Chairman Myers: Isn't that about the third one we have had on this subject?

3183

Mr. Bromley: It is the third one and the last one in a different magazine.

Mr. Hassell: Objection.

Chairman Myers: Same ruling. It is admitted.

(The document heretofore marked Respondent's Exhibit No. 81 for identification was received in evidence.)

3184 Mr. Bromley: Will you mark for identification the American Magazine for October 1943?

(The document above referred to was marked Respondent's Exhibit No. 82 for identification.)

By Mr. Bromley:

Q. I show you Exhibit 82 for identification and the story entitled "Death of an Image", which begins on page 31, and an illustration for which a full page color illustration appears on page 30. Have you read that story by Christopher
3185 LaFarge? A. I have.

Q. Can you tell us in summary form what the story is about? A. The story is about an artist who is married and whose wife is going to have a child. He was going into the Navy and decides to paint one last picture before he goes. He picked as his model a girl, I think described as a Hungarian girl. I am not sure of her nationality, but it goes into quite a little detail about the color of her skin.

She poses for him in the nude and his wife who is present the first time she poses immediately senses that there is some sort of a sex connection mentally between them.

It finally winds up that when the picture is finished she
3186 offers her love to the artist which he turns down, and then immediately leaves to go in the service, and she is so infuriated by the whole episode that while he is out of the studio she comes back and destroys the canvas.

Q. That is, the model does or the wife? A. The model.

Mr. Bromley: I offer in evidence Exhibit 82 for identification.

Mr. Hassell: Same objection.

Chairman Myers: Same ruling. It is admitted.

(The document heretofore marked Respondent's Exhibit No. 82 for identification was received in evidence.) 3187

Mr. Bromley: Will you mark for identification Cosmopolitan for June, 1943?

(The document above referred to was marked Respondent's Exhibit No. 83 for identification.)

By Mr. Bromley:

Q. In Exhibit 83 for identification, is the story on page 21 called "The Captain and Miss Reid", which is sub-titled a "witty, wicked story of a lady who was a chattering bore until her host hit upon a desperate remedy.", by W. Somerset Maugham. Can you tell us the plot of that story? A. Yes. The story is laid on a Dutch cargo ship carrying a single passenger who was an English woman of middle age, a maiden lady, who continually keeps the captain and the other officers in a furor because she talks too much. 3188

The doctor aboard the ship finally suggests one remedy to shut her up, and that is to send the radio operator, who is quite a youthful and handsome man, down to her cabin to, I presume, spend the night with her, which the radio operator does, at least the story gets up to the point where he is knocking at her door and she finally finds out who it is and asks what this message is which he purports to have, and he dictates this message which he has written himself, to the effect that he thinks she is very beautiful and he would like to come in, and so on, and as I recall the text it says something about she slipped off her spectacles and hid them under the pillow and said, "Come in". 3189

3190 The result of the whole thing is from there on back to England she keeps quiet.

Mr. Bromley: I offer in evidence Exhibit 83 for identification.

Mr. Hassell: Same objection.

Chairman Myers: Same ruling. It is admitted.

(The document heretofore marked Respondent's Exhibit No. 83 for identification was received in evidence.)

3191 Chairman Myers: How many more have you of those things, Mr. Bromley?

Mr. Bromley: What you see there.

Mr. Bromley: Will you mark for identification Newsweek for June 14, 1943.

(The magazine referred to was marked for identification as Respondent's Exhibit No. 84.)

By Mr. Bromley:

Q. In Exhibit 84, for identification, at page 60 is an article entitled "Venereal Disease in London," which describes 3192 the activities of prostitutes in London, etc., a large number of them, and the danger they constitute to our soldiers.

Is that something which is openly and freely written about and published in magazines of general circulation now? A. Yes.

Mr. Bromley: I offer Exhibit 84 in evidence.

Mr. Hassell: The same objection.

Chairman Myers: The objection is overruled.

(The magazine referred to, heretofore marked for identification as "Respondent's Exhibit No. 84," was received in evidence.) 3193

Mr. Hassell: This article is headed "V. D. in London," isn't it, Counsel?

Mr. Bromley: Yes, and if your read it you will see what "V. D." means, venereal disease.

By Mr. Bromley:

Q. It is commonplace now in magazines such as Newsweek and Time and Life to refer to prostitution and venereal disease and describe conditions relating to both, is it not? A. Not only in that type of magazine, but in the general type of magazines. 3194

Q. And is it commonplace in magazines, even like the Ladies Home Journal, to publish illustrations in color with pieces of fiction where the nude female form is exhibited, either front or side or back? A. I think it happens occasionally in all magazines.

Q. I call attention to page 23 of the Ladies Home Journal and the full-page color painting in connection with the story "Sorrow Acre."

3195

Mr. Hassell: What issue?

Mr. Bromley: May, 1943.

By Mr. Bromley:

Q. Is that the kind of illustration that frequently appears even in such conservative magazines as the Ladies Home Journal? A. Yes.

3196 **Mr. Bromley: Will you mark this issue for identification, please.**

(The magazine referred to was marked for identification as Respondent's Exhibit No. 85.)

Mr. Bromley: I offer in evidence Respondent's Exhibit 85, for identification.

Mr. Hassell: Same objection.

Chairman Myers: The objection is overruled.

3197 **(The magazine heretofore marked for identification "Respondent's Exhibit No. 85," was received in evidence.)**

By Mr. Bromley:

Q. Is it commonplace now to publish colored photographs in magazines of general circulation such as Colliers? A. Yes, sir.

Q. Of nude models, partially dressed? A. Yes.

Mr. Hassell: What does counsel mean by "nude models, partially dressed"?

3198 **Mr. Bromley: Well, I will make it plain to you. Will you mark for identification Colliers for May 8, 1943.**

(The magazine referred to was marked for identification as "Respondent's Exhibit No. 86.")

Mr. Bromley: I offer Exhibit 86, for identification, in evidence.

Mr. Hassell: Same objection.

Chairman Myers: The objection is overruled. 3199

(The magazine heretofore marked for identification "Respondent's Exhibit No. 86," was received in evidence.)

Mr. Hassell: The witness didn't answer so quickly on this one on account of Colliers being a competitor of Saturday Evening Post, did he?

By Mr. Bromley:

3200

Q. Would you say that the word "whore" was a word commonly used in magazines such as the New Yorker? A. Yes.

Q. I show you the New Yorker for March 13, 1943, at page 23, and ask you whether this is a typical illustration of the use of that word appearing in a story entitled "Sergeant Limeburner"?

At the top of page 23 it reads as follows:

"Speckled Bird managed at last to get a crap game started. A radio was playing in the sergeant's room but no one had seen him. 'His mother was an old whore,' Brown said, 'and his father was a lousy Lynx.' He used to 3201
live in a shack in Death Valley, where there ain't no trees and there ain't no water. When he was eight years old he sold his father's lousy pelt for a pint of varnish and got drunk on that and slit his mother's back up with a rusty razor." A. Is your question is that typical of the use of the word "whore"?

Q. Yes. A. Yes, I would say so.

Q. I show you the New Yorker of May 15, 1943, and

3202 particularly a story "Faith at Sea," beginning at page 17 and running over to page 22. Do you recall that on pages 18 and 19 in the course of this story the word "son-of-a-bitch" is used at least five times? A. Yes, I do. It is a story about a merchant marine and the sailor became ill and was operated on at sea.

Q. And do you recall this paragraph in that story? A. There is one rather choice paragraph in there.

Q. "It ain't hardly nothing, William, a cousin of mine had this and he was operated on and three days later he slept with the nurse." A. That's the paragraph I had in

3203 mind.

Mr. Bromley: Will you mark this issue of May 15, 1943, for identification.

(The magazine referred to was marked for identification as Respondent's Exhibit No. 87.)

Mr. Hassell: The New Yorker of March 13, 1943, page 23, is No. 87.

Mr. Bromley: I just read from that. I didn't have it marked.

I offer Respondent's Exhibit 87, for identification,

3204 in evidence.

Mr. Hassell: Same objection.

Chairman Myers: The objection is overruled.

(The magazine heretofore marked for identification "Respondent's Exhibit No. 87," was received in evidence.)

Mr. Bromley: Will you mark the issue of Time for April 5, 1943, for identification, please?

(The magazine referred to was marked for identification as Respondent's Exhibit No. 88.) 3205

By Mr. Bromley:

Q. In this Exhibit 88, for identification, on the pages 16 and 17 under "World Battle Fronts," in the article "Across Wadi Zigzau," does this following reference appear under the subtitle "Prisoners":

"Three more figures came through the gloom toward us. They were bending low and running, dodging a line of tracer bullets. One of them with a rifle and bayonet shoved the other two ahead of him and toward us. 'Prisoners,' he said. 3206
'What'll I do with them?'

"'Kill them,' shouted a voice. 'I'll kill the bastards myself.'

"'No, don't do that', said another voice, and the prisoners fell on their knees before us.

"'Feel under his testicles for hand grenades,' said somebody, 'they're tricky bastards.'" A. I remember that passage distinctly.

Mr. Hassell: What did the witness testify as to this?

Mr. Bromley: Just that it appeared in the maga- 3207
zine.

Mr. Hassell: Did he say that was a typical example?

The Witness: I said I remembered it distinctly.

By Mr. Bromley:

Q. Is that a typical example of a description of things that happened in the war, published in reputable magazines

3208 of general circulation? A. I think all magazines, particularly news magazines, are reporting things like that in a very frank manner. I know that they are.

Chairman Myers: While you are looking for the magazines, I might say that we have just been informed that Mr. Haggerty is to be sworn in as comptroller in the Postmaster General's office. How is that going to affect you? I expect it will take 15 or 20 minutes.

Would you like to resume or would you like to wait until morning? I know Mr. Hassell can't get 3209 through with his cross examination this afternoon. What is your pleasure?

Mr. Hassell: I would rather go over until morning.

Mr. Bromley: I wouldn't mind resuming.

Chairman Myers: Mr. Hassell just stated that he would rather go over until morning. You have a few minutes left so let's proceed now.

Mr. Bromley: All right.

By Mr. Bromley:

3210 Q. Is it true, Mr. Allen, that today there is a wave of pictures of pin-up girls which appear in all sorts of publications? A. Very definitely.

Q. In many instances are they printed for the purpose of being clipped out of magazines or newspapers and pinned on the walls of rooms and barracks and what not? A. Without any doubt.

Q. I show you the Washington Post, "Parade," a weekly newspaper published for October, 1943, and ask you

whether the pictures of the pin-up girls which appear on pages 8 and 9 of that newspaper in their weekly are typical of the pin-up girls which appear frequently? A. Yes. 3211

Mr. Bromley: Will you mark for identification this issue of "Parade" for October 24, 1943.

(The magazine referred to was marked for identification as Respondent's Exhibit No. 89.)

Mr. Bromley: I offer that Exhibit 89, for identification, in evidence.

Mr. Hassell: Same objection. 3212

Chairman Myers: Same ruling. It is admitted.

(The magazine heretofore marked for identification "Respondent's Exhibit No. 89," was received in evidence.)

Mr. Hassell: These pictures are black and white, aren't they, Counsel?

Mr. Bromley: Yes.

Chairman Myers: I have had a standing appointment for Saturday afternoon for some considerable time. It doesn't look as though we will get through by that, does it? 3213

Mr. Bromley: No.

Chairman Myers: Now, what shall we do about that? Do you want to run all Saturday afternoon? If you do I will have to cancel my appointment.

Mr. Bromley: I think we ought to run as long as you can conveniently do it, and then stop.

Chairman Myers: How do you feel about it?

3214 Mr. Hassell: That would be satisfactory to me if we wouldn't go on past 5 o'clock.

Chairman Myers: No. The question is whether to cancel this appointment of mine for after 12 o'clock. I want to ask counsel about it now.

Mr. Bromley: I am willing to stay until 12:30 or just as late as you gentlemen want.

Mr. Hassell: Until 12:30 would be satisfactory.

Chairman Myers: All right. I wrote a letter about it and I haven't had an answer, and I expect to have an answer today or tomorrow. They are

3215 some people from out of town and I don't want to put them to too much trouble.

We will adjourn at this point until 9:30 tomorrow morning.

(Thereupon, at 4:35 o'clock p. m., the hearing was adjourned.)

3216.

HEARING OF OCTOBER 29, 1943.

3217

PROCEEDINGS RESUMED.

Chairman Myers: Proceed, gentlemen.

Mr. Bromley: Mr. Allen, will you take the stand?

BENJAMIN ALLEN, a witness called by and on behalf of the Respondent, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination by Mr. Bromley (Continued): 3218

Q. Would you say, Mr. Allen, that the editorial policy and content of Esquire with respect to frankness and candor, differs in any substantial respect from that of magazines such as Life and Look and Time and some others which we have been looking at? A. No, I would say it does not.

Q. Have you examined the complained of material in the eleven issues for 1943 at my request? A. I have.

Q. And have you kept yourself informed about the state of public opinion with respect to the publication of material such as this? A. I have, sir.

Q. In your opinion, does any of it, either illustrative or textual, violate the standards of current morality in magazine publishing, in your opinion? 3219

Mr. Hassell: I object.

Chairman Myers: Do you want to strike the question?

Mr. Hassell: Yes, I move to strike it. I don't think this witness is qualified so far to answer such question.

3220 Chairman Myers: I think it might be better to find out what his standards of current morality are.

By Mr. Bromley:

Q. Will you state as fully as you can what, in your opinion, are current standards of morality insofar as the publication of illustrations and textual matter such as that complained of, in this country, are at the present time? A. I believe, as I said previously, that the whole tendency of magazine editing has become much broader in the last 15 years. We find articles in many magazines on subjects 3221 such as this cited material in Esquire; we find in many magazines cartoons, wit, humor, along the lines cited yesterday; we find certain pictures of women in various forms of art.

These things have been accepted by the public, most certainly, as indicated by the huge increase in magazine circulation, particularly in the last five years, and any broad reading of magazines indicates and proves that the accepted tendency in editing, particularly of class publications that cater to a small audience, a sophisticated audience, has definitely accepted that sort of material.

Q. What do you include in your use of the term "class 3222 magazines"? A. Well, a class magazine in the publishing business is one that caters to a certain smaller audience as compared to a mass market publication. Now, a typical example of a mass market publication would be the Saturday Evening Post or Colliers; whereas a class publication would be definitely a publication such as Vogue in the woman's group or the New Yorker or Esquire or any magazine that caters to a certain clientele, which has usually a limited field and usually a field in the higher income brackets, as it were.

Q. Is it part of your business as circulation manager of Curtis to keep yourself informed on the current and changing state of current opinion with respect to magazine content? A. Yes, it is. 3223

Q. Does your organization regularly make studies in order to enable you to be informed with respect to the state of public opinion? A. We do. We have a continuous reader research group that continuously checks with the public, particularly on material that we publish in our publications. Occasionally we will test other publications and that is true of magazines we compete directly with, magazines in our own line. 3224

Q. Now, having examined the complained of material in Esquire, will you tell the Board whether any part of it is indecent, obscene, lewd, lascivious or filthy? A. I do not consider it so.

Mr. Hassell: The same objection.

Chairman Myers: Overruled.

By Mr. Bromley:

Q. What did you answer? A. I do not consider it so.

Q. In your opinion, does any part of it violate current moral standards? A. No, sir. 3225

Q. In your opinion, is there any part of it which would have any corrupting effect on the morals of any class of our society? A. No, sir. I will qualify that. I don't think it is the sort of material that you would give to young children to read or use as a textbook in school, but aside from that I see nothing about it that would corrupt society.

Q. Referring to the exhibits which were introduced in evidence yesterday through you and to such magazines as

3226 Look, New Yorker, Harpers, Ladies Home Journal, Woman's Home Companion, and others, are all of them reputable magazines in the better and higher class of periodicals? A. They are.

Mr. Bromley: That is all.

Chairman Myers: Do you use this editorial analysis of the Lloyd H. Hall Company?

The Witness: Our company is a subscriber to that service; yes, sir.

Cross Examination by Mr. Hassell:

3227

Q. Mr. Allen, can you name me one publication which carries within its covers questionable pictures, off-color jokes, cartoons, and to some, indecent words all in one magazine like Esquire? A. You mean material similar to that that is carried?

Q. Yes. A. In any one issue of Esquire?

Q. Yes. A. I would say the New Yorker comes closest to that.

Q. You would say the New Yorker. Does that carry pictures comparable to the Varga girl pictures? A. You wouldn't find as many in one issue, probably.

3228 Q. Do they carry— A. But certainly there have been in the New Yorker not only cartoons but photographs in color of women in various forms of attire.

Q. Have any of those issues been offered here? A. I don't recall whether any of the colored photography was in any of the issues of the New Yorker or not. We can find out by checking them back.

Q. You referred to Esquire as being a class magazine such as Vogue, and you stated other material catering to a special

class of individuals. Did you name any others? A. I might correct that. I didn't say Esquire was a class magazine like Vogue. I said they were both class magazines but they cover an entirely different field. 3229

Q. I understand that. A. Yes, the New Yorker is a class magazine.

Q. What class does the New Yorker cater to? A. The same sophisticated class that Esquire caters to.

Q. Does it purport to be a magazine for men only? A. I beg your pardon?

Q. Does it purport to be a magazine for men? A. Not particularly.

Q. Does the Saturday Evening Post carry stories in which the words "son-of-a-bitch", "ass", and "behind", referring to that portion of the human anatomy, are mentioned? A. No, I don't think you would find that in the Saturday Evening Post. But the Saturday Evening Post is unique rather than average in its editorial policy. The Saturday Evening Post is not an average publication by a good deal. 3230

Q. Do you find those words in the Country Gentleman? A. I don't think you would.

Q. Why aren't those words found in the Country Gentleman if they are common every-day words that are accepted in polite and decent society? A. I think that can be explained in this way. The Country Gentleman is an agricultural publication. I don't think you would find those words in Capper's Farmer, either. 3231

Q. The rural population would not care for those words in a publication, would it? A. I don't think the rural population of the country is particularly interested in magazines such as the New Yorker or Esquire. They are interested in agricultural publications.

3232 Q. Will you answer the question? A. May I ask you to repeat the question?

Q. Would the rural publications such as the readers of the Country Gentleman and Capper's farm publication and other farm publications, not resent the inclusion of such words as I have mentioned in a publication? A. I would say that a certain per cent of them would resent it. I think you would find others that would not.

I don't think the average acceptance of that kind of material in the rural areas is nearly as broad as it is in the urban areas.

3233 Q. Do you say you would not give such sophisticated material as is contained in Esquire to grade school children to read? A. To what?

Q. To grade school children to read. A. I said I didn't think Esquire would be particularly good as a text book for grade school education.

Q. Why? Do you think it is too sophisticated? A. Yes.

Q. And by that you mean that it contains questionable pictures and cartoons and jokes and words? A. No, I don't think that. I think it is over the heads of a child audience. It is definitely a magazine for an older audience—just for the same reason that we wouldn't put that kind of material
3234 in our juvenile publication Jack and Jill, naturally.

Q. Do you think the ordinary average grade school child would not understand what these words, referred to as filthy in this case, mean? A. I don't think the average grade school child would be interested.

Q. You don't think he or she would understand those words? A. I doubt it.

Q. You said Esquire would be over their heads. You don't think they would understand the cartoons or the Varga girl near-nude pictures? A. I think they would recognize

them as being women with a certain amount of clothes on, but I don't think it would have any effect on them. I think it would be entirely lost. 3235

Q. Do you think that the double entendre jokes in the cartoons and in the text would be entirely lost to grade school children? A. I don't think they would even understand it.

Q. What age do you cover by grade school children, Mr. Allen? A. Oh, up to probably around fourteen.

Q. Have you any pictures that you personally selected or caused to be published showing girls partly clad? A. I did not understand that question. 3236

Q. Have you any pictures or have you personally selected or caused to be published any pictures showing girls partially clad? A. No. I have nothing to do with the formation of the editorial content.

Q. Do you place pictures of the girls in bathing suits taken in connection with or participation in swimming or other water sports in the same category as the Varga girl pictures? A. Yes. I don't see any dissimilarity.

Q. Have you ever seen any bathing suits for women as scanty as some of these Varga girl pictures? A. Yes.

Q. You have? A. Yes.

Q. Will you refer to the February Varga girl on page 98 of the January issue of Esquire. The costume that this model has on appears to be transparent, doesn't it, Mr. Allen? You can see the tint of the flesh through it? A. Yes. 3237

Q. You say you have seen a bathing costume as scanty as that? A. I have seen plenty of bathing costumes that reveal just as much as that reveals, particularly after they are wet.

Q. It revealed the color of the skin right through the bathing suit? A. Yes, sir.

3238 Q. Now, look at the June picture. You never have seen a bathing costume as scanty as that? A. I have never seen a bathing costume that didn't have something to conceal, at least the upper part of the body. However, I will say that there isn't anything more exposed as to the girl in that picture than is exposed in lots of bathing costumes.

Q. Now, look at the August Varga girl. Have you ever seen a bathing costume of that sort? A. I think the same answer that I made for February would apply to that. You often see girls on a beach with the straps of their bathing suit down; in fact there are such things, and I
3239 think there was one in one of the pictures that was submitted in evidence yesterday of strapless bathing suits.

Q. Do you have any idea how such a bathing suit as this, the August number, page 104 of the January issue, would stay up? A. No, I am not sure that it is a bathing suit.

Q. That matter is to all intents and purposes transparent, isn't it, Mr. Allen? A. Yes, but I again say it is no more transparent than a wet white bathing suit or even a black bathing suit.

Q. Now, has the Saturday Evening Post ever published a picture comparable to this August picture? A. No, I would say not.

3240 Q. Why haven't they published such pictures if they are entirely decent? A. Because of the thing I pointed out before, the Saturday Evening Post is a mass market publication. It is not edited to at all the same group that a magazine such as Esquire is edited to.

Q. You think— A. The fact that the Saturday Evening Post doesn't publish a picture like that does not indicate that there is anything obscene about it, in my opinion.

Q. You think it is entirely proper for a publication circulating generally over the United States, and going freely

through the United States mails at a subsidized rate to carry matter of this sort? A. Yes, I think so, and isn't that the question, the subsidy one, that is rather controversial? 3241

Q. I believe so. A. I was of the opinion that it depended very much upon the bookkeeping and the application of cost.

Q. Well, the cost accounting system, I think, of the Postal Service is pretty well accepted.

However, will you refer to the Varga girl picture at page 34 of the June issue? The Saturday Evening Post wouldn't carry a picture of that sort, would it? A. I think a picture of that sort would not be of particular interest to the Saturday Evening Post audience. The Saturday Evening Post, however, in a recent issue, carried some pictures of show girls and, so far as I know, this is a picture of a ballet dancer in a practice costume. 3242

Q. But in the pictures you referred to, which appeared in the recent issue, there was nothing as revealing as in that picture, was there? A. Well, it revealed just as much leg.

Is there a copy of that Post around here, does anybody know?

Mr. Bromley: Which one was it?

The Witness: It was two or three weeks ago. The name of the article was "Big Bruisers," and it was a review of Diamond Jim Brady's night club performance. 3243

By Mr. Hassell:

Q. I recall that. You won't find anything as suggestive or revealing in that article as you found here.

Mr. Bromley: That's what you say.

The Witness: I don't think those pictures are as

3244 revealing, as far as the girl above the waist is concerned, but I still repeat that I think, if my memory is correct, that it is just as revealing as far as the lower part of the body is concerned.

By Mr. Hassell:

Q. I would have no argument with you on that, Mr. Allen. Will you refer to the November issue of Esquire at page 38? Do you note that two-page size Varga girl picture? A. I didn't get your adjective there.

Q. Do you note that two-page size Varga girl picture? A.
3245 Yes.

Q. Have you ever seen a beach costume as revealing as that? A. I don't know that I have.

Q. That costume does not conceal any part of the body of that model, does it? A. The costume does not necessarily conceal much of her, but the position conceals a good deal of her.

Q. You say "doesn't necessarily conceal much of her." What part of her does the costume conceal, if any part? A. Well, of course, I can only look at that from one side. I would agree with you pretty much that it didn't conceal much, if any, part of her body, but I don't think that is
3246 necessarily the answer. The pose is the answer.

Q. Yes, the pose with the startled look on the face of the model and her attitude and her position. A. I don't see anything objectionable about her position.

Q. In so far as clothing is concerned, or covering, aside from the mules or shoes she has on, and the bow of ribbon in her hair, she is to all intents and purposes unclothed, isn't she, Mr. Allen? A. Well, she certainly has something on there.

Q. Something that, would you say, that would add to the attractiveness of the picture rather than detract from it? A. Yes, I think it does. 3247

Q. Mr. Allen, did you see the article in the July, 1943, Harper's Magazine discussing picture magazines, by John R. Whitney and George R. Clark? I show you that article. A. Yes, I read this article.

Q. Does that article purport to go into the history of these picture magazines? A. It is a rather complete article on that subject.

Q. Do you subscribe generally to the statements in that article? A. Well, I don't know what statements you refer to. I read this some time ago from a very definite interest in the possibilities of picture books as possible publications, so that I wouldn't know exactly what you referred to. 3248

As I recall it, after I read this article, I was very definitely of the opinion that the picture magazines were profitable publications.

Q. I see.

Now, note this statement that is encircled in red on page 163 (handing book to witness). A. I didn't recall that particular paragraph, no.

Mr. Hassell: So that the Board may know what we are talking about, may I read it: 3249

"Sex required skill in handling. People wanted to read about it and look at it frequently, but not all the time; it could be given in large doses, but it must not be over done. How to space the doses and coax the reader along from one dose to the next was Goddard's anxious care."

3250 *By Mr. Hassell:*

Q. You subscribe to that statement, Mr. Allen? A. I would be inclined to agree with that theory of publishing.

Mr. Hassell: I offer this entire article for the information of the Board.

The Witness: I will say, however, that apparently that subject has been handled pretty well, if that theory is right, by the leading magazines. That is, the leading magazines in that field, and by Esquire, and that can be pretty well proved by the fact that

3251 he says right there that the public doesn't want the dose in too large quantities or too small quantities. The average dose that is being handed out by these current magazines must be pretty near right or their circulation would not have gone up as far as it has.

Chairman Myers: Do you offer it?

Mr. Hassell: I offer it in evidence.

Chairman Myers: It is received in evidence.

(The magazine article referred to was marked "Post Office Exhibit No. 27," and received in evidence.)

3252 *By Mr. Hassell:*

Q. Mr. Allen, you referred to the readers of magazines as being in a sophisticated group or class. Would you think that the men and women of the armed forces are sophisticated or within this group? A. No, I wouldn't consider them so. In fact, I know that Esquire is not published particularly to the audience of service men. The service men just happen to like the thing that the audience that Esquire

is published for seem to like, and even taking a much broader view, or field, in my opinion, pictures like the Varga girls are not resented by the public even though that part of the public is not necessarily in the audience at which Esquire is definitely aimed. 3253

Q. You haven't really conducted any Gallup poll of the public to determine that, have you? A. Yes, we have.

Q. You have tested the public on whether or not the majority of the people of the United States want this kind of stuff? A. We have tested it on an accepted testing formula generally. That is, when I say generally I mean broadly, of course the whole United States.

Q. What was the method and formula for testing it? A. The method used was interviewing, by individuals interviewing the public at large. Those interviewers worked in cities from New York down to cities of under a thousand or towns of under a thousand. 3254

Q. You mean interviewing people in cities from the largest size down to towns of under a hundred thousand as to whether they liked the Varga girl pictures? A. That is right. A thousand, I said, not a hundred thousand.

Q. A thousand? A. Yes.

Q. When was this done, Mr. Allen, and who financed it? A. I had it done by our research department immediately following the Post Office citing of Esquire. It was not requested by Esquire, I did it because I wanted to find out for myself whether or not the Post Office having cited this material—whether or not we were distributing something that the average American was opposed to. 3255

Q. Who selected the persons to do the interviewing? A. I forgot to answer part of your question.

It was financed by the Curtis Publishing Company.

Q. Who selected the persons to be interviewed? A. Who selected what?

3256 Q. The persons to be interviewed. A. That was up to the interviewers.

Q. How many interviewers did you have? A. I don't know that I can answer that from memory, but is there a copy of that survey here? I think it is in that.

(Mr. Harding hands booklet to witness.)

The Witness: Would you like me to read some of this?

By Mr. Hassell:

3257 Q. What is that? A. I say, would you like me to read some of this information as to how this was made?

Q. I would like to find out who was interviewed and who determined who should be interviewed, and how many people you had making these interviews? A. Here it is. There were 25 interviewers.

Q. Twenty-five interviewers? A. This thing—

Q. What period of time did that work of making interviews cover? A. The survey consisted of the results of 2,266 personal interviews made from October 9 to 15, 1943. Shall I go on?

3258 Q. Those persons interviewed were in towns and cities such as you have described? A. Persons living in 85 cities and towns of the United States ranging in size from New York, the largest one, down to places as small as 75 persons. The distribution was made to parallel as nearly as possible the circulation of Esquire by the size of the community as shown by their statement to the Audit Bureau of Circulation for the first half of 1943.

Q. What section— A. All of the principal sections of the

country were covered as shown on the appended list of cities on the map. 3259

Q. What appendix is there? A. Well, I guess there is a map in here; in fact, I know there is. You probably can't see those dots from there, but they indicate the various cities here in the East, through the Middle West, and out in the South, and down on the West Coast.

Q. It goes down through the South and the Southwest and in the Mid-West and the Far West, does it? A. There is a list of them here.

Q. What type of people were interviewed? A. What is that? 3260

Q. What types of people were interviewed and how were they selected? A. Understand, I had nothing to do with this, that is why I can't answer those questions that you ask without looking them up. In other words, this was done by our research department who do this kind of work regularly for all the other departments of our company. I merely asked them to make such a test. They did all the rest of it.

What was that question again?

Q. What types of persons were interviewed? A. Here: The aim of the study was to obtain a cross-section of opinion among adults from 20 years of age, or over. Interviewers were about equally divided between men and women and distributed by age groups and made approximately to conform in the way they occur in the population. The sample was also controlled by education of the people interviewed. Employed women were interviewed in about the same ratio as they occur nationally, according to available data. 3261

Details on distribution of the sample of this poll will be found in the appendix.

As I recall it, the interviewers were 50 percent women and 50 percent men. They covered various age groups.

3262 The age groups covered were 20 to 29 in one classification, 30 to 44, and 45 years and over.

Q. Why were women included in these persons interviewed with respect to a man's magazine? A. Well, we know that a good many women read Esquire and we wanted to make sure—we thought possibly the men would accept it and the women might not.

Q. Do you think the readers of Esquire are divided fifty-fifty between the women and the men? A. No, I don't believe so. I think probably the book is purchased in most cases—not in most cases—but in the majority of cases by men, but that book is probably also read by a woman.

3263 So far as I know, there aren't many Esquires that are not read by both a husband and wife in a family.

Q. Do you think the Varga girl pictures would have the same salacious appeal to a woman as to a man?

Mr. Bromley: I object to the characterization in the question as "salacious".

Mr. Hassell: Cut out the "salacious". I accept the correction, counsel.

The Witness: I can tell you that. To the question that was asked, "In your opinion are the Varga girls pictures"—and samples were shown at the time, 12 pages of the calendar—

3264

By Mr. Hassell:

Q. Of all the Varga girl pictures, or which ones? A. The 12 pages in the calendar in the January issue.

Q. Oh, I see. They were the only ones shown? A. That is right.

Q. Were they full-sized reproductions, two page size? A.

I think they are all reproduced in one page size, if I am not mistaken. 3265

Q. They are two-page? A. At any rate, whatever the size of the book—

Q. I see. They are on one page; I beg your pardon. A. The answer to that question was—

> Mr. Bromley: Read the question.
>
> The Witness: When asked the question: "Are these pictures"—meaning the Varga girls—"obscene or indecent in your opinion?", the answer from males was that 87.5 percent "No", they were not, and 12.4 said "Yes", and one-tenth of one percent didn't know. 3266
>
> When it comes to women the percentage that said yes was 73.3.
>
> Mr. Bromley: That said "yes"?
>
> The Witness: 73.3 of the women said they were not and 87.5 per cent of the men said they were not.

By Mr. Hassell:

Q. What did the other per cent of the women say? A. 26.1 percent said they were and six-tenths of one percent didn't know.

Q. And the Varga girl pictures were the only things involved in this poll? A. That is right. 3267

Q. You didn't go into the other material in these eleven issues of Esquire? A. No.

Q. Is that broken down to show the sectional reaction by reasons of the country? A. I don't know—that is, yes. That is broken down by New England, Middle Atlantic, South, North Central and Far West.

Q. Give us the percentages of male and female in each one

3268 of those sections, Mr. Allen. A. I am sorry, but in that break-down they aren't also separated by male and female.

Q. Take them as you have them there, then. A. Well, in New England—these are percentages that said they were not obscene—New England 82.3 percent, Middle Atlantic 84.9 percent, South 73.9 percent, North Central 74.2 percent, and Far West 91 percent.

Q. And the difference between those percentages and 100 per cent would represent those that said they were? A. That is right, except for a very small percent, less than one per cent, that wouldn't know.

3269 Q. The question was whether or not they were obscene? A. Yes. Wait, I will read it exactly:

"Specifically it was desired to find out whether the public considered these pictures obscene or indecent. Here is what they said:

" 'We are making a survey to determine whether people object to various types of pictures appearing in magazines. I have a set of these pictures here. Will you please look at them and give me your opinion on several questions?' The question as shown on the following page was then covered with the person interviewed. The pictures shown were the 12 Varga paintings from the January, 1943, issue of Esquire.

3270 These were taken out of the magazine and carried in a folder, as it was felt to be a more objective research technique not to have the name of the magazine influence the results in any way.

"The questions were asked with regard to the collection of pictures as a set—however, the interviewers were instructed to record all cases in which the interviewee objected only to certain individual pictures, while not objecting to others in the set. It was found in tabulation that all of those giving answers were able to get their opinion on the pictures as a whole."

Does that answer your question?

Q. Yes, and can you give us some more information as to how, under what circumstances and conditions, the persons interviewed were selected? Were they people who were buying magazines at a newsstand, or were the calls made in the homes of Army officers? A. "Interviewing was done chiefly in homes, offices, and other business establishments. The interviewers used were women, who do this work regularly for the Research Department of the Curtis Publishing Company. They have been intensively trained in this type of work, and in most cases also do research interviewing for independent research organizations, advertising agencies and others in this field. 3271 3272

"The study was conducted in the name of The Editors' Research Council." This is the organization name under which all Curtis editorial research has been done. Neither Esquire nor Curtis was mentioned at any time during the interviews.

The 25 interviewers who made the survey were instructed to scatter their calls and to avoid bunching them by sections, occupations, religions, etc. They were told to interview at random in order that the best cross section possible could be obtained.

In most cases they interviewed in suburbs or nearby towns, in addition to the place in which they lived. Visitors from other places were in a few cases also interviewed." 3273

In other words, they might just happen to hit somebody from some place else that was in that town.

Q. All the interviewers were women, I believe you indicated? A. That is right.

Q. What period of time was consumed in making these interviews? Does that show? A. Yes. You asked me that before and I found it—between October 9 and 15th.

3274 Chairman Myers: Do you have the average for the entire country on that question of obscenity?

The Witness: Yes.

Chairman Myers: You gave it in sections.

The Witness: Yes.

Mr. Cargill: Is that book going to be introduced as evidence?

Mr. Bromley: I hope so, now.

The Witness: This, of course, is the total for whatever break-down it would be—the total is that 80 per cent do not think they are obscene or indecent and

3275 19.9 per cent say they are, and three-tenths of one per cent say they didn't know. They didn't have an opinion.

Chairman Myers: Was the method you followed the same method that the Gallup poll uses?

The Witness: Substantially, yes; that is the accepted technique.

By Mr. Hassell:

Q. You mentioned yesterday, Mr. Allen, that there is a trend in magazines today towards a more frank and outspoken manner of writing. Do you contend that this alleged

3276 trend is as evident in the Saturday Evening Post as in Esquire? A. I would say the trend has been probably as great. For instance, 15 years ago we didn't even accept cigarette ads but we do now. That is why I say when you keep talking about the Saturday Evening Post, you are talking about the exception, not the rule in the average publication. For instance, we are the only publication that does not carry liquor advertising and so when you compare any publication with

our particular editorial formula and editorial policy you are not talking about average magazines. 3277

Q. The Saturday Evening Post does not carry advertisements such as the one called attention to in this proceeding of the Thorne Smith books, does it? A. I don't remember seeing it.

Q. You don't remember seeing the advertisement of it—A. In the Post?

Q. I mean here. You know the advertisement I am referring to? A. Yes.

Q. You admit, do you not, Mr. Allen, that the character of the cartoons in the Saturday Evening Post are not comparable from a sexy standpoint as those in Esquire? A. Well, cartoons of that sort have never been part of the editorial content of the Post. As a matter of fact, we don't use many—I don't think we use many full page cartoons. All our cartoons are small cartoons. On the other hand, there was in this week's issue of the Saturday Evening Post a cartoon that I think was funny and I think everybody else would think was merely witty, but if you apply certain standards that had been at least discussed here you might get the idea that there was something about the cartoon that is similar to these cartoons that are cited. 3278

Q. What cartoon was that, sir? A. Well, it happened to be a soldier and a girl on a park bench with a little kid poking a flashlight at them and the little kid is saying, "I have no older sister, so I am free-lancing". 3279

Q. Has the Saturday Evening Post ever carried, so far as you are aware, any stories or articles like that of "The Unsinkable Sailor" or the "Court of Lost Ladies"; stories like that? A. Stories like that?

Q. Yes. A. The Saturday Evening Post has carried a good many of these stories on true experiences in the war.

3280 but that would not be exactly like that "Unsinkable Sailor". I don't think they have ever carried fiction like either one, no, not to my knowledge.

Q. Do you take the position that the so-called or alleged pin-up girl pictures referred to yesterday in your direct and the October 24, 1943, issue of "Parade" at pages 89 and following are comparable in their appeal to the Varga girl pictures? A. They would be if they were in color and not in black and white, in my opinion.

Q. Those pictures are smaller and they are not in color, are they? A. That is right.

3281 Q. Would you say generally that the models are more fully clothed than some of these models in the Varga girl pictures? A. Oh, some might be and some might not be. I don't remember the pictures definitely.

Q. Do you recall any of those pictures that showed models with as little or as scanty clothing on as this Varga girl model we referred to in the September issue of Esquire on page 38? A. Well, I am familiar with that but I have forgotten exactly what the others look like, except that there was a spread of them and I remember they were in black and white.

Q. You referred to or testified, I believe, Mr. Allen, that all of this mass of material called attention to by counsel in 3282 Respondent's Exhibits 47 to 88 are typical. Did you mean typical of the magazine, for instance, Life? A. I mean typical of that field; a typical presentation of that type of material.

Q. You would say the same type of material to which attention was called in various issues of Life would be found in the American Mercury? A. No, that does not cover the same field.

Q. Or the American Magazine? A. I think you could probably find in the American Magazine some of that material or some similar material. Naturally, they don't carry anywhere near as much. The American Magazine is primarily a magazine of fiction. 3283

Q. Would you say that that Life matter to which attention was called would be typical of matter found in the Cosmopolitan, Newsweek, Ladies Home Journal, Colliers and New Yorker? A. No, you can't say that because you are bringing into that list a whole lot of magazines that are not even in that field. Of course, you wouldn't see a Varga drawing in a magazine like Newsweek; it would have no place there. Newsweek is a news magazine. You can't take all these fields and say they all apply to all magazines, because magazines are very definitely edited to certain groups. All magazines are not competitive at all; they are only competitive within the field that that field covers. 3284

Q. I believe you stated that this poll to which you refer taken by the Curtis Publishing Company of Varga girl pictures, was similar to the Gallup poll. Isn't it a fact that the Gallup poll has proven inaccurate in its forecasts in connection with national elections and other questions? A. I think the Gallup poll has the best record on forecasting national elections of anybody.

Q. But it is— A. I may be wrong on that—but I don't think so. I think I am right. 3285

Q. But it has proven inaccurate at times, hasn't it? A. To a very, very slight degree. Would you like me to read this? They may have something in here that would throw some light on that. Well, here are several pages that are devoted to showing the technique of making surveys.

Here is a statement by Gallup, Dr. George H. Gallup in December, 1938, made the following statement:

3286 "If the matter of securing adequate and careful cross section were the only factor to be considered, then 1500 to 2,000 interviews would give a national answer within eight percent of accuracy in 97 percent of the cases, but in measuring political opinion as we do and particularly in breaking it down into political sub-divisions, certain other factors enter."

He goes on to say that in order that his answers may be broken down by State areas, the average sample consists of about ten thousand interviews. The Esquire poll does not attempt a State break-down and only shows such a break-
3287 down by broad geographical areas and community-size, etc.

An example of how accurate a small sample can be was given by Crossley, Incorporated, who do a great deal of work in opinion rating radio and marketing research.

Comparison of result of interviews with 600 families made in six carefully selected cities were comparable in result of 20,412 in 150 cities and towns. It goes on to show that base on 600 on this particular field they were questioning, which had to do with fountain pens, the result on 600 showed 90 percent of the families had fountain pens and when that study was extended to 20,412 interviews it was still 90 percent.

3288 In other words, they merely cite that to show that a small base will give the same results as a wide base if the base is properly selected and carefully broken down by geographical age groups and so on.

Q. Mr. Allen, do you contend that the standards with respect to radio broadcasting of questionable words and so forth is the same as that which in turn applies to the press or magazine? A. Well, I am not very familiar with those regulations that you mention, but I would say that there isn't very much similarity because the average person buys a

magazine because he wants that magazine. Magazines are bought on newsstands; the news operator has very little control of the sale; he doesn't sell a magazine; the customer buys a magazine and he buys a certain magazine because he wants what is in that magazine and he knows what he is going to get pretty much before he gets it. 3289

Now, the radio is an entirely different medium. You have a radio in your house and the only time our radio is turned off is when I come home and turn it off, otherwise it goes continuously, and nobody has any control over what is coming over that radio.

Q. Would you say that the— A. In other words, you can buy your reading, but you have to take it on the air. 3290

Q. I see. What would you say with respect to moving pictures, as to the standard we are talking about? A. Well, I don't see that there is any comparison. In what way?

Q. As to carrying scenes of scantily clad women and off-color sexy jokes and cartoons, and things of that sort? A. Well, in current moving pictures today you certainly see plenty of scantily clad females.

Q. Did you see the picture "DuBarry was a Lady"? A. Yes.

Q. Did you think the Varga girls shown in that picture were comparable, as far as the scantiness of costume, with those shown in this magazine? A. Well, my recollection of that was that they were almost clothed exactly the same as they were in the pages of the calendar for 1942. I think it was 1942. 3291

Q. 1942, I see. That is not involved in this case. A. My recollection of "DuBarry was a Lady" is that the Varga girls that were in there were costumed to represent the 1942-calendar. I may be wrong on that, but I remember certain ones that were exactly like the calendar pages.

3292 Q. Do you recall any model in that picture that is comparable in scantiness of clothing to this September Varga girl we have been talking about? A. No.

Q. Now, Mr. Allen, is it your contention that if a magazine such, for instance, as the Reader's Digest, had carried an article in which there was included contraceptive information, apparently in violation of the postal statute with respect to dissemination of such information, that would justify the carrying of indecency in other magazines? A. I am afraid I don't get that question.

3293 Q. You recall the July, 1943, issue of Reader's Digest at page 85 to page 88, the story on birth control. Did you read that article? A. Is that the one that was submitted yesterday?

Q. Respondent's Exhibit 79. A. It is an article that has to do with birth control called "Birth Control Going into the Church," or something of that sort?

Q. I don't believe that is the one. It was "Birth Control Pioneer"—and some other part to that title. A. Oh, yes, this is about birth control, the efforts of a woman to teach birth control to the shifting population in California commonly known as the "Oakies." Is that what you refer to?

Q. Yes, Respondent's Exhibit 79.

3294 Mr. Bromley: That is right.

The Witness: If that article does contain information as to how to accomplish contraception, would you think that would justify the carrying of that sort of information in other magazines?

By Mr. Hassell:

Q. Yes. A. I don't think—I think this whole question of birth control and the use of the terms that apply to it

so generally accepted by the reading public at the present time that you are apt to see birth control articles in almost any magazine. 3295

Q. Are you familiar with the federal statute with respect to the use of the mails for dissemination of that matter? A. No. I am not.

Q. If there were a law, a federal law, which made it a penitentiary offense to disseminate information as to how to accomplish contraception, you don't think this or any other magazine would be justified in violating it, do you? A. No. I wouldn't say so. I don't think anybody is justified in violating any law, if there is a law.

3296

Q. Let's refer to Respondent's Exhibit 63, the November 16, 1942, issue of Life, pages 104, 106, and 108.

Mr. Allen, I call your attention to the pictures. This is the illustrated article entitled "Varga Girls, Peruvian's Artist's Sleek Calendar Cuties Come to Life in DuBarry was a Lady."

This deals with the moving picture we talked about a while ago, doesn't it? A. Yes.

Q. Do you think these pictures shown here at pages 104, 106, and 108 are comparable in their revealing qualities to the Varga girl pictures involved in these eleven issues of Esquire? A. No, of course they are not, because in a movie the model moves. In a painting the model is right in the position in which she is painted. A model can have many less clothes and still not reveal anything, whereas a model that has to walk across a moving picture screen naturally has to have more on. 3297

Q. And these models have a great deal more clothes on, do they not? A. And they do a great deal more walking in the picture.

3298 Q. So you will admit the Varga girl models in the movie "DuBarry was a Lady" were much more clothed than the Varga girls involved in Esquire? A. They would have to be.

Mr. Hassell: That's all.

Redirect Examination by Mr. Bromley:

Q. Would you recognize the photograph of one of the Varga girls in "DuBarry was a Lady" if I showed it to you? A. I wouldn't recall that, no.

3299

Mr. Bromley: I offer in evidence the document entitled "Public Opinion Poll on Varga-Esquire Pictures, October, 1943, The Curtis Publishing Company."

Mr. Hassell: I object to that.

Chairman Myers: If Mr. Hassell objects I doubt if it is proper evidence. While some of its contents are in and some of the members of the Board would like to see it in, I don't think it is admissible.

Mr. Hassell: If the Board would like to have it in, I would just like to have my objection noted on the

3300 record.

Chairman Myers: I think you are entitled to have your objection sustained.

Mr. Hassell: Well, let it go in. I will withdraw my objection.

Chairman Myers: One Board member has indicated he would like to see it in, but I think your objection should be sustained.

Mr. Hassell: I want the Board to understand that

I object to all this line of testimony and I don't want the fact that I failed to object to some matter to which this witness voluntarily referred in connection with cross-examination to affect my general position on this matter. Other than that, the matter can go in. 3301

I don't see that it is any more valuable than other matter that we have here.

Chairman Myers: Shall it go in or shall it not?

Mr. Hassell: I say I have no objection other than as I have stated, and I don't want to withdraw that. 3302

Chairman Myers: That's all right. Have it marked. It will be received, subject to that.

(The document referred to was marked "Respondent's Exhibit No. 90," and received in evidence.)

Mr. Bromley: I confess I don't know whether this document is in evidence or not.

Chairman Myers: I think it is. Mr. Hassell made the statement that he objected to this line of evidence all along, but he had no objection to having the Board see and examine it, so we are going to admit it subject to his objection. 3303

By Mr. Bromley:

Q. I take it, Mr. Allen, that if this survey had come out the other way you would have had serious question about whether your organization wished to carry the distribution of this magazine? A. You are absolutely right about that.

3304 Q. So on your own initiative and at your own expense you caused a survey to be made in which there were presented to the sample of the public which you sampled three questions; is that right? A. That is right.

Q. And the first objective was whether the public considered these pictures to be obscene or indecent? A. Yes.

Q. And the second objective was to find out whether it was thought that the pictures would be apt to corrupt the morals of the reader? A. That is right.

Q. And the third objective was to find if people would object to having a magazine containing these pictures in
3305 the home? A. That is right.

Q. And, as I understand it, your interviewers asked three questions. A. There is a copy of the interview right in there.

Mr. Bromley: That is the third page of the book and shows the precise questions, if the Board please, which are:

"1. Do you think these pictures are—or are not—obscene or indecent?

"2. In your opinion, would these pictures be apt
3306 to corrupt the morals of the reader?

"3. Would you object to having a magazine containing these pictures in your home?"

By Mr. Bromley:

Q. Now, those are the three questions that were asked by the interviewers to the public interviewed? A. Those were the things they wanted to find out.

Q. To find out for the benefit of your business judgment as to whether you would continue relations with our magazine or not? A. That is right. 3307

Q. Does this book show the breakdown in percentages as to each of the three question? A. It shows the breakdown on each of the three questions in total and by various other things such as the age groups and sections of the country and, I think also, by educational levels, some with high school education and some with college education, and so on.

Q. What I want to get first is whether or not the percentages are divided as among questions 1, 2, and 3, because you have got three different questions. A. There are three different sets of percentages. 3308

Q. Question 1, which was, "Do you think these pictures are, or are not, obscene or indecent?" is answered by the first sheet under the heading "Results"; isn't it? A. That is right.

Q. And that percentage is— A. I gave the record on that before.

Q. Are not obscene, 80 percent? A. That is correct.

Q. Are obscene, or indecent, 19.7 percent? A. That is right.

Q. That is the answer to Question 1. 3309

Now, somewhere else will be found the answer to Question No. 2. That appears four or five pages further on under the heading "Results," and that question, which was: "In your opinion, would these pictures be apt to corrupt the morals of the reader?" was answered "no," 80.8 percent, and "yes," 17.9 percent; is that right? A. That is right.

Q. The question No. 3 again is found four or five pages further on under "Results," and reads: "Would you object to having a magazine containing these pictures in your

3310 home?" The answer is "no," 79.4 percent; yes, 20.6 percent.

Is that right? A. That is right.

Chairman Myers: That question was what?

Mr. Bromley: That question was: "Would you object to having a magazine containing these pictures in your home?" and the answer is "no" 79.4, and "yes" 20.6 percent.

By Mr. Bromley:

3311 Q. Is this the kind of a thing that your organization does, regularly and frequently? A. Yes, sir.

Q. For how many years have you done it? A. Oh, we have always done it as far as our own magazine is concerned, but much more fully in the last five years.

Q. Do you think this kind of survey is an accurate representation of public opinion generally? A. Definitely.

Q. Do you feel that the technique has been so developed by men like Crossley and Gallup so that you can get a very accurate indication of the state of public opinion on almost anything so far as what is published in a magazine is concerned? A. It is a very definite technical business at the
3312 present time, and there are a great many businesses of all sorts, but particularly advertising and publishing and radio and that sort of businesses, that depend almost exclusively on polls of this sort for their reader reaction.

For instance, on our own publications we do a continuous reader survey. That goes on all the time. I mean it is not just one job this month and one job the next month. It is a continuous survey.

Q. Do you remember you published a condensed article.

or a series of articles, by the author Robert Carse about the merchant marine and the trip he made to Russia in a convoy? A. Yes, called "We Fought Through to Murmansk." 3313

Q. Would this poll have enabled you,—I don't know whether you did it or not,—to go out and get the public reaction to that article, as to whether they thought it was proper or whether they would have liked it or not? A. It was undoubtedly questioned in the survey.

Q. It was? A. Yes.

Q. Do you think you could get an accurate cross-section of public opinion on such a thing as that? Their reaction to that particular article, for instance? A. We do it all the time. 3314

Q. Do you do it for the purpose of, among other things, guiding your future editorial policy? A. Oh, definitely.

Q. In connection with the questions asked you about Exhibit 79, the birth control article, do you remember a few years ago that Fortune published a long article about contraceptives? A. Yes.

Q. In which not only was there a full description of them and their use but photographs of the different types? A. Yes, sir; I recall it.

Q. This article in Exhibit 79 in the Reader's Digest, contrary to the information contained in Mr. Hassell's question, did not contain any information as to what the devices were or how they should or could be used, did it? A. No, it did not. 3315

Q. It just described the work of a woman who went around in California among the migrant people? A. It described her efforts to better social conditions, and that is what the article covers.

Q. It describes her efforts of interviewing them in respect to better birth control methods without disclosing any of

3316 the methods as to the information she gave them, and so on? A. That is right.

Q. So that if there is a statute forbidding the dissemination of information of that sort, and the use of contraceptives, that article would not violate any such statute as that, would it? A. That is right.

Mr. Bromley: Will you mark for identification an issue of Life for August 12, 1940? It contains a picture I would like to call to the Board's attention.

3317 (The magazine referred to was marked for identification as "Respondent's Exhibit No. 91.")

By Mr. Bromley:

Q. I call your attention to the picture on page 88 of this exhibit and ask you whether it is a typical bathing scene of men and women together? A. Yes.

Mr. Bromley: I offer the exhibit in evidence.
Mr. Hassell: The same objection.
Chairman Myers: Received.

3318 (The magazine heretofore marked for identification "Respondent's Exhibit No. 91," was received in evidence.)

Mr. Bromley: That is all.

Recross Examination by Mr. Hassell:

Q. You say that you made a continuous survey such as has been referred to here on all of your publications in order

to keep abreast of reader interest. Has such a survey been made with respect to the short stories in the Saturday Evening Post in the last year or so indicating that those stories have greatly deteriorated? A. Greatly deteriorated? 3319

Q. Yes, in reader interest. A. Not to my knowledge.

Q. You don't know whether any such survey has been made? A. Oh, when I say "survey," I am talking about a continual process of interviewing to find out reader interest in various or in all matters of editorial content. In other words, the short stories are being checked, the articles are being checked, the fiction is being checked.

Mr. Hassell: That is all. 3320

Mr. Bromley: That is all.

(Witness excused.)

Chairman Myers: We will take a short recess.

(There was a short recess taken.)

Mr. Bromley: Call Mr. Crossley.

ARCHIBALD M. CROSSLEY, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows: 3321

Direct Examination by Mr. Bromley:

Q. What is your name, sir? A. Archibald M. Crossley.

Q. Where do you live? A. Princeton, N. J.

Q. And your business is what? A. Crossley, Inc., marketing analysis.

Q. Your position with that company is what, Mr. Crossley? A. President and treasurer.

3322 Q. For how long has the company been in existence? A. Since the first of February, 1926.

Q. For how long have you been connected with it? A. Since then.

Q. Will you give us a word about your educational background, please? A. I graduated with the class of 1917 in Princeton, and I have been in the marketing research business for 25 years.

Q. Now, will you describe to the Board what your business is and what you do. A. Marketing research is the study of markets for goods and the means for reaching those

3323 markets. Primarily, we make those studies by means of cross-section analyses, field studies of the American people. The work is also done by means of statistical analysis and existing data, studies of retailers, and studies of others according to special cases.

Q. Now, what have you done in the way of testing public opinion with respect to such questions as Presidential candidates? A. We have made Presidential polls in 1936 and in 1940.

Q. Now, have you published the results of these polls, not only Presidential polls but other public opinion polls? A. Yes.

3324 Q. In what form? A. Newspapers, principally.

Q. Has the technique of testing public opinion on questions generally attained the status of a recognized science, would you say, today? A. I would say so, yes.

Q. Would you tell us a word about the organization which you have in order to put into operation these polls or tests of public opinion? A. Crossley, Inc., has a staff of representatives and interviewers throughout the United States, and, also, before the war, in Great Britain. These interviewers are trained in unbiased interviewing on all sorts

of subjects, and, principally, marketing subjects, marketing and public opinion. 3325

They run into a good many hundreds all over the country; we cover every section of the United States.

Q. Now, at my request, did you conduct a poll in connection with public opinion with respect to the twelve Varga girl pictures in the January issue of Esquire? A. Yes.

Q. Was that poll conducted, collected, and analyzed, and reported upon under your personal direction? A. Yes.

Q. Will you tell the Board in some detail just what you did in response to my request, as to what the reaction was, and what you did about it? A. We took the January issue of Esquire and taped it. 3326

Q. Did what to it? A. Taped it, as per this sample (indicating), so that the subject of the interview was confined to the twelve Varga girls, or the so-called Varga calendar, and the interviewer in showing this turned it like this (indicating), and allowed the person being interviewed to examine each one of these and then the interview was finished, after the questioning.

Mr. Cargill: Will you speak a little louder, please.

The Witness: Now, two questions were asked. The first question was this: 3327

"Do you consider these pictures to be obscene or of an indecent character? 'Yes' or 'No.'"

The second question was:

"Would you object to having a magazine containing these pictures in your home? 'Yes' or 'No.'"

Those twelve pictures, the calendar, were shown. This study was made as an urban opinion study. It was based on a sample of 4519. Statistically, the total results should vary less than two percentage

3328 points plus or minus in 997 out of 1000 such studies.

That is, I would like to emphasize that statistically there can be some greater variation in individual technique. The technique which we used was that of selective sampling or controlled sampling whereby the distribution of the interviews were controlled according to population.

For example, 37 percent of the population, according to the census, is in the eastern section. 50.9 percent of the population is in over 100,000, and so on. Now, our samples were controlled so that we

3329 had the same percentage, or approximately the same percentage, in those cases which varies within a tenth of a point as the census figures showed by geographical census, by population groups, by age groups, by sex, and, according to our own information, on living standard levels.

We used also check factors. One check factor being whether the person interviewed had a telephone, and the results compared very closely with existing information on that subject. That is the method which was used.

By Mr. Bromley:

3330 Q. Now, I wish you would explain that a little more fully to me. How many people according to Government figures or recognized figures of an authoritative nature—what percentage of our population has telephones? A. The latest information which I think is the American Telephone & Telegraph information is 44.2 percent of families have telephones throughout the United States.

Q. How would you use that as a guide in selecting the

character of persons you would interview? A. We would use it as a check factor rather than a control. In other words, if we discovered that we had in the results that we obtained a very high percentage of telephone homes in relation to the known number of telephone homes we would assume then that our distribution was not correct in some form. It could be that it had not gone far enough down the income scale, or it could be that it had not gone down far enough out in the country. 3331

When you use check factors such as telephones, gas, electricity, and various others, and come fairly close to known data, it is assumed that you have a pretty true cross-section of the country. 3332

Q. Would you use the fact of whether or not the person interviewed had a telephone, had gas, had electricity, had a radio, all that information from the people interviewed and check it against the statistical figures of what percentage of our population had telephones, gas, electricity, and radios? A. We do that regularly.

Q. Did you do that in this study I am talking about? A. We did it in the case of telephones.

Q. What kind of cross-section, economically speaking, would you take and how would you determine that? A. By "economically," do you mean living standards? 3333

Q. Yes. A. We have taken the distribution of living standards according to our own experience over a period of years. There is no set method of determining living standards. I am a member of the Committee of American Marketing Association, to try to check such standards. We have set those standards on the basis of trial and error over a number of years, and we have come out to such percentages which we have here, for A, B, C, D, and E levels.

The "A" being the top level locally, "E" being the very

3334 lowest level locally, "B," "C," and "D" being the intermediate levels.

Q. Now, would the "E" level of income include the poorest class of people? A. Yes.

Q. Would the "A" level of income include the rich people? A. Yes.

Q. "B," "C," and "D" the intermediate levels, judged from the standpoint of income? A. Yes. May I add to that not only income but living standards.

Q. So that means that the character of person interviewed out of your 4,500 samples bore the same relation to 4,500 that the whole class of "E" people to this nation bore 3335 to our 130,000,000; is that right? A. Extremely close.

Q. What other test did you use to check the representativeness of the cross-section of your 4,500 samples? A. No other check than the distribution.

Q. Now, for how long a time did it take you to make this check? A. The study was conducted over a period of approximately two weeks.

Q. Are you able to give percentagewise in the same way the last witness did the result of the survey on the first question? A. In total.

Mr. Hassell: I object to this whole line of testi- 3336 mony and move that all of it now be stricken.

Chairman Myers: Objection overruled.

By Mr. Bromley:

Q. What is the total? A. The answer to the first question, urban findings on Varga girl, the question being: "Do you consider these pictures obscene or of an indecent character?" "Yes," 22.4. "No," 77.6.

The answer to the second question, "Would you object to having a magazine containing these pictures in your home?" "Yes," 26.4; "No," 73.6. 3337

Mr. Hassell: Seventy what?

The Witness: "No" is 73.6.

By Mr. Bromley:

Q. Have you embodied the results of this study in detail in the form of a written report? A. Yes.

Q. Have you got it there? A. Yes.

Q. May I see it? A. Yes (handing report to counsel). 3338

Q. And have you got a detailed written report showing exactly what you did, and the breakdown in all cases which you have mentioned? A. Yes. This report gives the actual numbers. The report I just handed to you gives the percentages.

Mr. Bromley: Will you mark this for identification, please? This is the black-bound volume.

(The volume referred to was marked for identification as Respondent's Exhibit No. 92.)

3339

Mr. Bromley: And will you mark for identification this white-bound report entitled "Report by Crossley, Inc.," which is a summary of the first, as I understand it.

(The volume referred to was marked for identification as Respondent's Exhibit No. 93.)

3340 *By Mr. Bromley:*

Q. I show you Exhibit No. 92, for identification, and as you whether that is a detailed written report includin the copy of the questionnaire used? A. It is.

Mr. Bromley: I offer it in evidence.

Mr. Hassell: I object.

Chairman Myers: The objection is overruled: i may be received.

(The volume heretofore marked for identifica
3341 tion "Respondent's Exhibit No. 92," was re ceived in evidence.)

By Mr. Bromley:

Q. I show you Exhibit No. 93, for identification, and as you if that is a summarization of Exhibit 92? A. Yes.

Mr. Bromley: I offer it in evidence.

Mr. Hassell: I object.

Chairman Myers: The objection is overruled; i may be received.

3342 (The volume heretofore marked for identifica tion "Respondent's Exhibit No. 93," was re ceived in evidence.)

Mr. Bromley: That is all.

Mr. Hassell: May I see those documents?

Mr. Bromley: Yes (handing Exhibits 92 and 9 to counsel).

Cross Examination by Mr. Hassell:

3343

Q. Mr. Crossley, your poll on these two questions was conducted in urban areas only, was it? A. The original poll was conducted in urban areas. We also conducted later a poll in rural areas.

Q. Is the rural area poll shown here? A. It is shown in the summary, which is later than the other.

Q. Which one of these exhibits? A. The white one, and I think it is at the last page.

Q. That would be Respondent's Exhibit 93. Do you have reference to the last page in this Respondent's Exhibit 93, which reads, "Special Study of Farmers"? A. Yes.

3344

Q. And to the question, "Do you consider these pictures obscene or of indecent character," the answer was "Yes," 33.4 percent, and "No," 66.6 percent. A. Yes.

Q. And to the question, "Would you object to having a magazine containing these pictures in your home?" the answer is "Yes," 35.1 percent, and "No," 64.9 percent? A. That is correct.

Q. Now, did you average those percentage figures with your totals for the urban areas? A. We have not averaged them in a report. I can give you the weighted average of the two.

3345

You must understand that the urban study is a carefully controlled study. There has not been time to do a carefully controlled job among farmers.

The study is believed to be the same as a carefully controlled job would show within a very narrow margin. Statistically, if you put them together, they should be put on an estimated and weighted base. That I can give you.

If you put the two together you would find for question No. 1 approximately 27 percent, and question No. 2—

3346 Q. Twenty-seven percent what? A. 27.2 percent answering "yes" to the first question, the first question being "Do you consider these pictures to be obscene or of an indecent character?"

The "no," of course, would be the reciprocal of that, which would be 72.8 percent.

Question No. 2, "Would you object to having a magazine containing these pictures in your home," the weighted figure would be "Yes," 30.2 and "no," 69.8.

Q. I see.

Now, Mr. Crossley, are your interviewers—is that what
3347 you call the people who actually make the interviews? A. Yes.

Q. Are they women or men? A. Both.

Q. How do you select those interviewers as to education and other characteristics? A. The interviewers were originally selected from Government-trained research men and women some years ago. They have been added to, largely using these people as supervisors.

They are now of a wide variety. They cover all ages, and cover both sexes. They are a little more intelligent, naturally, than the average. They run from perhaps a low middle up to a fairly high grade.

3348 Q. As to intelligence? A. No, as to living standards.

Q. As to living standards? A. As to living standards.

Q. And do these interviewers live in the communities in which they are employed? A. Yes.

Q. For instance, if you had an interviewer in Washington, wanted to make a poll here, the person who does that would live here? A. They live here, yes.

Q. And they are used in all sorts of polls, are they? A. Yes.

Q. All sorts of questions? A. Yes.

Q. Does that apply to the small towns, too? A. Yes. 3349

Q. Take a town of 1,000 or 5,000 population where everybody knows everybody else, and the family history back for generations, maybe, the interviewer would live in that town? A. To some extent. Naturally they cover the rural areas and they have to travel. Sometimes they travel from small cities into small towns and rural areas.

Q. What technique do you instruct your interviewers to employ in soliciting information as to the approach to the person interviewed? A. They usually represent themselves as carrying on interviewing for Crossley, Inc., a national research organization They sometimes say they are carrying on the Crossley poll. 3350

Q. Do they go up to a housewife's door and ring the bell and take her from her duties and pry the information out of her? A. Yes.

Q. The answers made might depend in some cases on some questions to just what approach the interviewer made to the person interviewed? A. Yes.

Q. The state of health of the person interviewed, the state of his or her industry at the time, whether he or she was busy on something else, would it not? A. That could be.

Q. Are your polls on elections always 100 percent true in their prognostications? A. Never. 3351

Q. You wouldn't claim this to be 100 percent true reflection of the opinion of the American people, would you? A. I couldn't possibly.

Mr. Hassell: That is all.

Chairman Myers: Do you know who is going to run against each other for President next year?

The Witness: I wish I did.

3352 *Redirect Examination by Mr. Bromley:*

Q. Did you make a 1936 Presidential poll? A. Yes.

Q. And how far wrong were you? A. In 1936 we were between five and six percentage points out of the way, and in 1940 we were 1.8 percentage points out of the way.

Q. Well, did you correctly prophesy who was going to be elected each time? A. Yes.

Q. And the actual error in the total vote in 1940 was only one point something percent; is that right? A. That is right.

3353 Q. Would you do a quick one for me for 1944? A. Not publicly.

Mr. Hassell: What was that?

(Question and answer read.)

By Mr. Bromley:

Q. What about this business of possible inaccuracies in interviews because people are busy or sick? Do you take that into account? A. Well, that is averaged out because you don't find any very large number of people sick at the
3354 same time of the interval. You don't go out and carry on your interviews when every Mrs. Jones that you interview happens to be sick, so that you would probably find the same percentage of people sick as is true all over the country at a given average minute or average 15 or 20 minutes of the interview.

Q. Were you careful to instruct your interviewers as to whether your organization had any interest one way or the other as to how this thing came out? A. Yes, that is standard practice.

Q. What instructions did you give? A. They are contained in here. 3355

Q. Exhibit 92. I notice it says:

"Instructions for conducting picture attitude study. Read carefully." That is underlined.

"Crossley, Incorporated, has absolutely no interest"—that is underlined—"in whether people think these pictures obscene, indecent, or not. You must conduct this interview so as not to bias the person being interviewed on one side or the other."

Are those instructions always given to your people and are they well aware of the fact that they must be as objective as it is possible for them to be? A. Yes, that has been drilled into them. I have personally done it all over the United States year after year in training interviewers. 3356

Q. What do you do with the fellow who looks at the pictures and says, "I think they are all right, but I don't think my wife would like them"? A. I would consider them questionable and they would go in the "Yes" rather than the "No."

Q. You would actually record them as being obscene. Is that right? A. Yes.

Q. Is it a fact that your policy is to lean over backwards and construe any doubt in the minds of the persons interviewed as an answer connoting indecency? A. That instruction was given by me personally to the men in charge of the tabulation. 3357

Q. Can you give me another type of indefinite answer which you sometimes ran into which you tabulated as against the decency of the pictures? A. In a general way only. I have no examples with me, but if a person had said, "Well, one or two of them may be, but on the whole they are all right," or something of that kind

3358 Q. What would you have done with a case of that kind? A. In that case they would have been classed as "Yes".

Q. If a fellow said, "I think one is indecent but the rest are all right," you would tabulate that as saying all were decent? A. He would be tabulated as a "Yes" answer to this question, that the pictures are indecent.

Q. I want you to be perfectly clear about that because I can conceive of an interviewer asking an opinion on each one and added up the results would be that he thought six were decent and four indecent. You might have tabulated that as a "No" answer, but as I understand you, if any one
3359 said that any one of the 12 he thought was indecent, you put him down as answering the first question "Are these pictures obscene" as "Yes". Is that right? A. Yes, sir.

Mr. Bromley: That is all.

Mr. Hassell: That's all.

(Witness excused.)

Mr. Bromley: Mr. Lewenthal.

REEVES LEWENTHAL, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and
3360 testified as follows:

Direct Examination by Mr. Bromley:

Q. What is your name, please, sir? A. Reeves Lewenthal.

Q. How do you spell the last name? A. L-e-w-e-n-t-h-a-l.

Q. Where do you live, Mr. Lewenthal? A. 1165 Park Avenue, New York City.

Q. And your business or profession is what? A. Art

dealer, art manager, president of the Associated American Arts. 3361

Q. What is the Associated American Arts? A. Associated American Arts represents approximately three-quarters of the leading American artists.

Q. Are you an expert in art? A. I believe so, yes, sir.

Q. And for how long a time have you been connected with art in America? A. Seventeen years.

Q. Will you tell us in detail just what your artistic connections are? A. Well, I was head of public relations of the National Academy for three years; I was on the governing boards of a majority of the art societies of the country, 3362
I believe; that included the Society of American Etchers, National Association of Women Painters and Sculptors, and I was appointed to the Municipal Art Society of New York City, a member of the Board of Education group appointed by Mayor LaGuardia to preserve the arts.

I was recently appointed director of the War Department Art Advisory Committee.

I believe I have been associated and am associated with just about every major art association in the country.

Q. What is the National Academy to which you referred? A. It was founded by Samuel F. B. Morse in 1826, the oldest art society in the country. It has since 1826 taken a 3363
leading part in the professional activities insofar as art in the nation is concerned.

Q. Will you take the January issue of Esquire, 1943, and indicate as briefly as you can whether or not there are, in your opinion, any works of art or articles of art in that issue?

Mr. Hassell: I would like to inquire of counsel whether it is proposed to have this witness testify as

3364 to the artistic quality of any of the Varga girl pictures. I understood they were not offered or held out as art.

Mr. Bromley: No, I had no thought of calling his attention to Varga particularly.

Mr. Hassell: I submit there is no question in this case as to the art pages of this magazine.

Mr. Bromley: Will you stipulate, Mr. Hassell, that we regularly have features devoted to the arts, features devoted to the merit of artistic presentations, paintings, drawings, etchings, and so forth, and that

3365 a substantial amount of each issue of our magazine each month is devoted to the arts?

Mr. Hassell: I don't know that I would want to enter into a stipulation that far. I believe it is my recollection that a few pages of this magazine, most every issue, purport to be devoted to art.

That is not questioned here, as I understand.

Mr. Bromley: I don't like you to use the words "purport to be devoted to art". I want to prove they are devoted to art. There is no purporting about it.

Mr. Hassell: I object.

Chairman Myers: Overruled.

3366 The Witness: Yes. The Covarrubias America undoubtedly represents the highest in decorative art.

Mr. Hassell: Will you identify the passages as you go along, Mr. Lewenthal?

The Witness: It is opposite page 46.

Mr. Hassell: That is the January issue?

The Witness: That is the January issue, yes, sir.

The Covarrubias America undoubtedly represents the highest achievement in decorative map publishing. The artist, Covarrubias, is recognized as having per-

fected this particular art to the highest degree ever known. 3367

As a matter of fact, this particular map has been acquired by the State Department and has been sent to, I believe, every American Embassy, and is generally, although it appeared in Esquire for the first time, very well known today.

It is also used as an educational feature in schools throughout the country, it has been acquired by the Metropolitan Museum, the Museum of Modern Arts, and many other museums throughout the country.

I would like to ask one question. Primarily, after all, there are three categories of art. There is commercial art, applied art, and fine art, and I am not quite sure; I presume it is fine art that you are talking about? 3368

By Mr. Bromley:

Q. Yes. A. The illustration on page 70 for the article "61 Shopping Days til Love" are excellently done and certainly would be acceptable to any gallery for exhibition purposes. They are by Baer.

The illustration opposite page 74—I don't know this man Pachner—is well executed by every standard and can be considered in the classification of fine art. 3369

The illustration preceding page 77, by Leydenfrost, definitely shows a high degree of accomplishment, technical competency.

Q. Is that in connection with the article: "The Future of Air Power"? A. Yes, sir; it is.

Q. Who is Leydenfrost? A. Well, Leydenfrost is considered a top ranking man in the commercial art field. Of

3370 course, the old print opposite page 84 "First Nights and Passing Judgments", is certainly acceptable more from a historical standpoint and competency of that day than a contemporary thing.

The photograph opposite page 89 is photographically one that has a high degree of accomplishment. I don't know who the artist is on page 111, where there is an illustration in black and white which is excellent. The artist's name is not listed.

On page 114, obviously by the same artist, there appears another illustration which certainly can be characterized as

3371 fine art.

The same thing applies to the illustration by the same artist on page 116.

The illustration by Walter Bohl is definitely a thing of some accomplishment.

The photograph of the bull-dog, Champion Jackmins Ferdinand, opposite page 119, certainly, from lighting and general photographic standards, can be considered excellent.

Q. Who is Henry Waxman, the photographer? A. He is one of the leading color photographers of this country.

Of course, the chart on page 121 which has the key to the map of America by Covarrubias is certainly a unique

3372 representation of art.

I believe that covers that.

Q. Now, take the February issue and do the same thing. A. All right, sir. From the very broad viewpoint, the illustration opposite page 30, I don't know who the artist is, and this is a fashion illustration, is most competent and well executed.

Of course, the illustrations on page 48 picturing the Gibson Girl is very definitely of a historic value and shows the technique that was highly thought of in its day and which

I am sure for many years will be constantly referred to in the history of art in this country. 3373

The painting on page 55, by Pachner, is again a very competent example of fine art.

Mr. Hassell: 55, you mean opposite 54?

The Witness: Yes, sir.

The photograph opposite page 56, the painting, rather, by Leydenfrost.

Mr. Hassell: It is opposite page 57?

The Witness: Yes, preceding page 57.

This again shows a high degree of professional competency. 3374

The drawing by Eric Lundgren on pages 60 and 61 would be acceptable to any museum, acceptable as contemporary Americana.

The illustrations on pages 76 and 77 are excellent and would be acceptable for showing in any modern gallery.

By Mr. Bromley:

Q. Just a moment. Those are the illustrations in connection with the story— A. "Home Sweet Ruby Street". 3375

Chairman Myers: What page is that?

The Witness: 76 and 77.

By Mr. Bromley:

Q. Who is the artist who made those illustrations? A. Baer. Now, Baer was a discovery of Esquire and his work first appeared in Esquire and he today is highly thought of.

3376 His paintings hang in a number of museums. The Associated American Artists thought enough of his work to give him a one-man show, which was very well acclaimed by the critics, and today he is widely sought after to do work of a highly fine art nature.

Q. What kind of an illustration is this? Is it an etching or drawing or what? A. It is a pencil drawing and it has been tinted on a tint block on yellow, I think it is.

The photographic illustration opposite page 80 by Henry Waxman is highly competent.

The photographic illustration preceding page 83 of the
3377 movie star Linda Darnell shows a high degree of competence.

Q. Now, who is the photographer of that? A. Hurrell, who is one of the leading photographers in the country.

Q. Is he in a class with Waxman? A. Yes, sir. I would say he certainly is.

Q. Would you say he and Waxman were two of the half dozen finest art photographers in the country? A. Yes, I would certainly say so.

The color photograph opposite page 102 by Paul Garrison is excellent. I don't know whether—I don't know him very well. I have seen a few of his things.

The painting preceding page 105 by Walter Bohl is com-
3378 petent.

I guess that covers this one.

Chairman Myers: At this time we will adjourn until one-thirty.

(Whereupon, at 12 o'clock noon, an adjournment was taken until 1:30 o'clock p. m.)

AFTERNOON SESSION.

3379

(The hearing was resumed, pursuant to the adjournment, at 1:30 o'clock p. m.)

Chairman Myers: Proceed, gentlemen.

REEVES LEWENTHAL, resumed the stand and testified further as follows:

Direct Examination by Mr. Bromley (Continued):

3380

Q. I show you the March issue. Will you make comments on the art content of that issue, please? A. Facing page 32 is a commercial art work which I think is a very acceptable thing, a high degree of merit—it is by Pachner—who obviously can turn in a good many directions and on page 38 Pachner again with a pen and ink line drawing which I would certainly classify as a perfectly acceptable piece of fine art.

Q. Is that in connection with the fiction by Giffen entitled "These Four Virtues"? A. Yes, it is, and Pachner again on page 41, opposite page 40, a highly competent piece of work. That is in connection with "Lookout for torpedo tracks"—I don't know whether it is related to that or not. 3381

And on page 42 Leydenfrost again has a piece that is highly competent; on pages 44 and 45 I don't see the name but I recognize it as Howard Baer, and there are three illustrations. They are highly competent.

Opposite page 58 is a color photograph by Hurrell which has his usual degree of competency, and the same applies to the Waxman photograph on page 60.

On page 64 and page 65, I don't see the artist's name here.

3382 but it looks like Palazzo to me, a highly competent piece of work—yes, here it is, Tony Palazzo.

On page 72, a series of four reproductions which are certainly acceptable. I see they come from Knoedler's and are certainly acceptable in any magazine in the country.

Q. What is Knoedler's? A. Knoedler's is one of the leading art galleries in the country. They loan paintings as do other galleries, to Esquire.

On pages 76 and 77, in connection with an article entitled "The Chosen Conquerors"—I don't know the identity, but there are two quite beautiful line drawings.

3383 Opposite page 80 there is a photograph by Paul Garrison, which is a very able piece of work, and on the next page there is another Bohl painting which has his usual competency.

I don't know the artist, but on page 87, it looks like a wood-cut, very able.

Now, on page 103 and page 104 also there are a group of illustrations by Vertes. Vertes is certainly one of the outstanding fashion artists of our day, but it is rather interesting that he not only may economically turn to one field, but is highly acceptable in other fields as well. Recently he had an exhibition in the Gallery of Modern Art in New York

3384 which received fine critical acclaim.

I think the French artists have very much gone along in the tradition of the old masters insofar as viewpoint is concerned. I would particularly like to talk about Vertes because a short time ago I recommended him to the Steuben people who were getting up a series of lasts that they wanted represented by the outstanding artists of the world—not necessarily American—Vertes as well as Picasso and Doran, and others did them and his was a well thought of piece of work.

He is both an easel painter as well as a fashion artist. He moves back in the tradition of the early 15th century masters such as Michelangelo, Da Vinci, and others who were primarily master artists, and it made no difference to them whether they designed a stair well or laid out a road. Michelangelo never fancied himself as an artist but when Pope Julius asked him to do the ceiling of the Sistine Chapel he protested but did it very well. 3385

I think the tendency of today of contemporary artists is very definitely to turn to certain sources and add a certain perfection to a creation of their own in order to gain an economic sustenance, and to turn to the purely creative thing or purely serious product for easel painting, and I think Vertes is certainly one of those men. 3386

Q. Will you take the April issue, please, in the same way? A. Well, the double-page spread opposite page 34 is another fashion illustrative group which I think reaches a very high degree of competency.

Leydenfrost is again on page 44. My best comment applies to him.

Now, here is Baer again on pages 54 and 55 with illustrations that are certainly capable draftsmanship.

The photograph opposite page 56 is very well done by Hurrell.

The dog on page 58 by Waxman is excellent. 3387

I don't know who the artist is on page 60 and page 61. It appears to me to be Baer, I am not sure. There is no signature, but they are very highly competent.

Here are the easel paintings by Vertes on page 66 with an article by Harry Salpeter who was the art critic of the World for some time and is now one of the leading accepted art critics. Vertes is shown purely as a studio painter; highly creative, well done thing.

3388 Page 71 I would very definitely classify as a very able rendition.

The photograph on page 72, the color and the composition and everything is very fine.

The fashion illustrations by Vertes on pages 85 and 86 are certainly creative products.

Q. Now, take the issue for May. A. On pages 32 and 33 in connection with an article called "The Savage Beast In Us", by Paul Gallico, there are six illustrations. Contemporary artists have always found a great deal of material in the burlesque and in the theatre and I think these are
3389 very well done. They are by Baer. I don't see his signature, but I recognize his work.

Fashion illustration opposite page 34. As fashion illustrations those illustrations are excellent.

Pages 52 and 53, Baer again, I am sure. They are very competent, good drawings.

Photograph opposite page 54 by Henry Waxman. This definitely can be classified as a high achievement in photography. As a matter of fact, it has beautiful texture and everything. The same applies in the photograph preceding page 57. As a matter of fact, that is a very fine example of picture texture and quality in photography.

3390 Of course, on pages 58 and 59, Eric Lundgren, beautifully done pen and ink drawings, and they certainly would be acceptable in any exhibit and in any museum.

The painting by Leydenfrost opposite page 60 is competent.

The photograph preceding page 69 looks like a Ritter photograph. It is very good. He achieves a little different thing than Waxman does, or Hurrell. He looks more for the hardness in the line and so forth.

We have Vertes again on pages 82 and 83. He always does a very competent fashion job.

On page 84 there are a series of reproductions of paintings by Arthur Kaufmann. These paintings would certainly be acceptable. As a matter of fact, the paintings that Esquire has brought out month after month, since the suspension of Vanity Fair, have really carried on where Vanity Fair left off in presenting a fairly progressive character of art. These paintings, I am sure, would be acceptable in any contemporary museum in the country. 3391

Page 92 has a photograph which is well done from lighting, composition, and so forth.

That is all.

Q. Now, the June issue, please. A. The fashion illustrations by Pachner, I believe. Yes. Competent. 3392

Q. What page? A. It is opposite page 30.

The illustrations on pages 36 and 37, no signature, but they are Howard Baer, I know, are excellent.

The photograph by Hurrell following page 50, certainly well done from the standpoint of lighting and texture.

The same applies to Waxman's photograph preceding page 53.

On page 57 Leydenfrost's painting shows a high degree of illustrative value.

The photograph on—I don't see any page number here—it precedes the illustration opposite page 65—done by Jon Abbot. It is very good, color value, composition. 3393

The fashion illustration, I assume it is a fashion illustration, opposite page 65. Competent.

I think the art of caricature is well regarded in the illustrations following page 68.

I think the photograph on page 72 is interesting. It shows almost a degree of composition.

The paintings on page 78 are very good. As a matter of fact, I think Esquire is presenting them for the first

3394 time here. I think Esquire has also in the past presented many men that have been given their first opportunity by the magazine, either Esquire or Coronet, or, of course, Verve, which I think was sired by Esquire.

Q. Now, the July issue. A. The John Falter painting technically is—

Q. What page? A. I don't see any page number here. Preceding the Falter painting is a portrait sketch and an illustration by Eric Lundgren on pages 32 and 33. They are very swell.

Then following that page there is a double-page spread
3395 by John Falter called "The Submarine Appendectomy" and while it is highly illustrative, it is very competent; very able piece of work.

On pages 40 and 41 there are two photographs by Tony Palazzo—line drawings, they are very good.

Opposite page 47 there is a fashion drawing by Pachner which is unusual.

The photograph opposite page 50 by Hurrell is very able, well lighted. I think this photograph opposite page 52 is one of the very best I have ever seen. That and another one, I don't know what issue in Esquire it appeared, they were clipped by us because we felt they came closest to
3396 painting that we had ever seen. We generally distributed this particular photograph.

Q. What do you mean, you generally distributed this particular photograph? A. Well, we often clip things that might be helpful and stimulate our own men insofar as texture is concerned. That was clipped and we sent them around with our own comment and we hoped that they might stimulate them to certain directions. That is our own roster of artists.

The illustration by Leydenfrost, as illustrations go, is very good. 3397

Q. What page? A. Following page 56.

Photograph preceding page 61 is excellent.

The photograph following page 72 shows considerable originality and quite good.

The photograph preceding page 77, Jon Abbot, is an excellent photograph. There again the dog preceding page 85 is done with Waxman's usual competency.

Q. Now, the August issue. A. On pages 30 and 31, no artist is specified, but I believe it is Baer. Very, very swell competence.

John Falter's illustration in connection with the article "Bombardier's Last Breath". 3398

Q. About pages 36 and 37. A. It is extremely competent.

The illustrations on pages 42 and 43 by Eric Lundgren would find a place in any collection, that is, contemporary collection.

The caricature on page 57 is very well done.

The Hurrell photograph following page 62 is well executed, I think from a lighting and compositional standpoint, and the photograph by Hurrell on page 64 is very good.

I think the photograph on page 73 shows a high degree of artistry, and I think the composition and lighting and general concept is excellent. It has fine texture. 3399

I presume this is Leydenfrost—although I do not see his name here—there is no page number again, but it would be page 74—is highly competent.

The informal photograph—there is no page number here, but it is Serebrykoff—I guess it is—as an informal color shot it is very good.

Q. It is ahead of page 81, two or three pages ahead, two girls with the blue hats? A. The photograph, no page num-

3400 ber here, but it is a William Ritter photograph, and has a very realistic approach, and it is fine.

Q. Just ahead of page 81. A. On page 81 we have four paintings by Kopf, loaned by the Seligman Galleries in New York, that are beautifully done, and very definitely could be classed as museum things.

The fashion illustration—I believe it is Pachner—I recognize it as Pachner, although there is no name—on page 92, is very well done.

Q. I would like to call your attention specifically to page 127 in the August issue, because that is an illustra-
3401 tion which is under attack in this proceeding. Who are those drawings done by? A. I recognize it as Vertes.

Q. By Vertes? A. Yes.

Q. And are those fashion illustrations of the type which you have mentioned heretofore? A. Very definitely. He has formed a niche for himself in this particular field.

Q. What can you say about the quality of those particular fashion drawings appearing on those two pages? A. In concept and rendition, fine, excellent. They are very original and very fine.

Q. Now, will you go to September? A. The illustration on page 31 in connection with the article "The Sergeant's
3402 Reprimand," is very competent, a very free sort of thing, very good. There is no page number but the Falter painting, the usual Falter thing with a high degree of competency and realistic approach.

The pen-and-ink drawings on pages 40 and 41 were spendidly done. The one on page 41 is a specially beautiful piece of work.

The photograph by Bruehl on page 51 is, from a color sense, very exciting, a very swell photograph.

The photograph preceding page 53 has fine textual quality and lighting.

At what would be page 58 is a photograph by Serebrykoff, very realistic. Obviously the candid camera type of shot, which is very well done. 3403

The illustration by Leydenfrost, preceding page 61, is competent.

The fashion illustration by Saalburg—I recognize it as Saalburg, on page 76, is in the fashion field very fine.

Q. Now, the October number. A. The double page reproduction of a painting by Falter—again no page number, but it would be pages 41 and 42—is realistically done. It is highly competent.

The color photograph by Hurrell following page 56 has merit. 3404

The photograph of the ballet girls on page 58 is quite beautiful. From the standpoint of lighting and texture it is, I think, outstanding.

A photograph by Waxman following page 70 is very good.

The photograph preceding page 75 is excellent.

The four reproductions of paintings by Henry Major opposite page 83 are fine. They would be acceptable in any museum.

The color photograph at page 87 has a beautiful textual quality. That is by Serebrykoff again.

The Leydenfrost illustration following that page has his usual merit. It is his usual thing, which is excellent. 3405

The fashion illustration by—I think that is Pachner—it looks like Pachner to me—there is no signature—is very good.

Q. Now, November. A. The reproduction of the painting by John Falter—no page number, but a double-page spread—called "The Temptation of a Hero" is well done.

Q. It is about page 44. A. It is opposite the article, "The Man Who Didn't Shoot."

3406 I think the group of etchings on page 57 represent competent work.

The Hurrell photograph on page 59 could be classified as very able technically.

The photograph preceding page 61 is very excellently done, beautiful in so far as color is concerned. It is really quite a remarkable thing.

Q. Who is the photographer? A. Anton Bruehl.

Q. What can you say about him? A. Certainly one of the best in the country, if not in the world.

The photograph by Henry Waxman following page 72,
3407 from a painter's standpoint—it is very hard for a painter to get excited about photography, but this one is very well done, beautifully done. I doubt whether any artist could ever take exception to this photograph. As a matter of fact, I happened to show this one to Thomas Benton, who made the statement that he would not be able to get texture like that, painted like that.

Q. Has the draping and the folds—what seems to me to be folds and wrinkles in the yellow drape—anything to do with contributing to the beauty of the photograph? A. There would be no photograph without it; I mean, no excellency of the photographer involved. The exciting thing
3408 about it is the fact that the photographer has been able to achieve a very fine textural quality by wetting this drapery and highlighting it—it looks to me like from above and from the left—and was able to do a photograph which is quite an artistic piece of work.

The realistic photograph by Ritter, page 75, is very good. highlight and shadows and so forth.

The photograph following page 88 is very competent. That is by Serebrykoff.

Q. Would you say in summary, then, that in each one of these eleven issues there has been a substantial art content of high value? A. I definitely would, sir. 3409

Mr. Bromley: That is all.

Mr. Hassell: No questions.

(Witness excused.)

HENRY L. MENCKEN, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

3410

Direct Examination by Mr. Bromley:

Q. You are Henry L. Mencken, are you, sir? A. Yes, sir.

Q. And you live in Baltimore? A. Yes, sir.

Q. At the present time what are you doing, Mr. Mencken? A. I am writing a book and I am also doing a few magazine articles and I am a director in the corporation, the Baltimore Sunpapers.

Q. I see.

What is the work upon which you are presently engaged? A. It is a supplement to an old book of mine called "The American Language." 3411

Q. What does it deal with? A. With the common speech of the United States, just as the original book did.

Q. When did the original book come out? A. The first edition was in 1919.

Q. How many editions have there been since then? A. It is now in about the fifth or sixth printing of the fourth edition.

Q. Can you tell us something about its content and your purpose in writing it? A. The original purpose of the

3412 book was to study the American form of the English language in all its branches including spelling, pronunciation, history, proper names.

I began working on this book in 1910 and I gradually accumulated a rather large amount of material. My first edition came out in 1919 and it has been in print ever since with constantly increasing size, and the book has now become so large it is impossible to put any more material in it and I am bringing out a supplement of about the same size, which I hope to bring out in about a year.

The book has circulated so far something about 200,000
3413 copies. It has been republished in England and translated into German.

Q. Now, that book is called "The American Language," isn't it? A. Yes, sir.

Q. Does it contain slang words in current use? A. Some. It does not pretend to be a lexicon. It discusses words rather as types rather than making an effort to list them all. But it discusses, for instance, among other things, a chapter on euphemisms, forbidden words, words that are, for one reason or another, not used, dialectical forms, and various kinds of slang and trade jargons, and such things.

It also contains sections on the non-English languages in
3414 America, such as Louisiana French, Pennsylvania German, and so on, Yiddish in New York.

Q. We have been interested here for some time in the category you have mentioned as forbidden words, and I would like to ask you a little something about forbidden words. A. Yes.

Q. In the January issue of Esquire, page 123, there is a column in a two-page spread entitled "Ad libbing with Esquire", which is of a humorous nature and which begins "Dear Doctor Diddle". A. Yes, I have read it. I am familiar with it.

Q. Well, is the word "diddle" a forbidden word? A. No, sir. 3415

Q. What can you tell us about it? A. The word "diddle" is a very old word in English. It is hardly vulgar English even. It is rather respectable. It means primarily to rook, to swindle, to overcome, to get the better of, and it has four or five derivative meanings, one of which is vulgar, but is rather a rare meaning, and there is a considerable difference of opinion as to what this vulgar meaning means. It means different things to different people. It is not used much and the most familiar form is, of course, the word "I diddled him out of three dollars", which is a very common form of the word both in England and in the United States. 3416

There are several other forms, figurative forms, that take on the general meaning of "to shake", suggesting the words, "shake down". That is all I know about it.

Q. Would you hesitate to use it in any work of yours on the grounds that it was indecent or obscene? A. Hesitate?

Q. Yes. A. Why, I have done it in recent times. I shouldn't do it frequently, but it has a proper meaning and it is a proper word. There is an obscene significance to it, but I don't use it in that significance, and anybody that chose to read it into it was very free to do it. There are a great many words in England and in America that in themselves are proper words that have an obscene significance in the minds of people to whom they have an obscene significance, and I don't want in any way to avoid using them merely on the ground that some lascivious person might look on them as dirty. 3417

For instance, the word "juke" isn't improper, is an example.

Q. Juke? A. Juke is used in newspapers every day. It is a perfectly proper word which has unquestionably in some

minds an obscene significance, not my own. I never use it;
3418 I just don't happen to write anything about jukes.

Q. Now, in the February issue at page 95 there is a story called "The Unsinkable Sailor" on that page, in the middle of the left-hand column in describing what Showboat Quinn said at a union meeting we find this sentence: "I grabbed a piece of the broken glass and I yelled 'The first sonovabitch that moves I'll cut his head off.' They left the room—but I went to the hospital".

Now, what can you say about the obscenity of the use of the word "son-of-a-bitch" as it is spelled there or as it is used there? A. You mean obscenity?
3419

Q. The obscenity of it. A. There is no conceivable obscenity in son-of-a-bitch. It has no relation to sex whatsoever, I can say, not to a normal mind. Son-of-a-bitch is simply an opprobrious word indicating that the man is a son of a bitch. It is as old in English, I believe, at least as the word is. I have used it in my last book two or three times, quoting people, and I may add for your information, if it is interesting, that that book in which it is quoted rather freely has just been republished by the Army and Navy jointly with 50,000 copies to send to the soldiers and sailors, from which I get no royalty. I do get a royalty. I get a half a cent a copy.
3420

I was delighted to have it done and was very much flattered to think that the Army and Navy between them thought that this book was amusing to the soldiers and sailors, but this word was used in the book several times, but it applies only to the people who use it. I don't use it very often because I have several words which seem to me even more opprobrious.

Is that the only complaint there, "sonovabitch"?

Q. That is the only complaint in that paragraph. A.

Well, that complaint is so fantastic that I must confess frankly I don't know how to answer it. If I were asked to answer the complaint I shouldn't do it. You might as well complain about the word "backside". 3421

Q. I am going to come to that in a minute. There is another complaint in this same column of the story that occurs in the first whole paragraph up above in describing what Showboat Quinn, the sailor, had done in his life.

The author says: "In Las Palmas he went to work as a sort of contact man for an establishment known as The Black Cat, and the less said about that phase of his life, the better". 3422

Now, what can you say about the obscenity or lack of it in the reference to The Black Cat and the contact man? A. I see nothing obscene. They are all perfectly proper words. I can imagine only two forms of indecency and one of them is a word that in itself is indecent. Many of the so-called four letter words that are all freely used by modern authors, especially by Hemingway, in a book published by Scribner, one of the finest publishing houses in the country, and I have never used it. The other word is a word that in itself is frequently harmless and I think the court decided itself that it would be a word which might arouse illicit emotions in the breast of someone using those words, which I never have, and I can't imagine the passage you read there as being obscene. It is not in itself indecent. A contact man is used by everybody. Establishment is not an indecent word. The Black Cat is best known in America as a title of a magazine which had a great success for many years and the type of a short story by Edgar Allen Poe. I assume that what he is trying to say is that this man was a roper for a bawdy house. 3423

Q. That is correct. A. I don't know if there is anything indecent about it. If you are writing a story how are you

going to say he is a roper for a bawdy house than do as it is
3424 used here? You have practically made it unintelligible for many people and a few old men like myself.

Is that all you want?

Q. That is all I want on that one.

Now, did you ever hear of Edmund Gilligan? A. No, sir.

Q. He wrote an article called "The Court of Lost Ladies" on page 60 in which he describes a typical night court scene in a New York City night court division of the Magistrate's Court. He uses the words "street-walker", "syphilis", "prostitute".

What can you say about the use of those three words from
3425 the standpoint of decency or indecency? A. I should say that they are all perfectly harmless words. If you have to refer to the things you have to indicate, you have to refer to them. I have seen them in the New York Times. It so happens that when I was a newspaperman I was the first newspaperman in the United States who ever wrote or printed the word "syphilis" That was the year 1911. Syphilis then was a hush-hush word and I used it in the old Baltimore Evening Sun and I was given a rebuke in the office for doing it and insisted it was a good word, and finally had an order passed that it was a good word and could be used only when no other word could be used.

3426 In those days syphilis was used to mean a social disease and had no sex whatsoever, and was a filthy, dirty kind of evasion of the facts.

A little after that some Government official of high rank delivered an address about the problems of syphilis and it got into the press associations and most other newspapers as "social disease". That is thirty years ago.

Only a little while ago I saw the word "syphilis" in a headline on the first page of the New York Times.

The American public has made great progress in understanding obscenity when they have given it its proper place and value. 3427

I have seen the word "gonorrhea" in the New York Times as I have "street-walker". Everybody knows that fact. "Streetwalker" might mean anybody walking the streets, as a policeman. It is used as a euphemism, designating a peregrinating prostitute. They have other names; "cruisers", "battleships", and so on. There is a whole long list of euphemisms that are derived from different classes of naval vessels. The big ones are called "battleships" and the little ones "destroyers", but "streetwalker" has been in every paper in the United States. It is a word that is frequently used except by children under two and there is no suggestion of indecency in it, not the slightest, not to any normal mind. 3428

Q. Now, in the June issue, on page 134, an article by Roscoe Fleming entitled "Libel suits were as wine to that hell-firin' editor of the old West, Dave Day".

By the way, did you ever hear of this man Day? A. Yes; everybody has heard of him. He was an author of many famous American epigrams. He was one of the basic old-time newspaper humorists who was well-known in his time. He is now, of course, forgotten, but he was a man who had a tremendous following.

Q. This article says that Dave Day was the editor of the Colorado Durango Democrat. A. Yes, sir. 3429

Q. That is a fact, isn't it? A. To the best of my knowledge and belief.

Q. At any rate, there was such a person as Day. I confess coming from Brooklyn that I have never heard of him. A. I never saw him but I heard of him as one of the old time Western editors, of which there were many, whose stuff was copied in the East. They were the basic men in the American

3430 school of American humor, of which Mark Twain was the greatest and Bob Burdett was one. He was a clergyman, but he was a little rough. They were writing in the West in a rather spacious day before Sunday Schools had been open.

Q. He has a reference to one of his papers which is repeated here in this article that caused us some trouble here. The article says that he once wrote in his paper as follows:

"In future, all communications to the Muldoon will be marked with an asterisk to show that the editor disclaims responsibility. Each correspondent will have his own" and then there is an asterisk sign there and we finally worked it

3431 out after several days that it was meant by the reporter to mean ass to risk. A. I suppose so. It is very typical of the day and of the whole school of humor to indulge themselves in that sort of thing. The word "ass", of course, in those days, nobody ever had discovered that it was improper and it was used freely. Then came a prissy era in the United States in which certain words disappeared from usage, but nobody, according to my knowledge, in the whole history of the world, thought the word "ass" was obscene. I know of no such person and I would have heard of it if it ever happened.

Q. You should have been around here. A. May I apologize to Your Honor if I seem to argue. But if I do, stop me, because these things make me a little hot.

3432 Q. Now, in the August issue of page 30, and I am gradually approaching the word "behind," in that article: "Many Wives Too Many" appear the words "sunny south" in this connection; this is an article which comments in a satirical way on a proposal of Dr. Joad of London with respect to plural or multiple marriage to solve the discrepancy between men and women in England, and in the course of the story by David Emory, he said: "The cook-stove wife may consider as part of the deal, her loving six-time papa giving her at least

an adoring pat on the sunny south as she's bending over the cook stove and letting her pores drip onto the skillet". 3433

Now, what about the use of the words "sunny south"? A. It is not alleged that "sunny south" is obscene, is it?

Q. I believe it is. A. I can't answer such a question. It is too absurd. Sunny south is obviously an attempt at humor. I myself in such a situation use the word "caboose", but then everybody has his favorites. You have to sometime in this life, living a biological life of mammals, refer to backside, and in humorous writing, which this is, there is an effort to invent charming and, if possible, euphemous backsides. There may not be enough euphemisms and this man is 3434. inventing sunny south. I never heard it before. The idea that it was obscene shocks me. I didn't know anybody was absolutely so indecent that he could consider it that way.

Q. It seems to me to be a term of limited situation and only applied when a woman is facing north. A. Apparently so, only what he would call it if she was facing south, I don't know.

Q. Now, in the second column, the same part of the woman's anatomy is referred to as follows: "Unless Dr. Joad is lush with shillings, she can count on one of the four sessions being at a fish and chip coop where she will have to perch her fanny on a peg or stool." A. Fanny is a euphem- 3435 ism used by school children. Again the backside. It is very old in English. There is a considerable debate as to its origin. It apparently was named after some woman, apparently a vaudeville actress in London who was well developed to the rear, and it is a completely harmless word. Little children five years of age use it and it has no obscene connotation whatsoever, and does not refer to sex, even remotely.

Q. On page 144 there is an article entitled "Offensive on the Home Front," and the same part of the anatomy is re-

3436 ferred to as follows: "Dorothy began to cry loudly and headed out of the room. Dizzy and with the taste of blood in his mouth, he noticed how large the uniform made her behind look."

What can you say about the use of the word "behind"? A. Is "behind" the word complained of?

Q. I am afraid so. A. Gracious. "Behind" is a word—by the way, I have made a note, if Your Honor will permit me, I want to refer to a note. I want to get it, if I may.

Chairman Myers: Go ahead.

3437 The Witness: No, I had no note about "behind." I had a note about "backside," which is considered much more—"behind" was taught to me as a boy in the nursery as a children's euphemism. I knew no other word for the rear part until I was probably four years of age and became sophisticated.

At the age of three all children in Baltimore in the kind of society I was brought up with called "backside" the backside and it wasn't considered unpleasant or indecent. They knew no other word, and there was nothing obscene in it at that age. That is before Freud. Children didn't know anything about sex.

3438 Q. Now, in the October issue— A. Excuse me. Haven't you got "backside" here?

Q. No, I haven't got the word "backside." A. I am prepared for it.

Q. Of course, you know I could ask you a hypothetical question if it had been used what about it? A. I have answered it, Mr. Bromley.

Is "bawdy house" another word?

Q. I was going to come to that in a minute.

Here is a piece of fiction called "Portrait Above the Fireplace." Near the end of the story on page 128 the word "Madame" is used but in this setting: "Tressant hesitated but he went on. 'Of course you don't know John. I hate to think of anyone ever laughing at you. But that is a portrait of Mabel Haynes. She was the Madame of the highest class house in the old district.'" 3439

What do you think about the obscenity of that reference, with especial consideration of the word "Madame"; also "house"? A. I can hardly answer that because it never occurred to me that the word like "Madame," which is really a euphemism, the more vulgar name was "landlady," and to call a woman a Madame of a bawdy house was to rather flatter her; she was considered a rather high-toned woman if you did that. 3440

If you consider that such a thing as "bawdy house" exists in the world, and in view of its existence it is all right to mention that fact, I don't know how you are going to refer to the keeper of it by any better word than "Madame." I don't think it is obscene. I see nothing obscene about it whatever.

Q. Now, in the November issue we find the usual theatrical critical column by George Jean Nathan. You know him, don't you? A. Yes, I know him. 3441

Q. We find in this column which appears on page 77 that Nathan has this to say: "By way of amplifying my last month's departmental critical bit toward improving the new season's theater and making everybody a little happier, I propose that the following characters, scenes, dialogue, settings, stage business, etc., be promptly edited out of any plays which may be scheduled for production," as follows: "Simple interior sets, otherwise perfectly all right, which, for no good reason, and merely because their designers can't

3442 resist a little artistic self-expression, include such stairways as has seldom been encountered outside of Palazzo Vespucci or an old time St. Louis sporting house, and which when the plain, every-day characters come down them suggest a big throne room scene in the old road production house 'In the Palace of the Kings,' with Emil, the local butcher's boy, hired as an extra, grandly making his entrance as one of the Dukes."

Now, what about the use of the phrase "old time St. Louis sporting house"? A. "Sporting house" again is an euphemism. Everybody knows what the proper name is, and like "bawdy house" it is used as an euphemism. It is even more
3443 euphemistic than "bawdy house" and I might not use it in speaking to a Bishop unless I knew him very well, but it is not a thing that has any indecent connotation. If you assume that such an establishment exists on earth, it has to have some kind of name, and that name is "sporting house" or "bawdy house."

Now, this Nathan, you asked me if I knew him. I know him probably better than anybody on earth for many years. We have been intimate friends for 40 years, and he is really at bottom a very strict and rather proper fellow. He is very careful in his language and he is particularly opposed to riotous obscenity on the stage, and he has always been op-
3444 posed to it. Not on moral grounds, but merely on the ground that it was boring and was not amusing at all, so he is rather finicky in his vocabulary. He avoids many words that I, myself, can see no harm in, and the kind of things that he and I write naturally are the words that determine a refined and over-refined vocabulary and which have an appeal to a very elegant class of people, presumably at least.

Is that all?

Q. No. He used the phrase "bawdy house" in the same article. He says this, among those things to which he objects: 3445

"Any more points about someone who mistakes an innocent institution for a bawdy house" and vice versa. A. "Bawdy house" is included in the new English Dictionary, which is the large Oxford Dictionary, 12 volumes that would almost fill the Court's desk. The first example is dated 1552. It has always been used as a sort of euphemism to avoid the more direct terms of old English. It occurs in Webster's New International Dictionary, the chief authority of America, which is in all public schools, put in in my State by law, and it is the absolute authority of the Supreme Court of the United States for spelling and other things, and it is used by both the Army and the Navy and all American universities and colleges, and all public schools and all newspapers. 3446

The phrase "bawdy house" has been in it ever since Webster published his first edition in 1828. It is in there at this minute without any mark on it to indicate it is indecent.

So is the word "backside." "Backside" goes back—the new English Dictionary marks it circa 1500, and one of the excerpts they give of it is from Addison.

As you may know, the new English Dictionary is the greatest work of lexicography ever done on earth. It took 70 years to complete it, and it cost $70,000,000. It is the highest authority ever heard of on English, and one of its peculiarities is that after defining a word and giving the etymology it gives an example from each century. Hence, it is a really gigantic work. 3447

Its respectability has never been questioned by any human being.

3448 Q. Finally, Mr. Mencken, Mr. Nathan says in paragraph No. 21, listing things to which he objects, the following: "Den don't gimmie any a dat crap! What da hell did yeah tink I wuz gonna do? Hang around dis dump waitin fer Santa Claus tuh take care a me fer Chris sake? Looka you! What a yuh got? Six years yuh went tuh college an' what da hel a yuh got? A lousy handout a thoity bucks a week! Not fer me! Yeah, I got mine, but I took it!" A. Who is he quoting, a theatrical manager? Is that a quotation?

Q. That's a quotation and we have assumed—at least I have assumed—that is from one of the "Dead End" boys in the play. A. I can't answer for plays. I never go to the 3449 theater. I assume that is a quotation because that is not Nathan's style.

Q. It is a quotation. A. What is the word complained of, if any?

Q. "Crap." A. Will you read the sentence with that in it?

Q. "Den don't gimmie any a dat crap! What da hell did yuh think I wuz gonna do? Hang around dis dump waitin fer Santa Claus tuh take care a me?" A. It is obvious from the context that "crap" means nonsense, which is its primary meaning.

3450 "Crap" is a very old English word which is used in my country, at least, Maryland, to signify nonsense.

It has, I believe, an excremental significance, but that is rather rare, and I think it is not talking about excrement here but is talking about nonsense. He is not using the word in the indecent sense, if it has any, and I want to explain there that many words have both a decent and indecent significance. That is an example, and the word "jive" is another example. There are many, many such words.

An innocent word such as the verb "to block" has an indecent significance, but certainly if a man said the street cars were blocked no one would allege that he meant that they were being ravished. 3451

I can only answer there that I can't see even the remotest indecency there. He is plainly trying to tell these men to stop talking foolishness.

Q. Are you at all familiar generally with the magazine Esquire? A. More or less, as I am with any magazine; yes, sir. I have written for it once or twice in the past, the last time I think about four years ago, and I will appear in it again some time in the indefinite future—I don't know when. 3452

Q. Will you tell us, please, what is Mr. Nathan's reputation as a critic? A. Well, that's pretty hard. His reputation among his customers and readers is that he is not only the best living American critic, but the best that has ever existed.

His reputation among actors and theatrical managers is that he is the worst. A critic's reputation is a delicate thing. I was a critic myself once and can tell you by personal experience that some people had unfavorable views of me.

If you mean what is his competence, I can tell you Nathan is a man who has spent his whole life in the theater, he has no other interest on earth, and probably knows more about the theater than any other man. He is a walking encyclopedia. When I want to know this or that I never bother to look in a reference book; I merely write a note to Nathan. 3453

On the side of learning, no one can match him. I think that is generally admitted.

Q. Can you give us your opinion, Mr. Mencken, as to whether in your opinion the magazine Esquire has any literary merit? A. Oh, I should say that Esquire has very

3454 high literary merit if you judge by the kind of people that write for it.

Practically all the principal American authors have written for it in my time, headed by Dreiser, and including every author of any significance whatsoever. Of course some authors of much lesser significance have been in it constantly, but that merely means that the number of first class authors doesn't go around. There are not enough of them.

It is a highly reputable magazine and, as I have always understood, it is printed at a high price and addressed to adult men, not children.

3455 There is nothing in it to interest anybody but a male and the answer to why it is so regarded is shown by its advertising which largely consists of things for men.

I understand that is the theory of its founding and that theory has never been changed.

Mr. Bromley: That is all.

Cross Examination by Mr. Hassell:

Q. Mr. Mencken, does Esquire have any reputation so far as you know for being a risque or sophisticated magazine? A. Sophisticated, but not risque.

3456 Q. How do you distinguish between those? A. Sophisticated, I should say, would be a magazine that appeals to a civilized man in his relatively light moments, and risque would be a vulgar thing addressed to morals.

I don't think there is any appeal to the ignorant or the young in Esquire. It is over the heads of all such people.

I know that everything that I have written for it, which has been little, has been aimed directly at grown men.

Q. Did you state that you had been a pioneer in the use

of formerly taboo words, Mr. Mencken? A. I did not; no, sir. I said I had studied. I personally use such words only when I can't avoid them. I have not been a pioneer in the use of any such words. 3457

Q. Mr. Mencken, you are the author of a story called "Hat-Rack", aren't you? A. I am not, sir.

Q. You published it in your magazine? A. I did, sir.

Q. That story had to deal with some sexual activity in a boxcar or freight car? A. Not specifically. It dealt with people who engaged in sexual activity, but there was no scene of sexual activity in the story.

Q. Was "Hat-Rack" the name of the woman who did that? A. Nickname. Did you ask who wrote it? 3458

Q. No, sir; I did not. A. I will tell you if you want to know. It was written by Herbert Asbury, the great grand-nephew of Bishop Asbury, the first American Methodist bishop.

Chairman Myers: For whom De Pauw University was originally named.

The Witness: I didn't know that. There was a report that Asbury was the great-grandson of the Bishop, but the Bishop actually was a bachelor. He is a great-grandson of the Bishop's brother. 3459

By Mr. Hassell:

Q. Mr. Mencken, was the issue of your magazine containing that story declared non-mailable by the Post Office Department? A. Yes, sir. I think you ought to let me explain what happened, if you care to.

Q. Yes, sir; go right ahead. A. The Post Office entered that case rather late. An effort was made in Boston to suppress the magazine as a measure of revenge by the Boston

3460 Watch and Ward Society, which we had been denouncing. They proceeded by threatening a newsdealer. The poor newsdealer had no stake in the thing and was willing to subside and withdraw the magazine, so I went to Boston and sold the magazine myself on Boston Common and insisted on the Watch and Ward Society arresting me.

I was arrested, tried and acquitted.

Meanwhile, subsequent to my arrest, and four or five weeks subsequent to the time the magazine had gone through the mails, the Post Office Department issued an order barring it from the mails. It was a purely imaginary order. There
3461 were no more to be mailed.

So I went to court on that and I had injunctions against the Post Office by two Federal judges, both of whom denounced the Post Office as obscene, indecent, unfair and ignominious.

I agreed with the verdict thoroughly and believe it was just to this minute.

The Post Office tried to hit me in the back when I was fighting with the filthy Comstocks in Boston. I fought the Comstocks and I fought the Post Office, and I put my magazine back in the mails and they have never molested me since.

Q. Didn't the Federal Court in New York refuse to issue an
3462 injunction as the case was moot? A. That is not precisely what happened. I had my injunction in the district courts of Boston and in New York, and the Post Office, pursuing its filthy course of trying to persecute me, appealed to the Circuit and the Circuit after two years decided that the case was completely moot because we were in point of fact through the mails. They decided I could not get relief because the Post Office barring me from the mails was completely dishonest—I wasn't an applicant to the mails.

Mr. Hassell: That's all.

Redirect Examination by Mr. Bromley: 3463

Q. What magazine was it, Mr. Mencken? A. The American Mercury, and the judge who wrote the Circuit decision deciding that the case had become moot and we had no further recourse, was Judge Martin H. Manton. He later served three years in the penitentiary.

Mr. Hassell: Not for rendering that opinion, though.

The Witness: Unfortunately not.

By Mr. Bromley: 3464

Q. Just so the record will be straight, his name was Martin T. Manton. A. That is right.

Mr. Bromley: That is all.

Mr. Hassell: That is all.

(Witness excused.)

Chairman Myers: Call your next witness.

Mr. Bromley: Could we have a short recess, if Your Honor please?

Chairman Myers: Yes. We will take a short recess. 3465

(Whereupon, a brief recess was taken.)

Chairman Myers: Come to order, gentlemen.

Mr. Hassell: Mr. Chairman, may the record show that the testimony of Mr. Mencken was received subject to my general objection?

Chairman Myers: Yes.

3466 WILLIAM P. JACOBS, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Bromley:

Q. Will you give us your full name, please, sir? A. William P. Jacobs.

Q. You live where, Doctor Jacobs? A. Clinton, South Carolina.

Q. You are the President of Presbyterian College in South Carolina, are you? A. Yes, sir.

3467 Q. And you have some connection with the world of sports, I believe, sir? A. I am very much interested in sports as a means of building citizenship, young manhood.

Q. Among other things you are the donor of the Jacobs Interference Trophy, are you not? A. Yes, sir.

Q. Would you mind telling us what that is? A. About 15 years ago I felt that the unsung heroes of football should be rewarded for their unselfishness. I wanted to encourage recognition of the citizenship building qualities of the game of football, so I started giving a trophy to the interference runners in the football teams of the Southeast, the Southern Conference, and also South Carolina.

3468 Q. You are also the donor of various tennis trophies, aren't you? A. Yes; my principal interest in tennis, however, being in the tennis clinic, an institution which I had the privilege of starting a few years ago when I served as vice president of the United States Lawn Tennis Association.

There are thousands of them held over the country now whereby the young tennis players get a right start in tennis and learn the lessons of sportsmanship and citizenship up building qualities of the game.

Q. Have you had a close association with young men in various sports fields in this part of the country, the South and Southeast? A. Fortunately, I have, sir. 3469

Q. And have you or have you not made a study of their attitudes in general, so far as morality is concerned? A. That is my most interesting study. It is a sort of a hobby with me. I am not an expert, but it is an interesting study.

Q. Do you think you are reasonably well familiar with the moral standards and attitude of young men in sports in this part of the country and the South and Southeast? A. As I said, I can't pose as an expert, but I am certainly an interested student of sportsmanship and the attitude of young athletes. 3470

Q. Based upon the results of your studies in this field, will you give us your opinion as to whether you have found anything harmful in the 1943 issues of Esquire to young men of the sports age? A. On the contrary—

Mr. Hassell: I object, Mr. Chairman. I don't believe the qualifications recited by Dr. Jacobs—

Chairman Myers: I doubt very much—he says he is not an expert.

Mr. Bromley: Well, I will try it this way.

By Mr. Bromley: 3471

Q. Are you acquainted with the sports contents of the magazine Esquire as it has appeared in the eleven 1943 issues? A. I have and I have read the articles.

Q. What is your judgment as to the merit or lack of it in the sports part of the eleven issues of Esquire? A. Well, I would think that the articles are calculated to good sportsmanship and an attitude of fair play. I think there is an uplift caliber in the articles.

3472 I think that the magazine has contributed constructively towards the encouragement of sports, clean sports.

Q. Do you think that the polls which they have conducted and the results of which have been published each month, have contributed anything of help to the sports world? A. Definitely. Those studies have been needed for some time and I believe that the contribution made by the studies is worth while in the promotion of an interest in sports, participation in sports, and the constructive citizenship building characteristics of sports.

Q. Do you find that that feature of the magazine at least
3473 has a ready acceptance and wide circulation in the world of sports, as you know it? A. I believe it has.

Q. Is it a fact, Doctor Jacobs, that in each one of these issues with which you are familiar, there is a substantial part devoted to sports? A. I have not analyzed the percentage content of the magazines and these issues, but in a general way I would say that the emphasis on sports is constructive and worth while and important, and represents a relatively important feature of the function of the magazine.

Mr. Bromley: That is all.

Mr. Hassell: No questions.

Mr. Bromley: That is all, sir. Thank you, very
3474 much.

(Witness excused.)

Mr. Bromley: Mr. Gingrich.

ARNOLD GINGRICH, a witness called by and on behalf of the Respondent, having been previously duly sworn, resumed 3475
the stand and testified further as follows:

Direct Examination by Mr. Bromley (Continued):

Q. You had gotten as far in your testimony, I believe, as the conversion of the magazine Esquire to a monthly magazine and its first issue in October, 1933. Is that right, sir? A. That is right.

Q. Will you tell us briefly and generally how it developed from then on? A. Well, with the first issue we established a circulation level of roughly 100,000 copies. That repre- 3476
sented a size of circulation about comparable at that period to the so-called quality group of magazines, Harpers, Atlantic Monthly, Scribners, then still functioning—this would be the beginning of 1934—and the feminine counterparts of Esquire as of that moment, Vogue and Harper's Bazaar.

They all had about 100,000 circulation.

Beginning, as of that time, with the intent of selling this magazine to men and through men's stores, and not thinking of it as one going into general circulation, our content as of the first phase of the magazine was pretty strongly not only embracing men's interests exclusively, but even since, you might say, it also had the anti-feminine point of 3477
view from the point of providing a magazine which would provide surcease from what we might call the over-feminine point of view of our reading matter and magazines.

I would like to stress, in speaking of the development of the magazine, that when I speak relatively of the early stages of the magazine, through its changes that came in a natural business evolution, along with the increased circulation of the magazine, I am speaking relatively.

3478 I would like to state categorically that I have never written or caused to be published nor have I been interested in publishing obscene matter, by even the broadest definition of the term.

Nevertheless, in the opening phases, since we were thinking of the magazine as being read by men and as a relief from the undue feminization of general magazines, our humor and our articles and our fiction all stressed a man alone angle—you might call it a stag party type of treatment.

Our cartoons as of that period were very largely concerned with that type of humor.

3479 I may also remark that there had not been any cartoons in full color up to that point. That was one innovation in the magazine.

I ask the Board's indulgence for being so detailed on these things, but they are points that I would like to get into the record as a proper background for an appraisal of the 1943 issues. I will make it as fast as I can.

Q. I would like to go back a bit. Had you, prior to this time, done any writing yourself? A. I had done some writing—not what you would call serious writing. Along with advertising copy writing I had written occasional articles, book reviews, or even occasional stories, the sort of pot boiler type of work just done for the sake of getting some
3480 extra money. I didn't get a chance to do any serious writing at all until 1934, at which time I wrote a novel. That was the only really serious writing I had done.

Q. Now, going back to 1933, was the magazine then sold for fifty cents a copy? A. Yes, it was.

Q. So that the price has never changed? A. The price has never changed, only the frequency changed. It was launched as a quarterly and continued as a monthly after the first issue.

Q. When it came out in the original days of 1933 and 1934, what about its size? A. The size was as it is now. The binding was different, but the format was essentially that which it continues to employ. 3481

Q. That is to say it would run from 150 to over 200 pages. Is that true? A. Yes, the very first issue was quite well under 200 pages, but during our first year I believe we averaged in excess of 175 pages and there has been very little change with the exception of a few years in which the presence of a good deal of advertising raised the possibility of the size of the issue being larger, but as a norm I would say the magazine has been roughly the same size with the exception that our holiday issues are much larger. 3482

Q. And has always sold for $5 a year? A. Always.

Q. You heard the witness the other day, Mr. Hall, I believe, who said the advertising content of these eleven issues was about 35 percent as against 65 percent of textual or pictorial matter. Is that your estimate? A. That is our own figure. We independently, in Chicago, in the editorial office, our own research department, maintain a constant breakdown of every issue, and I would say the figure is 65 to 35.

Q. How has that changed or varied from 1933 down to the present day? A. I would say it has remained quite constant and that any variation that might have occurred would have been as a result of changes made since the paper limitations. There may have been more fluctuations since that time than there ever had been up to that time, but, as a matter of policy, our habit always was from the very beginning to increase the editorial content in the issues in which the advertising decreased, so as to maintain a reasonable stable same 50 cents worth in total size of the maga- 3483

3484 zine throughout the year, with the exception of the holiday issues, which are always much larger. They, however, sell for the same price.

Q. Does the fact that the magazine sells for as much as 50 cents have an influence upon the amount of editorial content you feel you have to give in order to have successful sales? A. Yes, we have always felt that one of the basic reasons for the magazine's success was that it gave a very generous 50 cents worth. That has been the underlying reason for the varied editorial content, in trying to furnish as many different possible facets of interest for the reader, both pictorially and textually, and in the range of subject 3485 matter covered.

Q. Did you at the outset adopt or agree upon or originate an editorial formula? A. Yes, I would say that that formula has changed more than any of these mechanical characteristics about which you have questioned me, and that change was a natural change that came about with increasing circulation.

I have mentioned that we began with 100,000. As of the end of the first year the magazine's circulation was 200,000; as of the end of the second year it was 400,000; and as of the end of the third year it was 600,000.

3486 Now, naturally, when a magazine goes into the 100,000 circulation category it may run things that it would hesitate to run for a wider audience. I think, for instance, of some of the articles in our first year when we were thinking of ourselves as being a restricted circulation. We ran one piece in particular by Maurice Maeterlinck, which I venture to say required a post graduate college degree in order to even make reasonable head or tail of, and such a hi-faluting, high flown article such as that we would have been less inclined to run at a stage of 600,000 circulation than at 100,000.

And also in the development of this magazine in its first three years, having begun with color cartoons and with full-page cartoons, we attracted a good number of imitators. There were various magazines which had various other related titles to that of Esquire, but the imitation copied only the superficial aspects, the smoking-room type of humor, much, much grosser than anything we had ever used ourselves, and girl gag content without the solid core of literary and artistic merit that made up the balanced blend and personality of Esquire. 3487

Surely from no other consideration than that of trying to preserve the magazine's originality and smartness, we tended to get away from that type of gag which we had considered a rather smart attribute of the magazine in the beginning, but which had become very common, and as it became common and became featured in magazines selling for a dime and fifteen cents, we tended to drop it out from a magazine selling for 50 cents. 3488

So that was one change that you might call evolutionary.

We also felt, as the magazine grew as a business property, that we were being typed unduly as an advertising medium by our original extreme emphasis on the exclusively masculine type of feature and emphasis in all the magazine's literary and humor content, so we began rather consciously broadening out in that aspect as well. 3489

Now, those are the only basic changes that have occurred in the magazine's content from the period of its inception up to the war period.

Now, as of the war period—and by "war period," I mean, roughly 1940, because with conscription and with the defense program, I think of that time as being the beginning of the war era for us, editorially. And there has been since the war some natural change that has been an adaptation to war-time demands.

3490 For instance, we have found that our fashion pages for men have had to concern themselves a good deal with uniforms in addition to, and, to some extent, replacing some of our emphasis on purely civilian fashions, and also the obvious change that we have been increasing, in answer to constantly increasing demand, the pin-up elements in the magazine.

Those things are a war-time phenomena.

Q. Has the type of article or story changed its character since the war time? A. Very much. Our article content—I would almost say that of this past year under consideration as a whole that there has been some war-time coloration of 3491 the majority of the articles. There has been some secondary consideration over and above mere literary and entertainment motivation for a majority of the articles. That, too, has fluctuated, depending upon the state of the war effort.

In the early part of the year I think examination of the issues will show that as of the time when public officials were making speeches about complacency and how we were losing the war, we stepped on the accelerator a great deal more heavily in writing inspirational, morale-building types of articles than we have in the latter part of the year when there has not been the same apparent need for it.

3492 Q. You used an expression a few minutes ago in saying after a while you dropped out the "girl gag" type of cartoon. What does "girl gag" mean? A. I was using that loosely as a description of the various imitation types of Esquires that sprung up from time to time from the period after 1936, when Esquire had become conspicuously successful with its humor content. There were a lot of such magazines. They actually contained never a really serious article, seldom any actual full-length feature materials such as our articles and stories and sports articles, but they would

simply trade upon the superficial aspects of Esquire and emphasize what to us were the features that we least wanted to see become cheapened and common. 3493

The girl gag, of course—I don't use the term as one of opprobrium or even derision—there is nothing wrong with having girl gags in relation to the content as a whole, but what I mean is that these magazines were made up of almost nothing but the obvious gold-digger type of cartoon, that type of feature.

Q. All right. Now, will you go back and tell us about your editorial formula? A. Our editorial formula is a balanced blend in which we try to maintain an average over the year, and at the same time not to have too regularly pigeon-holed issue by issue. 3494

We don't want to become so formula conscious that you can lay down one issue on another and know that on such and such a page will appear such and such a feature, month after month.

But taking the editorial feature as a whole we maintain nearly 65 percent editorial content; that is, on the issue in its entirety, and 35 percent advertising, and the remainder text.

Breaking up the text, we allow approximately 10 percent—this meaning issue to issue, to sports, and approximately an equal proportion to fiction. Then we have for the articles 19 to 20 percent, and that includes personality articles. We quite often will treat in a given subject, though, some conspicuously successful or colorful personality in that field. Then we devote about, as of now, 7 percent to fashion. That would have been in peace time another 10 percent, but that, as I say, is at somewhat of a minimum during the war. 3495

Q. What kind of fashions? A. Primarily men's fashions. Since the magazine has broadened out so much in its reader-

3496 ship, and since it has attracted women readership to a degree larger than we ever expected as of the beginning, we have only, as of this year, very retiringly and very gingerly, dared to include some women's fashions.

As of this year, there is almost, I would say, 20 percent attention to women's fashions and the remaining 80 percent to men's fashions in our fashion content.

Then we devote, consciously maintaining this balanced blend, another roughly 10 percent to the arts as a category, and then we have—I have not added up these percentages so it is hard to know what I have accounted for and what
3497 I have not without looking at an issue—well, our departments represent another approximately 10 to 12 percent.

Then, we have additional features in the way of games and quizzes and things that are simply little boxed items, meant to relieve the monotony of straight text carry-over pages throughout the body of the book.

I think the last breakdown I remember looking at was approximately 3 percent.

Q. What do you call your departments? A. Our departments are the theatre, books, potables, a term we have given to all beverages,—that is, to wines and liquors,—and edibles, a department devoted to cooking and to connoisseurship of
3498 food, and wearables, which is a text fashion feature.

Those are the main ones—and a rather general category called the lively arts, which is a designation for the regular articles of Gilbert Seldes, who moves back and forth from the ballet, the movies, to the theatre, to radio, and the entertainment field, but always with some artistic emphasis to it.

I think I will have to look at an issue for the departments to make sure that I have been over all of them, and not overlooked any.

I have stressed the most important ones. There is one as of this moment, which is again a war-time feature, "Goldbricking with Esquire," the double spread of selections from army camps and Army and Navy publications. 3499

Q. While we are on that, what is your idea of or purpose in publishing "Goldbricking with Esquire"? A. That has been done with a twofold motive. From a business point of view, we have been constantly cultivating the good will of the members of the armed forces ever since the fall of 1940 when the defense program really got under way.

I would say that our motivation there is approximately half editorial and half business, using business in the long-term sense. We think of these men in the armed forces as being an extremely valuable advertising market and we have been making a very conscious, selfish effort to establish ourselves as firmly as possible with those men in the armed forces in the belief that they will constitute the most important single block of customers for the post-war years, and then that they are extremely valuable from an advertising point of view. 3500

Therefore, we have in all these issues, ever since the percentage of the male population under arms has achieved measurable proportions, stressed particular appeal to the members of the armed forces.

We have quoted these gags out of all of these various Army camp papers both because we think they are of interest to the men in the armed forces, to see what is appearing in the various other Army and Navy papers, and because very frankly every time we make a selection from any one of these camp papers of a citation—I use that in the harmless sense of the word—they practically declare a field day and devote practically the next issue in saying 3501

3502 that Private Jones made Esquire and make quite an occasion out of it. The response has been quite extraordinary and we felt we were gaining a great deal through that.

Q. What is the significance of the word "Goldbrick"; that title? A. To "goldbrick" is a word for "soldiering," for fooling around. It is Army slang, and it is not confined merely to the Army. I have seen it in Navy publications. That feature had more or less of a natural evolution in that we received so many of these Army and Navy publications which were sent in to us by their editors, all really over the course of the last two years, before it ever occurred to
3503 us to make a separate department of quotations from them. We used to read them with considerable care, just as a guide in our own editorial qualities in selecting matter calculated to be of appeal to the men in the Army and the Navy.

Q. Now, will you take the January issue of Esquire and give us, please, some indication just of the nature of the articles and the authors which appear in that issue? A. Well, the very first feature following the table of content on page 5 is the editorial page, and that is largely devoted in this particular instance to a republication from an Army camp newspaper. This one appealed to us on two grounds: First of all, because it was a parody of an original article
3504 in Esquire. It amused us perhaps even more than it might amuse the reader. We felt that the take-off was more entertaining, by far, than the original article had been, and at the same time was serving to illustrate a point that seemed at that moment something well worth making.

I referred a few minutes ago to the fact that there was so much in the press today in the way of talk about the war effort and complacency and that the only thing in which there was no shortage as of that moment was the fact that

there was a lot of tough talk about everybody's being complacent and everybody spreading complacency; and seeing this item from the camp paper it was, to us, a very wholesome attitude of soldier humor on something that has been characteristic of successful armies throughout all time. I used it simply as something upon which to hang an editorial, saying that since these boys didn't allow themselves to get into that state of mind of excessive gloom, which was characteristic at that moment, the end result of the war could not possibly be anything dangerous or deserving of any doubt. 3505

Q. That excerpt "Shor Nuff," was that actually published in the camp paper? A. Oh, yes, surely.

Q. And it shows where you got it from at the bottom of the column, doesn't it? A. It is credited as coming from the September 18, 1942, issue of the Fort Ord Panorama, published by the soldiers of Fort Ord, Calif. 3506

Q. Now, somewhere in that column, in the second column, I believe, the author of it in the camp paper made a reference to an individual he called "Woodhead." Is there a man named "Woodhead" and who was it, if there was? A. Well, Woodhead was the author of the original article in Esquire. I think he makes it clear in the article that the man's name is "Woodhead." Since that time Woodhead, himself, is in the Army. I believe he is a lieutenant.

Q. Never mind about him now, but then he was the author of the article which appears in Esquire which this service paper is poking fun at; is that so? A. Yes, that is correct. It is parodying it, it is indulging in a lot of horse play. I mean that from the original article he gagged up the quiz; that would be immediately apparent to anyone who had seen the original article, and to those who hadn't seen it it seems to me it is quite clear. In that respect it is self-explanatory. 3507

3508 Q. What was the title of Woodhead's article which appeared before in Esquire? A. "Shall I Marry the Girl?"

Q. What was it about? A. It was about sizing up the end term attractiveness as opposed to her momentary glamour appeal of a prospective candidate for romance. In other words, if your main objective answers to the following questions about this girl, resulting in the following table tabulating her various discernible attributes at various prescribed percentages, then you know you are going forward or slowing up, one or the other, and as concerns your intentions it gives you the key to them.

3509 Q. Now, was your purpose in quoting this article from the camp paper, to make your readers believe that your magazine was a spicy magazine because the word "spicy" occurs in the first paragraph of the article "Shor Nuff"? A. Oh, well, if we had to take literally mindedly every characterization of Esquire that we have ever printed in our columns, we would be so mixed up we wouldn't know ourselves what kind of magazine it was. That seemed to me was a very nice and in no way objectionable thing to say. "The four-bit magazine which is always as busy as a little beaver sandwiching good advice between its spicy cartoons, comes up this month with a male Dorothy Dix who tells you how to pick a war bride." After all, you can't caricature
3510 anybody without exaggerating some obvious attributes and overplaying them. I suppose he has overstressed the soundness of the opinion as much as he has overstressed the cartoons, but it would be quite a bit of sourness on our part to reprint the thing in anything but the manner in which he chose to portray us.

Q. Do you consider the reference to the juking at the bottom of the first column and, I believe, at the bottom of the second column, indecent or obscene? A. Neither inde-

cent nor obscene. I was fully aware and counted on any ordinary reader to be fully aware of the fact that the man 3511
is kidding the pants off Mr. Woodhead. That, I think, he makes pretty clear, and he indulges in a lot of ordinary Army camp type of rough humor in ribbing Mr. Woodhead's relative appraisals of the desirability of this or that attribute in the female.

Q. Does each issue of these 11 complained-of magazines have an editorial page and an editorial? A. Oh, yes, every issue has an editorial page.

Q. You have always had that? A. Since the first issue.

Q. Now, go to the next feature in the January issue, which is quite conventional, is it not; a page of letters written 3512
in by subscribers and readers? A. Well, I hope it should not be quite conventional. We always try to keep it as unconventional as possible.

Q. Well, conventional in the fact that it is a part of your monthly practice? A. Oh, yes, conventional in that sense. Letters to the editor appear in every newspaper as well. You find it in virtually all of the magazines, and, as I say, in most newspapers. It has appeared in every issue of Esquire since the first issue. Naturally, there were no letters to the editor in the first issue; but it has appeared under that title and with as diversified and sprightly a content as the daily mail would afford for the past almost 3513
ten years.

Q. What object did you have, if any, which governs your selection of these letters? A. Oh, quotability. That is there is a basic premise there. The news value of contentment is nil. Any editor of anything I think would agree with that, that if you were to fill up such a page with "Dear Mr. Editor: I certainly do think your magazine is wonderful and I certainly do like this article and I certainly do like this

3514 cartoon," you would have the flattest possible page in the magazine as a whole.

By playing down that type and playing up every kind of possible squawking letters, or sometimes exhibitionistic humorous letter that the mail brings us, we have managed to keep the page—it sometimes runs more than a page, but it is a feature which is frequently called our most popular feature by the readers.

Q. You call it "The Sound and the Fury." A. We called it that, as I say, since the second issue. It did not exist in the first issue but the response to the first issue formed
3515 the available material for "The Sound and the Fury" in the second issue.

I think the title is probably self-explanatory. The letters are published in a tongue-in-cheek attitude because most of them are written in a tongue-in-cheek attitude, and rather than answering back we simply give it a label saying that this is "Sound and the Fury", signifying nothing, which is a little like saying, "No holds barred, or all bets off." The page speaks for itself, and acts as a sort of safety valve on occasions when some vociferous part of the audience wishes to talk back to this or that author for any feature.

Sometimes "Sound and the Fury" will be very largely de-
3516 voted to some subject which has caused a tempest in a teapot. I think, as a matter of fact, this is something of a case in point. While numerically it does not run over a large portion of the contents, yet there is one letter here that is labeled a letter typical of several score of these letters as published, just in fairness as being one that is allowed to speak for a matter of probably close to a hundred, that came from Negroes who were offended by the story that had appeared in the previous November issue, and our answer appears just beneath the letter and is typical of the way in which we print, and in some instances like this, get expres-

sions of disfavor or disapproval from some part of the audience. 3517

A lot of the letters have no other point in them than to reflect the fact that the man was trying very hard to write a letter that would be sufficiently disturbing and off the usual reaction to insure being published in the "Sound and the Fury." In other words, I think there are people who try to make the "Sound and the Fury" such as there are amateurs who try to make a column in the newspaper, who send them in for no reason than to hope that they will be published.

Q. What is the next feature in the issue of this magazine? A. Well, "Talking Shop with Esquire", which is a shopping service. It is comparable with the similar pages in the front sections of many of the better magazines devoted to the goods on display or available in the New York shops. It is a column that serves as a sort of clearing house for information for readers outside of New York who are interested in obtaining any of these novelties for gifts or other purposes that are featured. 3518

During this period, incidentally, this department has become almost a service men's shopping bureau. We have had instances where we have had money sent in to us in care of this department to buy a birthday present and even to send flowers to a girl in Alabama from a boy in the South Pacific, and a great many services have been given by this department, purely, of course, since the war. 3519

Q. That "Talking Shop with Esquire" goes on for three or four or five or six pages, I notice. A. Yes. It usually runs about three of these pages, although in the holiday issues it is a little larger. You will find that this holiday end of the year there is more of that material than there naturally would be otherwise; that the gift selection in mind makes the feature larger than in the normal issue.

Q. What is the next thing? A. The next comparable de-
3520 partment is "Painting the Town with Esquire", which again serves as a sort of New York guide for out-of-towners; a guide to places to go for dining and dancing; for amusements. It confines itself to the restaurants; it is more a food column than anything else, but it is a guide to what is being put on in the way of a floor show, or what band is playing at what night club or restaurant.

"Backstage with Esquire" is a regular feature which presents briefly articles and pictures of those authors who are appearing in the magazine for the first time. It usually does not include any biographies of regular contributors and we
3521 do not devote too much space in there to the well known contributors, but to those for whom the reader might be less apt to have any information of his own.

Q. Are the articles and the fiction separated in the body of the magazine or merely in the table of contents where they appear first under articles and then under fiction? A. Well, they are segregated into strict divisions only in the table of contents and yet in the body of a magazine, since they are labeled as such, you can leaf through and read, for instance, all the fiction and then you can leaf through and read all the articles, if that is what you want to do.

Q. But the articles do not appear in one section textually,
3522 and the fiction in another? A. Oh, no.

Q. They are mixed up? A. They are mixed up, and we try to have no unbroken succession of the same type of material. That is, just as a matter of make-up you will find that fiction alternates with sports and articles as we go through the pages.

Q. Now, what is the first feature in this January issue? A. Well, the first feature in the issue is apt to be one that key-notes seasonally any special significance that the issue may possess.

For instance, this January issue is a holiday issue and accordingly is given a holiday type of story. 3523

Now, quite possibly in some other issue there might be an article on a specific theme that is receiving extra attention in that month and that would be the lead off feature, but in this instance the story by Manuel Komroff is a Christmas story, a highly topical one, and as it turned out now, now that we look back over a year's time, it turns out to be a prophetic story as well.

It talks about the surrender of Italian troops on Christmas Day and the over-all implications and over-tones of the story are that individual Italians, or Italians as a whole, are bound to do the same thing. 3524

Q. Who is the author? A. The story is by Manuel Komroff. Manuel Komroff is one of the better known American short story writers. He is also a novelist, but his main field is the short story. I would call him a true teller of tales in the old sense of a natural short story writer.

He did do one conspicuously successful novel, "Coronet", but his short stories have been perhaps more distinguished, consistently distinguished for literary excellence than any of perhaps a half dozen American writers.

During the years of Edward J. O'Brien's annual short stories, his book of selections of the best short stories of each given year, Manuel Komroff was consistently starred by O'Brien for literary excellence, almost on a par with Jesse Stuart. Those two, I think, were given the triple star by O'Brien more frequently than any other American authors. 3525

Q. Didn't he write a book on the Bible? A. Yes. As a matter of fact, he was a Bible scholar in the early days of his career. He did a good deal of research in the back stretches of Biblical knowledge, the parts of the Bible that

3526 had gotten out of common knowledge, the things that have been in Bibles of other centuries and now are not included in the standard Bible, let us say, the Gideon Bible today.

Komroff, I should explain, has been writing for us, oh, perhaps as readily and as steadily as any other single author ever since the beginning. There was a Komroff story in the first issue of Esquire and we tried to see that there would be one in virtually every issue after that. He would occasionally miss, as any contributor will, but he reached a point some years back, oh, a couple of years back, at which he found himself running a little short of inspiration for
3527 meeting the monthly deadline with any regularity, and I suggested that he do a series, I think it was a series, of Bible stories. He had done that before, he had done one or two just as regular contributions to regular issues. They were very beautiful dramatizations or presentations in short story form of some of the lesser known, less familiar themes and incidents from the Bible, so I suggested to him to try it as a series, to go back to the first two that he had done some months apart and to make a series of them, and he did and they ran for practically two years.

Q. Where? A. In the magazine.

Q. In Esquire? A. Yes. I would say for about twenty
3528 months, and then upon the completion of the series, when he had brought out a complete cycle of them he found himself with a book out of it which was published under the title, "The Years of Our Lord."

Q. Now, there is a cartoon on the first page of this story, you said, page 39. A. Yes. There is apt to be a cartoon in the corner of most of the text pages except where we use a double spread for an editorial feature and give it illustrations. They are an accompaniment to the story itself, but just as a part of the format of the magazine we try to

make the space work as hard as possible and certainly these days when space is at a premium, we try to include as many cartoons as possible, and this is a device for doing that to get a cartoon and story or article on to the same page. 3529

Q. Over the page there is a full-page cartoon, is there? A. Right, page 40.

Q. And another one to the right hand of the following page, 41? A. Right.

Q. What about the article "School for Saboteurs"? A. That is an article written just after the author's arrival in this country; he was a Czechoslovakian refugee. He has written since that time for the New Yorker and for Harper's, I believe. At the time that he did this article his relatives were still in Czechoslovakia, and it was only at the last moment, before its publication, that he felt that he could allow us to use his own name on it. We were going to publish it under a pseudonym out of a sense of deference to the fact that his family was still in the occupied countries. 3530

It is an interesting sidelight on one phase of the war effort, that whenever it was even discussed before the war got under way, people thought that there would be a great deal of reaction on the part of the populace to the Nazis. Nevertheless, that never quite came off in the degree that it was expected. People used to predict before the war that if Hitler declared war he would find that sabotage would cripple the war effort within a matter of weeks. 3531

Well, that never came to pass and people began to pooh-pooh the idea of there ever being any reaction from the body of the people as a whole against the militarized people. This article explains and gives a firsthand approach to what you might call the anatomy of the underground. It shows

how in spite of the efficiency of the Gestapo in these occu-
3532 pied countries, and of course Czechoslovakia was the first of the occupied countries, so you would naturally expect that the efficiency of the occupier would be at its highest point there, he shows that there is a veritable industry of sabotage and underground activity and ingenious methods that had been developed for mass sabotage and training of saboteurs, almost comparable to that of military training.

Q. Now, the next piece of text is a piece of fiction called "Strictly Legitimate Deals," by Louis Paul. A. That is right.

3533 Q. Who is Louis Paul? A. Louis Paul is one of the earliest of the magazine's discoveries. We were accused in the very beginning of being snobbish in our approach to our text content and also snobbish in our attitude towards men's fashions, strictly out for big names and nothing but big names, so as an answer to that accusation we started out by trying to put somebody in print for the first time in every issue. We might have a big name appear on the first page and then put somebody new next, somebody who was achieving his first story.

Louis Paul appeared, I believe, in our issue for March—it might have been April, but I believe it was March, 1934—
3534 with a story called "No More Trouble for Jedwick." It was his first appearance in print, and when he sent his story in I think he sent a letter in saying that it was an unpublished story and that he was a never-to-be-published author, and that he had written not only this story but two and a half novels, one half finished and the other two practically worn out from being rejected, from one publishing house to another.

The story when we got it was just a little short of being

a masterpiece. It had a few amateur touches about it which rather spilled over and almost negated the artistic story. 3535
It didn't need much touching up to make it really a gem of a story. We published it at that time, I think it was in March, 1934, and it was very gratifying to us to have that story win the O. Henry Memorial Award as the best story in an American magazine for that year, and as a fairly obvious consequence for achieving print one of these heretofore unpublished novels, "The Pumpkin Coach," was published, and was the Literary Guild selection for, I believe, July of that year.

I remember in accepting that first story of us writing him 3536
that we were confident that he would not remain unpublished for long after this first publication of his, and as a matter of fact he did break into a large number of the better paying magazines within a short time afterwards. Magazines and different markets. He has contributed to our pages with considerable regularity ever since that time. His stories have varied a great deal in their range of subject matter, and as one aspect of this effort to play up to the Army we began a series of stories of the adventures of Sergeant Smoot, and they were sort of holding up a comic mirror to life in the Army camps, and this is one of a series of these Army stories that have appeared for the last couple of years since the 3537
mobilization became large scale.

I think about the first twenty of them have recently been put into book form under the title "Ordeal of Sergeant Smoot."

Q. In the story Sergeant Smoot and Corporal Smith, and Private MacClusky appear and reappear, do they not? A. The same characters appear. They are sort of Four Musketeers, you might say, who are constantly being given the most undesirable duties of the entire camp, and the result is that

3538 they get into any number of weird misadventures in story after story.

They are comic, they are satirical, and they have an extreme validity and warmth. Louis Paul was in the Army in the last war, and in the first of these he drew rather largely on the basic humorous situations of armies in every century, but as this series got under way he began visiting Army camps to acquire fresh material for them, and many of the stories have come right out of observation firsthand in many camp centers.

Q. The next one is an article entitled "Marriage Makes Strange Bedfellows," by Lawrence Gould. Who is he?

3539 A. Lawrence Gould is a popular psychologist; that is, an author of popular books on psychology.

I might speak of him as in a sense the successor to another popularizer, that is Dr. Barron Wolfe who wrote other such articles for us, and Lawrence Gould has done a number of these for us since Dr. Wolfe's death.

This article is a policy article, and I would like to speak of it a bit more fully. This represents and has been our policy really from the beginning of the magazine, with variations in the approach of it that we have had from the earliest days until now. I must point out that there never has been any change of moral approach in any of these things. This

3540 has been part of a consciously calculated policy to debunk superficial sophistication, and to try to be as pert and as brilliant and as fresh in promoting homely virtues and in making the straight and narrow path seem attractive, and while the approach may often be at least light, to have a light touch to it, and it may be at times a flippant touch, nevertheless the underlying core has sound reason and purpose in every piece of this type, and that is to reinforce and to stress what I might call the centripetal element of marriage.

In other words, they are against divorce, they are against philandering, they are against the continental hand-kissing type of smartness. That would go back to 1936 with an article "Latins are lousy lovers," which was perhaps the most conspicuously celebrated article in that vein which we ever published, and that one was one stressing the long-run value to women of good, solid homespun American males who did not go in for fancy lightness or slick philosophy, but who nevertheless were a lot better offer than the great lover type of matinee idol, and this piece fits in that same slot. 3541

I would like to find perhaps a significant paragraph in it which would bring out that main point about these pieces as a general category. 3542

"Yet marriage can bring both peace and happiness"—

Mr. Hassell: Where is this?

The Witness: On page 176, first column, last paragraph.

"Yet marriage can bring both peace and happiness—at least, most of the time—and the formula is much the same as that for peace between one nation and another. The first, and in some ways hardest step, is mutual understanding, based on the fact that beneath all differences in language and viewpoint, both parties are more alike than they are alien to each other. 3543

"I noticed in France during the last war that with few exceptions American soldiers who could speak French came home (as I did myself) with new affection and respect for their then allies, while too many non-French-speaking doughboys never got beyond the stage of talking about 'damm Frogs.' There is no good reason why a man can't learn to understand, if not to

speak a woman's language, or a woman a man's. Equally absurd is the idea that there is any fundamental contrast between their aims in life." And so forth.

3544

In other words, the end point and aim, or the basis of this, is to educate a man in the understanding of a woman and thus to insure the preservation of the family relationship. We have had other pieces of this character entitled "Why I am Faithful to My Wife," and another one entitled "Why Divorce?" and this is a typical example of that general type of article.

3545

I recall some point in the discussions we have had here these last few days, someone saying "We never omit sex." Well, that is a very sweeping statement. We try not to omit sex from any issue if we have a piece that does make this point, but I am not sure there hadn't been enough of them to be able to include something in this category in every issue, but they are a persistent and recurring policy.

Q. Well, there is a cartoon on that page, too, isn't there? A. Yes.

Q. I don't know whether that has a sex angle or not, but it is a cartoon of a young girl sitting on a bed and telephoning and saying "This is she—this is her—wait a minute till I get my dictionary." A. Well, it has a very clear sex context in the "she" and the "her," but I think, as it was in Mr. Mencken's testimony, it is a joke on language.

3546

Q. Now, who is the author of the poem on the next page, "Benedicts, Awake!" about which we have heard a great deal. A. Franklin Reynolds. He is a newspaper man who is now in the Marines, and who was just trying to get into the Marines at the time he sent in this poem.

As matter of fact, along with this poem he sent a request for a letter to go to the Marine recruiting officer, whoever it was. He was applying, trying to get in, and the poem was almost—I wouldn't say he sent it in for publication because I don't think he wrote it for publication. He wrote it as a mood accompaniment to his own news that he was passing along to me, that he was about to leave his bed and board and take up arms, and I found the thing so moving that I surprised him with a check for the poem along with a letter to the Marine Corps. 3547

Q. Had he been a friend of yours? A. No, not a friend, but he had contributed several things in the course of the past few years; not much. I think we had two things from him in the course of the past ten years, but, as I recall it, what he wanted was just a confirmation of the fact that he had sold us some of his writings in the past. 3548

Q. Now, the next piece is fiction, "Testimonial to Hillel" by Louis Zara. Who is he? A. Well, Louis Zara is another of our discoveries. He is a young man we put in print for the first time, I would say about 1935, and perhaps I am wrong in saving we put him in print for the first time. He sold a story to the "American Mercury." I think he sold it after he sold his first story to us but I believe it achieved publication before we actually came out with the story he sold to us, and since that time he has written, oh, approximately a novel a year, and some of them have been—well, all of them have been critical successes and some of the more recent ones have begun to achieve pretty substantial sales. 3549

This story is a flag-waving story, you might say, but it does it by reverse English. It starts off by saying—"I don't like flag wavers" and then it goes right ahead with a story that is about as obvious a piece of flag waving as the old George M. Cohan stunt, but it is a little lesson on the making

3550 of an American. It is a little lesson also in race tolerance. This is the story of the honoring of an immigrant, as it happened, a Jewish immigrant, who is being given a testimonial after fifty years in this country.

I would say that its literary value lets it get by. That it is rather obvious propaganda and has propaganda content, but in this particular point of the war I think all of us are a little less severe in our judgment of the literary contents if the purpose of the thing from a morale point of view seems to justify publication. I wouldn't call it one of his best stories and yet it was one that had a good ingredient
3551 in it at the moment in the war effort.

Q. There is a cartoon on that page too, isn't there, of a little boy looking at a stork, at the zoo possibly, and saying to the stork "It happened the night of March 16, three and a half years ago—going on four—I was the McIntosh baby." A. Yes. I recognize a very remote sex content, if that is what your question refers to.

Q. It does. The previous witness told us about this map which I confess I do not fully understand. He told us about the artist. What is it meant to represent? A. Well, it is meant to represent the abundance of potential strength in this country and to pictorialize for the natives of the various
3552 regions this country, the identifying characteristics of their territory. You can look at your own home town and find almost that section is noted for something.

Q. It doesn't have anything down here for Brooklyn? A. Yes, I think it has.

Q. It has? A. It has a lobster. No, that is north of Brooklyn.

Q. I saw the fish. A. The original of this is about twice this size, I would say. We reduced it by about half to get it into this gate fold because it is the most amazing piece

of work, and Covarrubias must have devoted more than a year to its creation because every last one of these identifying pictorial characteristics of various places, are all worked out in detail and scale with regard to the individual states. 3553

The text beneath it expresses the point and purpose, that is if a work of art needs an explanation:

"Now, in time of war, we are latently awakened to the grandeur, color, and infinite variety of this America we fight to defend".

It seemed to us in a war time holiday issue to be a most appropriate pictorial thing to include.

Q. On the reverse side of the gate fold—and by the way, gate fold means this kind of page fold-over? A. Yes. It is a technical term for an extra leaf on any page, allowing it to open up to approximately double size. 3554

Q. What is the photograph on the reverse side of the gatefold? A. I would call it a mood picture, done by Blumenfeld, and it is a trick photograph in the sense that what appears to be two women is actually a reflection. A girl posed with her cheek against a mirror, and Blumenfeld has depicted the camera angle that allows two faces to appear virtually side by side.

Q. Can you tell us about this photographer, Blumenfeld? A. Well, Blumenfeld I would say has raised the knack of trick photography more nearly to the level of art than any other photographer I know. We first knew him in Europe about 1936. He had just then come over to the photographic field from painting. He was a painter, and we obtained some of his photographs in the course of a trip I made at that time in getting material for Coronet. He sent some things over to us from time to time during that period, from 1936 to say about 1940, and then, of course, he became a refugee with the fall of France. 3555

3556 As I recall, we issued an affidavit of some kind to assist him in getting over to this country, but immediately upon his arrival here he established himself all in a matter of weeks. He was doing color photography and black and white photography for Harper's Bazaar, and I think they put him on a regular contract as a matter of fact upon his arrival in this country, and he has been doing a great deal of photographic work, color photography, for various advertising agencies.

Q. He did some covers for Harper's Bazaar, didn't he? A. I believe he has done some covers for them. He has
3557 consistently done a number of black and white and color fashion features for them. Oh, yes; I guess he did covers. I remember a number of them that were quite memorable, now that you remind me of it. One of their holiday issues where there was a woman with her cheek in her hands, wearing different color gloves, red glove and a green glove, and wearing various jewelry.

Q. This man Blumenfeld is the man who did the three "paste-your-face" pictures, one of which has been complained about? A. Yes.

Q. The same man that did this picture? A. Yes.

Q. Now, what is on the next page, the article called
3558 "The Unpredictable Profile"?

Mr. Cargill: Do you select these personally when they come in, these articles?

The Witness: Yes, Mr. Cargill. I select them in the sense of selecting them finally, not solely. We get about 150 manuscripts a day and we have a number of people reading them.

Mr. Cargill: They are screened before they get to you?

The Witness: Well, different people read different kinds of material. Sports will go to one group and fiction to another group and articles to another group, so by the time I get them they have sometimes as many as six or seven comments on them, and usually there is a recommendation, or let us say a vote, to purchase or not to purchase; by the time I get them, but yes I do have the personal selection at the end of the line. 3559

Mr. Cargill: You have the final okeh?

The Witness: That is right.

By Mr. Bromley: 3560

Q. Now, we come to the article "The Unpredictable Profile", by John Decker. What is that about and who is John Decker? A. John Decker was a life-long friend of John Barrymore. He is an artist and at one time in Barrymore's career Barrymore was an artist, too. Barrymore was an unsuccessful newspaper cartoonist, and I believe it was from those days, in Barrymore's extreme youth, before he tried the stage, that he and Decker became buddies, and upon Barrymore's death Decker sent in to us a query to ask whether we might be interested in a clear, intimate portrait of Barrymore, and since it came to us as somewhat of a scoop to get the piece so soon after Barrymore's death, and Barrymore was certainly a newsworthy subject, we jumped at the opportunity and asked him to send it right in. 3561

Chairman Myers: I regret to have to interrupt you at this point, but the Postmaster General wants to see us about something.

3562 I suggest we adjourn now for the day.

Mr. Bromley: All right.

Chairman Myers: We will adjourn now until nine-thirty tomorrow morning.

(Whereupon, at 4:30 o'clock p. m., the hearing was adjourned until Saturday, October 30, 1943, at 9:30 o'clock a. m.)

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3564

HEARING OF OCTOBER 30, 1943.

3565

PROCEEDINGS RESUMED.

Chairman Myers: Proceed, gentlemen.

Mr. Bromley: I would like to interrupt to call Dr. Siebert for a short examination, please.

Chairman Myers: Very well.

FRED S. SIEBERT, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

3566

Direct Examination by Mr. Bromley:

Q. Your name is Fred S. Siebert? A. Yes, sir.

Q. It is spelled S-i-e-b-e-r-t? A. That is correct.

Q. Where do you live, sir? A. I live in Champaign, Illinois.

Q. And at the present time what is your business or profession? A. I am director of the School of Journalism of the University of Illinois which is in Urbana.

Q. What experience have you had in journalism, Doctor Siebert? A. I was graduated from the University of Wisconsin School of Journalism and after graduation I worked for several years on newspapers in the Midwest, Hibbing, Minnesota, Duluth, Minnesota and Peoria, Illinois.

3567

I then went on for advanced degrees and took work at the University of Chicago, University of Minnesota, and then I was employed as an assistant in journalism at the University of Illinois on a part time basis, and took my doctor's degree there along with my teaching duties.

3568 I later became a full time member of the faculty of the University of Illinois, became a professor at Northwestern University, and in the meantime I had spent eleven months in England on a fellowship, studying the backgrounds of the regulations of the press in England, and then two years ago I was appointed the director of the School of Journalism at the University of Illinois, where I have been since then.

Q. Will you tell us something about the nature of the courses of study pursued in the School of Journalism at Illinois? A. Our School of Journalism is divided into two
3569 curricula, one for students who are interested in editorial work and newspapers, magazines, trade publications and radio, and another curriculum for students who are interested in the management side of publications and radio.

Q. Do you regularly study, analyze, and dissect magazines? A. Since this field of journalism is more or less current, one of our attempts is to keep up with current publications and make assignments of studies in periodicals, magazines, and radio programs as they are produced currently.

Q. In the course of teaching at the Illinois School of Journalism, do you use the magazine Esquire? A. We do.

3570 Q. For how long a time have you used it? A. Well, before my time. It has been on the open shelves at the library there and used as assignments in class work at least for the last six or seven years and probably before that.

Q. Has that magazine along with others been studied in class room work for the purpose of analyzing its content, as to whether it consisted of information of a public character and, if so, how much? A. The magazine, I know, has been used both by professors in the editorial division and by professors in the advertising division for the analysis of its contents. Both editorial and advertising.

Q. Would you say that the magazine Esquire is made up largely, if not chiefly, of material of information of a public character? A. I would. 3571

Q. And advertising, of course? A. When I say information of a public character, I mean that there is in that publication a sufficient amount of that type of material, including advertising, to make it a magazine primarily of that character.

Mr. Bromley: That is all.

Cross Examination by Mr. Hassell:

3572

Q. Doctor, do you regard the Varga girl pictures as coming within this content that you have just referred to as information of a public character? A. No.

Q. Do you regard the cartoons, the Sultan type of cartoons, and other cartoons of a somewhat sexy nature, as having this type of character? A. No. I can see that a cartoon of that—I have seen cartoons that are information of a public character. If you would limit it to some of them, I would say some are not and some are.

Now, the Sultan ones I would say are not; that is the ones you are referring to specifically.

Q. What do you say about the jokes in the magazine that deal with sex situations? Would you say that is information of a public character? A. I can see how some of it might be. 3573

Q. Some of it? A. Yes.

Q. You mean to say that the jokes in the magazine that have a bearing on the sanctity of marriage and things of that sort are information of a public character? A. May I answer your question this way? That if I had before me

3574 a publication consisting solely of material of the kind you describe, I would say that that publication was not information of a public character, but—

Mr. Bromley: Go ahead.

The Witness (Continuing): But if a magazine including other material beside the material of the type you just described were under consideration, I would say that that magazine as a whole, taken together with all of its content for the purpose of creating reader interest would be information of a public character.

3575 Mr. Hassell: That is all.

Redirect Examination by Mr. Bromley:

Q. Almost all magazines have cartoons and pictures and jokes interspersed with other more serious content, have they not? A. One of the high reader interest features of one of our most successful magazines, Reader's Digest, and I think all of our students and our editors and our professors realize that that type of material creates reader interest and with that they create the circulations that have come about during the past ten years and it has become a com-
3576 mon feature of most publications of national interest.

Q. Now, does the fact that these particular eleven issues of Esquire to which Mr. Hassell has referred contain material like the Varga girls and the Sultan cartoons and other cartoons change your opinion in any way that the magazine as a whole and each issue thereof is primarily devoted to the dissemination of information of a public character? A. No, sir; it does not.

Mr. Bromley: That is all.

Recross Examination by Mr. Hassell:

3577

Q. Doctor, one other question. Does the magazine Esquire enjoy a reputation of being sophisticated or spicy? A. Well, I have quite an association with college people, both professors and students, and right now our student body is mostly feminine, and I was surprised at the reaction of the young ladies in the University toward Esquire, which has been probably directed toward men readers, and from the reaction I got from the co-eds at the University, they did not consider it—you call it spicy—they use that term to describe certain other publications which are available, but not this one.

3578

Q. Doctor, could you answer my question? I was not asking about what the co-eds thought, but whether you regard Esquire as a sophisticated, spicy magazine? A. No, sir.

Q. You do not? A. No, sir.

Mr. Hassell: That's all.

Chairman Myers: What is your idea about being devoted—you use the term "devoted"—to literature, the arts, sciences, and so forth?

The Witness: My idea being that that is one of the major appeals of the magazine. It has in each issue a sufficient number of items of that character in that number of the magazine.

3579

Chairman Myers: If it is devoted to a subject, it necessarily may touch upon, but not necessarily be what that subject purports to be?

The Witness: Not exclusively.

Chairman Myers: That is, a periodical may be devoted to literature and not be literature in the best and highest sense?

The Witness: That is true.

3580 Chairman Myers: Is the same thing true about art?

The Witness: I should say so. If it is devoted to art, whether it became art or not wouldn't make much difference if that was the primary purpose.

Chairman Myers: That is all.

(Witness excused.)

ARNOLD GINGRICH a witness called by and on behalf of the Respondent, having been previously duly sworn, resumed the stand and testified further as follows:

3581

Direct Examination by Mr. Bromley (Resumed):

Q. You had reached yesterday the point of commencing to talk about an article in the January issue, commencing at page 51, called "The Unpredictable Profile", by John Decker. Will you continue with that, please? A. I believe I had simply said that this seemed to us to be an article of unusual interest in view of its timeliness, coming at a moment when Barrymore, just after his death, was such a news-furnishing subject.

The article all the way through shows the most revealing

3582 diagnosis of what made this genius of the American stage tick, as it were.

On the next page, 52, we had a full page cartoon which, as it happens, was one of a recurrent series. There is one of this type in every issue, and I believe, without exception, ever since the beginning of the magazine, perhaps about three or four months after the launching of the magazine, these hill-billy cartoons, called by the artist, Webb, "The Three Mountain Boys", have been featured in every issue throughout the past nine and a half years.

Q. Don't we see these hill-billy cartoons, and by the same artist, in many other publications now? A. Not by the same artist in many other publications. You see many that are more or less obviously an imitation of these. 3583

But while Webb has done cartoons for other publications he confines the mountain boys to Esquire. Having begun the feature in Esquire, he has a perfect right to use it in book form for himself, but not to contribute the mountain boys cartoons to other publications.

Where you do see these three mountain boys and the other related members of the family, the little uncle who is perennially about 18 months of age, and Grandma, who is perpetually behind the plow doing the hard work, is in the form of insignia on Flying Fortresses and I believe something like 20 different ships of the Navy, and as the mascot device for any number of military and naval units. 3584

Many of our cartoonists' characters have been requested as insignia and as devices by various units of the armed forces, and one of the most popular has been the mountain boys series.

The artist began drawing these hill-billies, as I say, almost at the inception of the magazine and, to my knowledge, at least up to a matter of something less than a year ago, he had never been south of Connecticut, and yet the mail from that region has for a long time commented on the obvious inside knowledge of the area revealed by Webb. 3585

The next page, 53, is a somewhat technical argument about two styles of skiing, and two styles of skiing instruction. You might call this something of a private fight which became one of public character because the adherents of the two styles of skiing have been battling practically through summer and winter over the last two years in supporting and attacking, respectively, the styles of instruction sponsored by Otto Lang and by Fritz Loosli.

3586 Each will run an article in our pages showing that by his style you can learn to ski beautifully in a matter of a day, and by the other you can't possibly accomplish the same thing.

Both, as it happens, are very well-known European ski instructors; one Swiss and one Austrian.

Q. Now the cartoon on the right-hand lower part of the page has relation to the article, at least to some extent, has it not? A. It is related matter and we do as a matter of policy, without straining too hard for a tie-up between those articles and the cartoons, try, without pressing too hard, to

3587 tie them up, and particularly that is true in relation to our departments.

If there is a cartoon on a bookish subject or a cartoon concerning food, it may be placed in relation to that month's regular department or feature on that subject.

Mr. Cargill: Right at that point, who inserts the sentence below here, "Is there one like this going down?". Who puts that in? Does the artist put that in?

The Witness: They do sometimes. Some we put in. As a matter of general practice, I think you will find that relatively few of the cartoonists furnish their

3588 own ideas. They may start that way but they quickly come to depend on gag men who sell the rough idea of a drawing. They furnish probably a crude pencil sketch along with that gag or punch line of the drawing. Sometimes they dislike to be referred to as gag men and prefer to be called idea men, but there are a half dozen such fellows who have made a very fine living out of providing ideas for cartoonists, and as far as our own cartoonists are concerned, I would say

that E. Simms Campbell, who was in the beginning an idea man himself, almost invariably supplies his own, but almost all the rest of them have to be given the subject; they draw it up. 3589

Mr. Cargill: Do you editorially put some of them in yourself?

The Witness: I beg your pardon?

Mr. Cargill: Do you editorially put some of them in yourself?

The Witness: We have done that two ways. We buy the ideas as they are submitted to us and then we farm them out to our various cartoonists. I mean, there will be an idea coming through in the mail from outside and it will strike us as being one that is particularly suited to execution by this or that particular artist. That is, it fits his style, so we send it to him. 3590

That is a fluctuating market and we don't like to rely entirely on the mailman for it, so we usually have some one employed who is an idea man, who just sits in a quiet office somewhere and devotes himself to nothing but the manufacture of ideas for drawings.

Then we take those and keep our artists supplied constantly with ideas for future drawings.

Mr. Cargill: And all these are submitted to you before they appear in the magazine? 3591

The Witness: Yes.

Mr. Cargill: All right.

The Witness: That is twice. That is in the course of ideas that are to be supplied to the artists; I see them before they go and then I see them again when they come back from the artist. Sometimes we will make changes in the gag line, the topicality may be

3592 affected. We may get a cartoon that has perhaps lost some of its point by the fact that it refers to a situation that is no longer in the news and we will change it around to the point where it is.

Chairman Myers: You don't have one particular cartoonist, for instance, like some newspapers have? The editor gives him an idea and he works it out? For instance, we have two or three of our most distinguished ones in Chicago. Of course, as I understand it, the difference is the difference between the various artists, and then you may have a man like Ken Hubbard, who does "Abe Martin".

3593 Do you know him?

The Witness: Very well.

Chairman Myers: Where he works his own ideas and does his own cartoons, but here the editor takes the idea and hands it to the cartoonist. You don't do that, do you? You have fellows in different parts of the country?

The Witness: That is right. And we have found that it doesn't work out to advantage to have an artist or cartoonist work at a desk all the time.

Chairman Myers: To have them on production.

3594 The Witness: These fellows, even if they are almost tantamount to being on a salary, they are on a yearly salary basis, nevertheless we find if we leave them alone and let them work, then they do better work than working for us in the shop.

Chairman Myers: Your idea is to get different kinds of ideas and different kinds of presentation?

The Witness: Yes. I should have mentioned, in fairness to Mr. Webb, that although we may have to furnish all the ideas sometimes to all the cartoonists, we

don't have to present ideas to Mr. Webb for these mountain boys. That has been his own and he does it himself, but when we get a submitted gag that comes from the outside, and if the joke is one concerning his subject, we might adapt it around and send it to him, even though it may not come in as a hillbilly idea in the first place, but that is just to assure his long stock. 3595

He goes along with his continuing series on his own.

I am not keeping any track, Mr. Bromley, of the number of sex and non-sex as we started to do yesterday, but I make the obvious point that that one is not. 3596

Next, page 54. That is a piece of sports fiction and I might characterize it also as a satire because the whole point of it is that a man who was a ballet dancer turned out to be so much more successful in the prize ring than he was on the ballet stage that he shifted to the boxing career as a profession and, of course, the obvious inference is a slam at the fancy type of pugilist who is on a bicycle all over the ring.

The next, on page 56, is an article about the Tanaka Memorial, and is a popularized explanation of the manner in which the militarists in Japan managed to turn the entire country to their own ambitions and plans, and it shows how over a long period of time the Japanese—at least that element among the Japanese—were calculatingly and consciously and with slow, deliberate design preparing a world-shaking scheme for the aggrandizement of the Japanese nation on a global basis. 3597

The author, Curt Reiss, is a European journalist, a German, who was in a concentration camp briefly

3598 in the first months of the Hitler regime in Germany.

In 1934 he managed, after being released from the concentration camp, to move to Paris and since he had been brought up as a bi-lingual person, having spoken French and German interchangeably in his family circles, he started a new career in Paris where he joined the staff of the Paris-Soir, the biggest French newspaper, and the one most naturally comparable to American newspapers out of all the foreign newspapers.

3599 He was sent by the Paris-Soir to America as a correspondent, and he maintained the New York office of the Paris-Soir from, I believe, 1936 to 1940. I shouldn't say he maintained it by himself. As a matter of fact, he was the assistant to Raoul de Roussy de Sales, who was the chief correspondent in America for that paper, but with the fall of France, of course, the Paris-Soir ceased to exist, or, rather, became a Nazi paper, and he was cut off from his home base and we helped him become a freelance author.

3600 I say we helped him become that. I had known him for several years through contacts with the people in the Paris-Soir group in Paris, and when he lost his livelihood I suggested that he try making a living as a freelance journalist and author.

We began in 1940 publishing his articles on various phases of international affairs and he very quickly rehabilitated himself and, in fact, has become a much more important figure since then than he was before. He has written a number of books, some of which were direct outgrowths of his Esquire articles. I will mention some of those as we come to other contributions by him in other issues.

Arnold Gingrich—for Respondent—Resumed—Direct.

Q. There is a cartoon at the bottom of page 56 which certainly has no reference to sex, has it? A. It is a sheer nonsense cartoon and it is a category which we refer to in all of our own estimates of what the nature of the different cartoons may be as pure slapstick. It is a brand of humor that I certainly would not call corny. I think that the New Yorker uses it a good deal as we do. I think the term for it may be "nut" humor. I have seen it so described frequently. The very point of it is its pointlessness. 3601

Q. It certainly has pointlessness.

I wish you would tell me the relation the subtitle has to to the picture. To me it means nothing. A. It is ludicrous.

Q. It says, "I'm afraid you've done it again, Phillips." Done what again? Walked up the wall or not? A. I'm afraid you have beat me again, overcome me again, and he has used the side wall, two corners of the room, in the manner of a fly to get up all over and do everything but hang from the chandelier in returning every possible shot sent to him. 3602

In analyzing these things you have to bear in mind that since the time of at least Aristophanes there have been thirty-odd dramatic situations available to all authors and playwrights, and perhaps half that many humorous situations available to authors of comedies and creators of cartoons and other comic material. 3603

There is no such thing as a new joke.

Q. This one has created a new one, as far as I am concerned. A. This man has created a third dimensional joke, a shot into the realms of the ridiculous, but it is a category of current magazine humor.

Its text equivalent is what we call the "shaggy dog" story. We have run a number of such stories. They are like olives; you either acquire a taste for them or you don't. You either

3604 think they are side-splittingly funny or you say "Is that the end of the joke?"

The very pointlessness of them is what makes them the kind of thing that will break up a dinner party.

Chairman Myers: If you ever publish any more like that please send me a diagram of the text.

The Witness: That is what I am trying to furnish now.

By Mr. Bromley:

3605 Q. I don't see how anybody could see it. A. Take the one on the opposite page, page 57. There is a tendentious cartoon. We take some reasonably funny situation and just because it lends itself to a patriotic twist we use it as a commentary on the enemy.

I don't imagine you will split your sides laughing at that one.

Q. But I can understand that one.

Chairman Myers: So can I.

The Witness: Page 58, "West Point's First Captain is an inspirational article pretty frankly done
3606 as a piece of glorification of West Point tradition. As a matter of fact, the author, Thom Yates, is the publicity man for the academy. Call it a celebration and sketching in the background of the careers of those who in other days have been the First Captain of West Point.

For instance, 40 years ago MacArthur was the first captain and 56 years ago Pershing was the first captain, and other famous names in American military

history are identified as having been in their day the first captain. 3607

The cartoon on that page is again one of that super-silly variety and the only explanation of it that you need, I hope—

Q. We don't need any for that; we can all understand that. A. It is a picture of the obvious. That is as old and sure-fire a cartoon formula as you can find. That is always good, large or small, for a full page, something that is so evident to every beholder becomes the point of the cartoon.

I should say the same thing applied to the cartoon on the opposite page where the young lady refers to the fact that some 89 guys in uniform are also very fond of her. 3608

We now come to a four-color section devoted to cartoons of various sizes and since this is a holiday issue, given a decorative marginal treatment to hold all these cartoons together and to give the issue as a whole a festive air.

The color motifs around the margins are seasonal holiday designs. The cartoons on this spread are all in slapstick vein, ludicrous exaggeration being the chief point.

The next spread, however, is an exception. These cartoons are of a totally different nature. Here we have the patriotic type of cartoon, the cartoon that is a commentary, done as it happens in this instance by a very distinguished pair of artists who unfortunately have not ever in this country managed to achieve the same recognition and fame commanding position that they achieved in Europe. 3609

These two fellows, Derso and Kelen, were practically the official caricaturists and political cartoonists of the League of Nations. They lived in Geneva for 15 years, up to the outbreak of this war. They are Hungarians originally. They

3610 worked together as a team. No one has ever quite managed to find out just which part of their work has been done by which one of them.

The spread as a whole is a patriotic commentary, topical and political in the international politics sense.

The next spread again, just the obvious ludicrous situation of the juxtaposition of a temporary high value with a permanent high value. In other words, to point up the momentary pricelessness of a rubber tire by using it as a frame for a masterpiece.

Now, with page 67 we come to a sports article which is
3611 directed primarily to industrial managers selling the idea of the value of organized sports for large industrial organizations. Pointing out how the Phillips Petroleum Company has managed, with its basketball team, to build a spirit of company feeling among its executives through their participation in the sports activities.

In other words, part of the makings of a Phillips Petroleum executive is his participation in their sports activities. As he goes up in the company his active participation in the sports may cease, but they use it as a feeding ground for the personnel and many other instances are cited how the same idea has been found to be of great value by any
3612 number of other industrial concerns.

In the middle column of that page at the bottom there is a list of companies who have followed out this plan and who have found it of great value, and, of course, propose it to other companies.

The cartoon has no relation, of course, in that instance, on that page.

The next article, on page 69—do you want me to comment on the cartoon each time I pass one?

Q. No, not unless there is something peculiar about it.

A. Yes. That is a biographical article about Horatio Alger, whose name has become practically a legendary reference to our generation, most of whom are actually unaware that there was such a person, and his books are now practically unread. 3613

It is a historical piece and one that also portrays the success formula of the time and era of the American life, and the contrast is made between the spotless nature of his books with the anything-but-spotless nature of his own life, showing that he was some miles removed from practicing what he preached.

The article is by Stewart Holbrook, an author who has specialized in stories of the frontier and the backwoods and has done books about the timber industry and about many of the places and people of the Old West. 3614

The next spread, pages 70 and 71, contain one of the "Ruby Street" stories. The series was an offshoot of a book by Edward Harris Heth, called "Light Over Ruby Street." I read the book. It appeared, oh, I would say, about three years or three and a half years ago, and I found it the first funny Negro idea that I had come across since the days of Octavius Roy Cohen's "Sons and Daughters of I Will Arise," the old series that ran for so many years in the Saturday Evening Post.

We had published this young fellow Edward Harris Heth as one of our discoveries some years back. At that time he was just out of Dartmouth and was living for post-graduate experience in Europe, and I got in touch with his literary agent Carl Brandt, from whom we have bought many things ever since the inception of Esquire, and suggested that he see whether Heth couldn't take these same characters out of this book "Light Over Ruby Street" and start a series of stories. 3615

3616 In other words, not let the neighborhood die with that one book but to go on with it and try to do a series of humorous stories. The basic idea of the humor is a combination of social satire—the colored lady of somewhat less than average mentality who has delusions of social consciousness. She thinks she is a social worker and she apes the behavior of social workers who come to visit them in their squalid neighborhood, and she goes around right after the social worker trying to ask the same kind of questions of her neighbor just as they previously had been asked by the social worker. In doing so she writes a little note as
3617 the social worker has made notations down in her own notebooks, and she writes these little notes and hands them to her neighbors all over the neighborhood, and the spelling of them is so ludicrous that it struck me as being somewhat comparable to that series the New Yorker ran "The Education of Hyman Kaplan," where the whole point of the thing is the distortion—I will call it almost the vivisection—of the English language.

Well, this series began perhaps at the end of 1941. I know it ran off and on through 1942 and perhaps might be going even yet but I felt even though we had no actual complaints about the series that when we did have some
3618 complaints about another story from the Negroes and from the Negro press, from what I might almost call the professional Negro, I felt it was not in good taste to continue a series that poked fun, no matter how harmless, at colored characters at any time when in relation to the war effort and the whole concept of the United Nations it just seemed wrong to go on with a series that in any way took advantage of a race difference, so I let the series die a natural death and did not go on with it.

I think that there was one or two, at the most, more of these in the series. 3619

Page 72, a sports article about a big frog in a little puddle. The man who is to the second flight of organized baseball what Joe McCarthy is to the top flight. He has won as many pennants as McCarthy in the big leagues.

The cartoon on page 73 is again a ludicrous reshifting of emphasis. You take a seemingly casual line and build it up to a momentarily scarce commodity. The employer is serenading the reluctant workman by saying, "Say the word that will make me the happiest man in the world—say you'll be mine, Mr. Swejckowski for $62.50 plus overtime." The obvious skeleton on which to hang all kinds of topical gags. 3620

The next story, on page 74, "Strangers Defeated," a very fine animal story about the making—call it rather the taming of the spirit of a marvelous horse that the natives in the South African locale consider so dangerous that they begin to believe that he must in some way be bewitched, and the narrator shows how by patience and by care gradually overcoming the fear of the natives he inculcated in them the feeling of his own admiration for this magnificent animal, and I suppose the moral of the story is that the best things are the hardest to obtain but very obviously worth the trouble.

3621

By Mr. Bromley:

Q. Who is the author? A. James Stern, a young Englishman who came to this country, as I recall, about 1938 or 1939. I had met him once or twice in England, and after he got over here he got in touch with me and I helped him make a few contacts in this country, got him a literary agent, and got him started on this side of the water. He

3622 has done very well. He has sold stories, never outside the quality group, but he has sold them to Harper's and Harper's Bazaar. I should say perhaps never outside the limited class circulation group. He has not hit any of the big circulation slicks, but his stories are of a high literary quality.

The next feature on the page opposite 74 is one of a series of songs of the United Nations, devoting a page to the National Anthem, or in the case of some of the occupied countries, say the French, to the song of the Fighting French, and this series, which ran through a good part of this year, and virtually all of the year preceding, devoted 3623 each month a page in color to a presentation of the words and music of the particular nation's best known or official song. In many instances they were used by the consulates of the various nations for distribution. As I recall, the Polish consul in Chicago—of course no longer the consulate except as of an exiled Government—sent out a large number of reprints of this feature.

The artist is William Pachner, who was a very talented young Vienna refugee who came to this country in March of 1939. He came to Chicago and worked for us, well, almost on an employee basis, and in getting his feet on the ground through consistent publication in Esquire, he began to ac- 3624 quire enough reputation to attract commissions from national advertisers, and at the present moment he has left us to live in New York where his work is beginning to command a great deal of attention from national advertisers. He has done very well. He has a very high talent, and I would say that he stands astride both fields of commercial art and fine arts.

Mr. Cargill: Let this be off the record.

(There was a discussion off the record.)

The Witness: The next full page color insert opposite page 77, one of the series of regular monthly color inserts devoted to the different types of airplanes. This series done by an outstandingly fine painter in this field has been extremely popular, and is one of the notable exceptions to the fact that the armed forces seem to demand only pretty bipeds as pin-up material. 3625

These have been collected and commented upon at great length, not merely by men in the air forces but by members of the various branches of the armed services.

The airplane does seem to be the glamour item of this war and fellows in many other branches of the service are fans of this type of thing and have pinned them up and they have acquired a real following. 3626

The article on the page opposite, the Future of Air Power, I will comment on generically, and that will save the necessity of commenting at great length and detail on other comparable articles.

This represents, simply in this one month, one example of a continuing policy of emphasizing aviation, of trying to educate the laymen in an appreciation of both the possibilities and the difficulties of this new branch of war effort. 3627

There is also in every issue at least one, and sometimes we have run up to two or three articles in an issue, on different aspects of the art of military aviation; that is, the use of air both as a strategic and as a tactical instrument.

Page 78, a mystery story. These are rather a rarity. It is very hard to get a true mystery in the short story form. The essence, of course, of mystery

3628 stories is suspense, and it is very hard to create suspense when the complications of the plot and then the unraveling of it are going to take place only in a matter of paragraphs away, instead of many pages away.

We search for them avidly because we consider mystery stories to be one of the most obvious favorites of male readers, but we aren't too successful in it, and it is relatively rare for us to be able to offer what is really a true mystery story formula achieved in short story form.

3629 The cartoons of that same topical nature—

Q. It shows a typical newspaper reporter, doesn't it? A. Yes.

The next feature, pages 80 and 81, consist of a type of article that has some reader participation value. We try in virtually every issue to include some one article that will stay with the reader in the sense that it will give him something that he can either talk about or perform a trick or show some one accomplishment that he has obtained out of reading an article of this type. You will find others that even go into the realm of languages, how to learn to speak Japanese overnight and astonish your friends—that kind

3630 of thing.

The next page, page 83, the Gilbert Seldes contribution for this month, the review of the "Star and Garter" show. Gilbert Seldes every month makes a topical contribution in some branch of the living arts. If I can refer to an editorial page in one of these issues I think it will shorten the record by letting that editorial tell all about what Seldes does, and who he is, and how long he has been doing it. and what his particular field is.

That editorial, devoted entirely to Gilbert Seldes, I guess 3631
is about the August editorial—I refer you to the editorial on page 6 of the August, 1943, issue, entitled "The Inexhaustible Exuberance of Gilbert Seldes."

I realize that this article has been read so often in this room that I hesitate to linger on it any longer other than to say that in that editorial I think a good explanation of what Gilbert Seldes does in and out of the pages of Esquire will constitute a sufficient answer to the interpretations that have been put upon this article during the course of these proceedings.

Next is page 84, the regular theatre department of George 3632
Jean Nathan, in which he grinds two axes, or, let us say, drives two nails, one against the wrenching out of shape of all the dramatic unities in the name of patriotism, and the very low grade of drama concocted as an answer to the topical demand for war plays.

I would like to point out in this article the fact that George Jean Nathan makes virtually the same point that Seldes made in the famous "Star and Garter Blues," and I don't believe anybody has called attention to that in all this discussion of what Seldes was talking about in his "Star and Garter" review, and I would like to turn for a moment to the carry-over of this feature and simply call your atten- 3633
tion to the last paragraph on page 142, reading:

"The present emphasis on strip teasers in the burlesque revivals will not lead to prosperity in the long run. If, like Michael Todd in his show "Star and Garter," the impresarios, safeguard the all-important low-comedy element with such gala old burlesque clowns as Bobby Clark and such gay zanies as Professor Lamberti, the big money will no doubt continue to roll in, but if, as in "Wine, Women and Song," the emphasis is on women who take their duds off, with

3634 weak regard to the comedy, burlesque is ultimately doomed to go the way of all flesh.

"Mark Twain may have been right when he remarked that he would rather look at Lillian Russell stark naked than at General Grant in his full uniform. But I doubt that even Mark would have rather looked at Lillian in that state than at, say, the beforementioned Mons. Clark in his misfit suit, with his cigar butt awiggle in his mouth, and with his cane bouncing up periodically and slamming him grandly on the nose."

In other words, Nathan says in a paragraph at the end of his theatrical department for this month essentially the 3635 same thing that Seldes says in his full length article about the same show.

The gate-fold opposite page 84 is a full size double-spread reproduction of a fine old English sporting print, the kind of thing that you call suitable for framing. We try every year in the holiday issue to provide features of this nature where there is a contribution made, you might call it a reader dividend, the inclusion in the issue of something of intrinsic value, a reproduction, as in this case, which by the normal standards of prices charged for prints of this character would be worth about the price of the issue as a whole.

3636 The reverse side of that gate-fold is the Hurrell photograph, one of a continuing series of Hurrell glamorizations of Hollywood ladies, a popular feature that has continued in the magazine for some time, although it was formerly run in black and white in a smaller size.

The next page, 89, "The Sporting Scene," a regular feature by Herb Graffis, a part of our sports emphasis in addition to the sports poll in each issue, conducted by Herb Graffis and Ralph Cannon.

We carry this sports column, which in some months may be a miscellany of short comments done in the manner of a columnist, a sort of grab bag of sports shorts, and in some other months may be devoted entirely to some one sports subject. 3637

Q. Who is this author Graffis? A. Herb Graffis is a Chicago newspaper man, originally from Indiana. He has long been a regional favorite in the area around Chicago.

Herb Graffis is to his followers and fans what Westbrook Pegler used to be in his sports writing days, before he became a columnist in other fields.

In the last few years Graffis has gone the same way. He has begun to write a general column, a daily column in the Chicago "Times," and he has a magazine of his own called "Golfing." Between that magazine and his daily column in the "Times" and his work for us he manages to stand astride of the sports field and the field of subjects of national interest. 3638

This is a case in point, this article right here, which is devoted to the use of sports by the Navy in its intensive conditioning program given to the Navy cadets.

The next feature, on page 91, is also a regular department, and in this particular instance for a holiday issue is devoted to various suggestions for gifts, and also to recipes for holiday parties; that is, recipes for serving of wines and champagnes for holiday occasions. 3639

The next feature, pages 92 and 93, is the previously mentioned "Esquire Sports Poll," a regular feature of each issue, and on that we have found it to be of extreme value, and I would have to rate it at the present time as being next to the "Sound and the Fury" in its reader interest as evidenced by the mail we get.

Of course, a part of that is attributable to the technique

3640 with which this feature is conducted. We have a large list now of sports writers, radio broadcasters in the field of sports, and other people more or less intimately connected with the sports field, to whom we send a questionnaire each month, and their reactions and comments to various questions in the field of sports serve as the grist for this monthly feature, which is made up for the most part of their individual expressions of their opinions as concerning questions at issue in the sports world as of the given moment for each issue.

3641 Chairman Myers: Referring to The Sound and the Fury, why do you refer to it as that in there?

The Witness: That is very interesting and I had forgotten it entirely. That takes me back ten years now. Sound and Fury signifies nothing, of course, except the Shakespearean quotation.

Chairman Myers: "It is a tale told by idiots".

The Witness: Signifying nothing. As I mentioned yesterday it was our way of putting in all these wild-eyed comments and more or less written that way with the hope that they would be inserted.

There was an author, named Faulkner, and back at that time he wrote a book called "The Sound
3642 and The Fury", so we just used that rather than the Shakespearean reference as the title for the feature.

Chairman Myers: I wondered, because sound and fury seemed so much more effective to me.

The Witness: Well, we divided the thing deliberately so, because we had two types of articles in there; the noise that is created by this or that type of article, the tempest in the teapot, and the squawks that came in. You have those two categories in

there. You could also say it is a way of adapting it to the usual type of title for them, the type of feature "Bricklats and Bouquets" compliments and the opposite. 3643

The next regular feature on page 94, "The Edibles". Devoted every month to some phase of cooking with recipes included. It may be surprising to see that in a man's magazine, but you would be surprised to see how much mail comes in on this feature and how many male readers very definitely and evidently do actually try out and put into practice the very good recipes contained from month to month in this feature. 3644

There are a lot of men who like to cook and who do follow with great interest these articles on how to do with limited facilities some of the things that are done by chefs with limitless facilities. It has been a very popular feature in the magazine.

There again I call your attention to the fact that the cartoons in both instances on that spread are related to the subject matter. The one in the lower lefthand corner, the silly question: "Cream or lemon?" by one of the two shipwrecked sailors who very evidently have nothing but cases of tea as their only sustenance; and the cartoon on page 95 with the use of the second color, the little green tint plates to resemble the dark green of spinach, and the gag line referring to the inexplicable nature of the food being consumed. 3645

Page 96, "Esquire's Five Minute Shelf". That title is one that has been the property of the magazine rather than of the individual contributor ever since the magazine began.

3646 There again I make one exception. It began in that form with the first monthly issue rather than with the first quarterly issue, but as of the last three years or so, from 1939, this department was regularly conducted by William Lyon Phelps, who was one of the best friends the magazine ever had. Long before he began to contribute to it regularly he used to write in about different stories and particularly different editorials from time to time. He was one of our most articulate fans, and he got a great kick out of his Esquire job during the last three years of his life, that he held it and we miss him very much.

3647 Chairman Myers: He had the greatest sense of humor of any man I ever knew.

The Witness: There is another editorial page which contains an insert just like the insert in this instance from the Army camp papers, about William Lyon Phelps, that I would like to call your attention to. I believe it is the November editorial page, which contains as a boxed-in insert, a very moving tribute to William Lyon Phelps by Walter B. Pitkin entitled "Manprints". It serves as a sort of memorial notice to the passing of William Lyon Phelps.

3648 Next, the Varga calendar, which is an annual feature presented in the January issue as in 1943 and 1942. Begun December, 1940. We first included it in our December issue and then as we developed the idea of two holiday issues in the year, we moved the Varga girl over to the January issue and retained only a pre-view of the Varga calendar in the December issue. To relate the two issues as holiday issues we would give a couple of pages of the Varga calendar in December and then the Varga calendar in its entirety in the January issue.

I think this feature has perhaps had enough discussion. As a calendar it has been one of the most successful things we have ever done. We have sold these in really enormous quantities, increasing numbers each year. 3649

As a separate calendar, in addition to and apart from its appearance in calendar form in the magazine itself. As a separate calendar there is the little boxed-off days of the individual month put on each of these pages.

Mr. Cargill: How many of these calendars did you sell; do you remember?

The Witness: Well, it has been going up, Mr. Cargill, each year. It is up in the millions now. We sold, I think, something like 300,000 the first year. These figures will probably be available in specific form, but roughly say three hundred and some thousand the first year, and five hundred and some thousand the next year, and then they ran up to nearly a million, and we began to produce it in many different forms. That is, other kinds: the basic calendar, then the desk calendar, the wall calendar; all containing the same pictures. 3650

Now it has become almost a separate branch, a little business within a business. We have a Varga calendar division and all those orders are handled by that and we now have agents handling the Varga calendar on a regional basis around the country. 3651

The next feature—

By Mr. Bromley:

Q. Before you leave the Varga calendar, haven't you got some orders while you have been down here from the Army

3652 and the Navy and what not? A. I believe we have. There was an order of 50,000, as I recall it, from England, I believe.

Q. For our Army? A. Yes, not for the English Army. I mean for our Army in England. Just recently received.

The next feature, page 109, is a special feature and not typical of every issue. This is something in the nature of an added attraction in a holiday issue. It is a condensation of a very important book which made a lot of speculation and some promises on what might happen in the field of aerial warfare, and laid down a blue-print for the function and role of air-power in our war effort, and as of today
3653 a good deal of that blue-print has been filled in by events that have become actualities.

The book is "The Coming Battle of Germany", by William B. Ziff, the editor and publisher of "Flying Magazine," the man who has been intimately connected with the development of aviation ever since the last war, and even before the last war.

It was Ziff, by the way, who published in his magazine, in one of his aviation magazines, the articles by Billy Mitchell which caused such a controversy and which, in fact, led directly to his court martial. Many of the state-
3654 ments made by Billy Mitchell in trying to rouse the military authorities to the potential value and obvious need of aviation in the future, were first published in Ziff's magazines.

The presentation of the condensation here is in the form of a sort of primer of aviation, dividing the book up into its most cogent passages, and as quoted on page 110, breaking it down into lessons on how to apply air-power as a strategic instrument, high-pointing these different basic premises, axioms, and corollaries laid down by Ziff in this book.

Q. You have told us who Ziff is? A. I have mentioned what he is, but who he is, he is an ex-Chicagoan. For a long time he lived out near where I live, northwest of Chicago. He had a farm out there just a few miles away. Now he lives near here. He has a farm over here in Maryland. His center of activities since the war has become Washington. He is active in an advisory capacity, civilian advisor, to the air forces. He has been sent on trips on behalf of the air forces to England. As a result of one of those trips he issued the R. A. F. special issue of Flying, which was a remarkable single volume containing all the technical and popularized information about the Battle of Britain and the probable future of the R. A. F., issued at a time when it was much less evident and obvious than it is today that the British concept of the use of air power would prevail over that of the Luftwaffe. 3655 3656

Page 117, one of a series of color inserts devoted to various game birds of America. These are the sportsmen's color print type of thing which has been very successful, done by Walter Bohl, whom we claim as a discovery of ours. He is a young man whose sporting nature prints were first published, oh, many years back. I would say all of eight years ago and they were quickly taken up by such sportsmen's outlets as Abercrombie & Fitch in New York and Von Lengerke and Antoine in Chicago, and from there led to sales to a great number of galleries throughout the country. 3657

A long, continuing series of monthly inserts in color devoted to the various breeds of dogs. In each instance, a champion typifying and representing the entire breed, photographed in full color by Henry Waxman. The origin of that feature dates back to the time when Henry Waxman called on me with a big portfolio of girl pictures. Waxman

had specialized as a girl photographer, girl pictures for ad-
3658 vertisers. The toothpaste ads, all the various types of advertisements that use the pretty girl color photograph, and in showing me a whole lot of examples of his pretty girl features I pointed out that we had the Hurrell photographs as a regular feature of each issue and we weren't in the market for pictures at that moment, and as he started to pack up his samples and put them away, one photograph fell out of the file and I said, "What is that?"

He said, "I am sorry; I didn't mean to have that one. That is a picture I was delivering to a friend. I took a
3659 picture of his dog."

And I grabbed up the picture and said, "If you will come back with an armful of pictures like that, I would be interested in seeing them", and with great reluctance he agreed to begin the series. He pointed out that he had never been a dog photographer and didn't want to become one as a career, but from that point on he went ahead with these studio shots in natural color, of one breed after another, and I think as of now we have probably covered, oh, better than thirty of the different breeds.

These have been very popular, of course, among dog lovers. I have seen them in many kennels where the entire series is mounted and framed and set along the wall as a
3660 wall decoration of the kennel.

The key on page 121 answers your previous question, Mr. Bromley, as to what is contained in the Covarrubias pictorial map of America on page 47 of this issue. This can be turned to for ready reference to identify any portion of the entire continent in terms of interpreting Covarrubias' painting.

"Ad Libbing with Esquire", on page 122, is a feature done by one of our gag men or idea men, Bruce Patterson, who

is regularly employed in our Chicago office as a furnisher of ideas for the cartoonists, and in his diddling around with various ideas for humorous features we were intrigued by a lot of these things that he did that did not lend themselves to pictorial use, but incorporated themselves as attractive tid-bits of text; so we began this feature as a sort of rough equivalent to the "Talk of the Town" item in the New Yorker. 3661

Commentary with a light touch interspersed with jokes and gags just for their own sake.

In some instances it goes into the field of satire, as a take-off on the advice to the love-lorn, the "Dear Doctor Diddle," on page 123, the right hand column. 3662

The next two pages, 124 and 125, again a related cartoon. A tie-up between the cartoon on page 124 and the article on 125 pertaining to the subject of clothes. In this instance, a page on the care and the preservation of the various items of the Army uniform.

There are inserted features, small filler type of features on pages 120 and 126. Things that are set in as short humorous fillers to break the monotony of unrelieved type matter in the carry-over pages. These are by Parke Cummings in both instances.

Parke Cummings has contributed this kind of humorous item to the Saturday Evening Post, Colliers, and many of the large popular magazines over a number of years. 3663

Opposite page 126 is a typical holiday issue feature representing the conversion to the holiday season of our regular fashion pages, which, in this instance, are devoted to gift suggestions for the holiday season.

These are photographed in full color in direct representation of the actual objects themselves, followed by, after four pages of color reproduction, a gift selector, which is

3664 a shopping memorandum with suggestions opposite various categories of gift shopping.

It makes suggestions as to what might be a suitable present in the different fields.

Next, the cartoon on page 134, making fun of the obviously ludicrous situation where a prima donna of the football field would refuse to go forward unless the other tanks had run interference for him.

And that as far as our beginning pages are concerned, completes the issue, although we do carry on some front cover to back, smaller features, fillers to sustain the interest from one end of the magazine to the other.

3665 An example of that is on page 140, a self-portrait of William Allen White. This is a regular feature in which we ask men prominent in many fields—we have had a number of Senators, a number of Congressmen, a number of prominent actors, authors, and public figures in many fields—to draw their own picture and express their own opinions on a number of more or less pertinent questions addressed to them, with the result that you have a self-portrait and a self-interview.

One of our regular fashion pages, on page 156—this is the typical Esquire fashion page appearing in reduced number in the case of a holiday issue, because the gift pages 3666 preempt so much of the space, but this kind of a page serves to stand as the type of which we have anywhere from four or five or six in a normal issue.

Another one, on page 166, in that instance devoted half and half to civilian and military fashions and accessories.

Another feature on page 194, a continuing feature devoted to notes and activities of sports figures who are now in the armed services, giving some background about their exploits in the past on the field of sports, and their feats of distinction as of today on the field of battle.

The picture in the center of that page, or rather in the center of those two columns, is an old-time picture of Admiral Ghormley back in 1900 when he was quarter-back on the University of Idaho football team. 3667

A great deal of our sports material is given a military treatment and our sports department has served as a funnel for a lot of morale information and inspirational type of advocacy of strenuous life as a preparation for military activity.

This feature continues on page 196 and, on page 197, there is a reproduction of some cards received from German prison camps, sent by prisoners in the R. A. F. In both instances I believe these are flyers who were shot down. 3668

And here is one instance where I believe I would agree with Mr. Hassell that we published something and are quite willing to let it stand as an estimate of what the readers think of the magazine.

They are difficult to read, but one of them goes:

"Dear Sir: As prisoners of war for the past two years may we add to your vast store of testimonials the appreciation of this camp for Esquire, the most sought-after magazine in the camp.

"Our great drawback is that one copy has to pass around two thousand of us. Is it possible that among your readers there are a few kind souls who would send an extra copy? 3669

"We should also welcome mail from anyone who cares to write.

"This is the main Royal Air Force camp and we all vote for bigger and better Varga girls.

"Wishing Esquire every success, yours sincerely,

"Sergeant G. Peter White, Prisoner of War 235.
Sergeant A. D. Lancaster, Prisoner of War 81."

3670 The other, right beneath, from another prisoner of war, signed "Steve Travis" reads:

"Wonder of wonders. Yesterday I found a back number of good old Esquire, the first I have seen for over a year. Sneaked over to a seat in the sun and hungrily devoured it from cover to cover. Boy, it did me more good than six food parcels. Am taking time out to let you know how much I appreciate everything in it. There is a waiting list of over fifty fellows who had better get cracking on it again. Best magazine I have picked up since I was shot down last year. Sincerely. Steve Travis."

3671 We printed these letters in good faith at the time, after checking with the Post Office on the possibility of answering these requests for copies from our readers, and unfortunately there was a change in the regulations between the time we went to press with this and the time that it appeared, with the result that we were in quite a jam because people responded to this from all over the country and went to their post offices and tried to send magazines to these prisoners in the prison camps and found that the change in the rules made it impossible to send anything to a prisoner of war unless you were, I believe, either a relative or had a specific permit to do so.

3672 Q. What arrangements, it any, have you made with the War Department about sending the magazine out for the use of the armed forces? A. As far as our regular subscribers' copies are concerned, they follow wherever the soldiers go. But in addition to that we have had copies bought by the Army for the various post exchanges overseas. That has been in increasing quantity ever since July, 1942.

It began with, I believe, only a matter of about 3,000 copies at that time, and has gone up month after month since to where I believe the figure is now something like ten times as many.

Arnold Gingrich—for Respondent—Resumed—Direct.

Those copies are bought by the Army at the regular wholesale price, the same as any of our distributors would buy them. Then they are, as I understand, sold at the P. X.'s post exchange at the same wholesale price. In other words, they don't charge them anything for it. They enjoy an Army preferential rate, as I understand in common with many other things in the P. X.'s. 3673

Those copies bought by the Army for sale by the Army in its own post exchanges, represent one segment. Then, of course, the normal distribution outlets take care of Army camp sales in this country where the local dealer will supply the Army camps, to the best of his ability, the number of copies he has, because there is a great shortage in those areas now. 3674

I can recall a news dealer located near an Army camp where there was a hospital, writing in again and again asking for more copies and enclosing correspondence from the camp commander there demanding 1,000 copies, and he had supplied 100 copies—in other words, one-tenth as many copies as they asked for.

Then, we have just recently begun to supply the Army Special Services Division, at their request, with copies for the wounded and for hospitals and for detached or isolated military units who are away from any of the normal post exchange coverage. 3675

The Army obtained for us a special quota of paper tonnage outside of our regular W. P. B. allotment, and as a result of getting that tonnage we are contributing those copies in addition to those that are handled through the post exchanges, and that began with our current number.

Of the November issue we have supplied, I believe, in the neighborhood of 50,000 copies, and as of the January issue that will be in an increased number, something like 60,000 copies.

3676 They are on lightweight paper and, as far as the now current issue is concerned, the only difference between them and regular copies is that they have an inset legend printed right in on the front cover saying "These copies are supplied with the compliments of Esquire for the exclusive use of the armed forces."

As of January, when the production change-over can be accomplished, those copies will contain no advertising whatsoever. They will be a special edition containing only the editorial matter, and in some instances, where the removal of the advertising creates a make-up difficulty there will be

3677 extra editorial matter thrown in in this special edition for the Army Special Services Division.

Q. Now, turn back to page 137. Who is the creator of that cartoon? A. Bill O'Malley, a cartoonist with whom we have dealt for a long time, and who has contributed pretty regularly to most of the magazines.

I am quite sure I have seen his cartoons in Colliers and in a number of the magazines. He is an old-timer.

Q. Do you know whether that is an idea that he thought up or you thought up, or some of your employees thought up? A. I don't recall in that specific instance whether that idea was sent to him as one that was done inside the house

3678 or one that we had brought in from the outside.

I am pretty sure it was sent to him as one of a bunch of gags to be made up into drawings. We do that pretty generally. We don't send them one at a time, but we send a group and they will come in in a bunch.

Q. Did you pass on this cartoon before it was published? A. Yes.

Q. Yours is the final responsibility? A. Oh, yes, surely.

Q. Did it occur to you that it might be considered to be obscene or indecent? A. Not by the wildest stretch of imagination.

Q. What inference did you get out of it, or what inference do you think is the reasonable inference which flows from it? A. The obvious and reasonable inference to me is "What a life, sitting there drawing the nude model". 3679

It is the oldest gag in the world. It goes back to Johann Strauss, Artist's Life, the life of Reilly. It is a contrast between what I used to do and what I am doing now.

It reminds me of a gag I saw so many years ago—I don't remember the magazine in which I saw it or how long ago it was—I was very young at the time—but it showed an overstuffed capitalist type running wildly across a field, being chased by a bull, and the gag line underneath read: "I wouldn't do this for $1,000 and here I am doing it for nothing." 3680

There he is sitting up on a roof top for nothing and to think what he used to be doing.

Q. Go back to page 123 for the moment. Did you approve the "Dear Doctor Diddle" column? A. Yes.

Q. Who wrote that? A. That is written by Bruce Patterson, whom we call Beep. You notice the "Beep" in the lower right hand corner of the page, being "Bee" and "P". The headings are done by him as is the little device for the heading there "Ad Libbing with Esquire."

I think this is all his material in this instance. I do not believe there is anything in here that isn't of his own. 3681

We from time to time would feed even a column like this if we got related material that seemed to be a suitable contribution for it. We would drop it in.

Now, this is an instance where after it was called to my attention—that is, in studying the citation and the specifications—I talked to him about it and received confirmation from him that as far as any fourth, fifth, sixth, or seventh meaning of the word "diddle" was concerned, he

3682 had never even given it a thought and, although he is not a very young man—he has a son 23 in the air force—he professed never to have heard what I think Mencken referred to as the fourth or fifth meaning of the term "diddle".

I have heard it. I am less innocent than he, apparently, but I can recall as a matter of 25 or 30 years ago, hearing somebody among the kids when they saw a marquee, one of those canopies that comes out in front of a house when there is a wedding—I have heard a kid say to another "Hey, legal diddle", obviously a sex connotation. It is not

3683 a matter of not being able to account for the possibility of there being one, but it is a matter that never occurred to me, or, as far as the creator of this thing is concerned, to him.

In my discussions his contention was that he never heard of it.

Q. You didn't publish it then to use a nasty word, did you? A. If you were just looking around for a nonsense name you might have called it "Dear Doctor Fiddle", or "Dear Doctor Dopey", or "Dear Doctor Yes and No", or "Dear Doctor Maybe Perhaps".

The only possible—I won't say the only possible—but

3684 it seems to me that the overwhelmingly probable interpretation of that name is one that could be expressed by "Dear Doctor Futile".

Here is silly advice, silly answers to silly queries from silly people. It is sheer nonsense.

I use the term "nonsense" advisedly. You can go back to a nonsense rhyme for a comparable use of the word "diddle". You have:

"Hey diddle diddle
The cat and the fiddle,
The cow jumped over the moon.
The little dog laughed
To see such sport
And the dish ran away with the spoon."

3685

I have never known what that means and I have heard it all my life, but I can imagine doing a good job on it if I wanted to find sex connotations in it.

The cow jumped—"jumped" is a dirty word, and so is "the moon"

Q. Is this in a way sort of laughing at question and answer columns in the daily papers? A. Yes, a parody, a take-off on the absolute stupidity of the questions which sometimes is only exceeded by the answers.

3686

I would have liked—I am not trying to talk for the sake of what I want to get into the record exclusively— but I had wanted to make as brief reference as I could to a couple of things in February and March.

Q. Let me ask you this first. In a general way, would you say that the description of the January issue is typical of the contents of all the succeeding ten issues here in question? A. Yes, with this exception. As I said yesterday, in discussing our editorial formula concerning which you asked me some general questions, I answered that we have a formula which averages out over the year and that is not so regularly constructed that you can lay down one issue on top of another and find the same thing on the same page, issue for issue. I think it would be a frightful thing if we ever became as grooved as that.

3687

That is why, if we had the time, I would have liked to give you a diagnosis of the anatomy of Esquire, would

3688 have liked to take the first quarter of the year, for instance, and go through January, February and March, and in the course of any three issues strike an average and you would have a normal issue.

I mean, you would have the things covered that will recur with sufficient frequency over the course of any one year or over the course of five or six years, to be able to—

Q. Instead of doing that, won't you just briefly indicate any extraordinary features in the February and March issues which differ from what you have described as appearing in the January issue; say? A. Yes, sir.

3689 Mr. Cargill: Could he take the three months, July, August and September possibly? Would that be a representative three months?

A. No, because in the course of infrequent appearances over a year, sometimes a thing that won't be in one month will be in the following month and then won't come back again for several months.

For instance, there is a recurrent feature in February—that is an annual feature as it happens in that instance, one that comes every year—something we are building up as another attribute of the magazine.

3690 We have a sports program and this, as it happens, is in the field of music, a jazz program upon which we have embarked. Somebody once said, "The truth has twelve facets," and I would like to polish three or four of them in trying to characterize the magazine as a whole. I won't go through page by page. I promise you that. We finished that with January.

Q. You have mentioned jazz as a new feature in February. What else is new? A. The jazz article is an all-American band—

Mr. Hassell: What page?

The Witness: Page 74 of the February, 1943. 3691
issue.

Now, in that issue it is announced that this will be an annual feature. It began last February, conducted by Robert Goffin, who is one of the foremost of the international authorities on jazz, as a branch of music, and even though he is a European, the first recognition of American jazz as an art came from abroad.

Fellows like Robert Goffin and Panassie developed a serious recognition of jazz ten years before there 3692
was any sign of it in this country, and Esquire was the first general magazine in this country to treat jazz music as a serious subject, and an art form warranting the attention of collectors, the collecting of jazz records.

That article appeared ten years ago in the Febary, 1934, issue, and so now, with the next coming February issue, we, for the second time, name the all-American band, the outstanding performers on each of the instruments in the classic jazz orchestra, and the performers, who are selected by a group of 16 of the outstanding authorities in this field. There 3693
will be a poll of these experts as to who are the dominant personalities in each branch, and then we are going to put on a concert. In other words, last year's all-American band existed only on paper. This year's will be brought together for a concert, and we are going to hold it at the Metropolitan Opera House. That will represent the first time that jazz music has invaded the always sacrosanct precinct of music in this country.

3694 And the affair will be conducted as a benefit with the entire proceeds going to a war charity.

Q. What other feature is there that is new, either in February or March? A. I would like to comment on the article on page 23 of the February issue, because there is another basic point involved. If you hold that article up to the light you will see that the answers to the questions propounded in this full-page quiz on air power are answered through the page.

Chairman Myers: What page is that?

3695 The Witness: Page 23 of the February, 1943, issue.

Now, my one reason for wanting to comment on that is that you can see the correct answers are shown in the little square. After you have taken that quiz for yourself you put down whether it is "A," "B," "C," or "D," and write it into the box and hold it to the light and you see whether you are right or wrong on your answer to each of these questions.

My reason for wanting to comment on that is be-

3696 cause it touches upon one of the basic reasons for the success of this magazine.

We have been, as I told you in my prefatory remarks the other day, trying to account for this phenomenon, this magazine that appears to have different facets, depending on the angle of approach taken to it. This magazine has been characterized ever since the beginning by a pioneering attitude in the fields of reproduction, or call it the mechanics of publishing.

We have been experimenters who have made innovations and have done stunts in the use of paper and printing, and those things have been one part of the entertainment value, of the personality of the magazine. 3697

In going behind the scenes in that respect I would point out that David Smart, who in the beginning of our business handled the production end entirely back in those days,—where all we did was the reproduction of men's fashions in color, that a large part of the success of all these ventures lay in his imaginative use of existing facilities and a pioneering into other fields, for changes and differences and novelties and variations from the usual accepted run-of-the-mill routine type of publication practice. 3698

That in the ten-year course of Esquire it has accounted for the introduction of the gate-folds, of the use of various kinds of paper, some of which had never been employed before in this field, and I simply like to stress it as being one aspect of the character of the magazine.

The editorial at page 6 of the February issue represents a follow through from the letter, to which I called attention in the Sound and the Fury on page 10 of the January issue. I commented yesterday on the reaction of the Negroes to the one story in our November, 1942, issue, which we had presented as a truly amazing performance by a 16-year-old Brooklyn high school boy, Elmer Grossberg, who sent it in to us, and we published it, thereby adding him to our roster of young authors put into print for the first time. I don't know, but I think that would be a record, getting the first story accepted at the age 3699

of 16. I don't remember if we have ever had an
3700 author break into our pages that young.

This story we thought of as being exceptional in its literary merit, and as pointing a beautiful moral for the appreciation of the problems of the minorities as a whole. This was a story that showed the brutal handling and mishandling of a young Negro boy by the plug-ugly employee who was a professional beater attached to the sheriff's office. The kid is beaten within an inch of his life in trying to make him confess to the theft of an automobile, and after he has been restored to consciousness they tell him
3701 "Now, you are a good Negro. After all we didn't mean any harm; we just made a mistake. We just found the guy that really done it, and believe you me if you think you got hurt wait until you see that fellow," and they ask him, "Do you like ice cream, do you like to go to the movies," and told him, "If you don't say anything about this to anybody else, just go home, and if you don't tell anybody about being beaten, why, we will buy you some ice cream cones and take you to a movie."

Well, the story to us looked perfectly obvious in its intent; it was certainly anything but one of attacking the Negro race. Here is a story which takes
3702 the point of view of the underdog, and yet by misinterpretation and by an undue sensitivity we were given an unmerciful going over by what I call the professional Negroes, because in the course of this beating scene, where this little Negro boy is being almost murdered, he is being addressed as "nigger." Well, "nigger" is an offensive word; it is a word that they don't want to see in print, so we were given

a terrible going over in the Negro press, and by any number of letters of this same type as represented on page 10 of the January "Sound and Fury"; and this editorial on page 6, in reference to the entire incident as a whole, contains a few sentences that do meet with the voice of policy, what this magazine believes in, always has believed in, and always will believe in, and I would like to insert a few of those sentences at this point. 3703

"If you have followed this magazine more than casually over its nine-year career to date, you know that we have said, early and often, that we would never knowingly offend against religious or racial sensibilities, while reserving the right at all times to offend all other kinds of peculiarities, prejudices, or bigotries however and whenever we felt like it." 3704

Then skipping over to the bottom of that page, toward the bottom of the righthand column on page 6:

"We as a nation are fighting against the attempt of one race to set itself up in mastery over others. We are fighting that tendency wherever it shows itself, all over the world. Hence, in all conscience and logic, we must fight that same good fight right here at home. 3705

"Esquire began fighting that good fight long ago, even before it became fashionable. It will never abandon it even if, as appears now most unlikely, it should ever again go out of fashion.

"Meanwhile for so much as a single word of affront, in its column, to the Negroes, or to any religious or racial minorities, it herewith apologizes in all sincerity and without reservation."

3706 That explained my reason for dropping the "Light Over Ruby Street" series, the Miss Geranium Finn humorous stories, which harmless and innocent as they were in their intent, portraying the foibles of a comic character in a colored neighborhood, were nevertheless dropped overboard to avoid any possible suggestion of taking an untenable position in relation to racial minorities.

By Mr. Bromley:

3707 Q. Now, in the February issue you inaugurated a new feature in the comic strip called the "Exploits of Esky"? A. That is true.

Q. How long did it run or how long did it continue? A. We began with February and continued through June. I don't think we had it for July. I would have to look.

Q. That is right. A. It is not July?

Q. No. A. That was inaugurated in the February issue with a little prefatory page, page 90, an introduction page. That is our usual practice in introducing a new feature.

Q. Now, what can you say about its acceptance by the public, or lack of it? A. It went over their heads. It was advertised beforehand with an announcement of intent on

3708 page 90 of the February issue as an adult comic strip which would be a take-off and parody of all the comic strips today, ranging over the entire field of comic strips, such as the World in the Future one, Buck Rogers, such as the sexy strips, as that of Alex Raymond and Flash Gordon, where ostensibly these comic strips are for children and yet they had always struck us as being, in the light of its emphasis and in going through the feature as a whole, as being something entirely different. We thought, and the creator of our strip thought, he was being sufficiently ob-

vious and unchildlike and transparent in his attempt to make light of and belittle and poke fun at and to exaggerate, after the immemorial habit of caricaturists, people who rib or parody a thing, of the salient features of the things you are parodying. 3709

Q. Now, I find it appeared in the July issue and that is one of the things complained about. Was it thereafter discontinued? A. I believe it was July. It was about that time that we dropped it because it just didn't ever catch on. People reacted to it as a waste of space. I think in going through the issues we can find references probably reproduced in the Sound and the Fury about the pointlessness of the thing. That is, they didn't feel that it warranted the space that it was taking up, and it was a gag that in Broadway parlance had laid an egg. 3710

Q. That is, it had failed? A. It had failed to strike a responsive note.

Q. Now, are there any other authors in the succeeding issues whose names you particularly want to mention? What about Jesse Stuart? A. Oh, yes, Jesse Stuart is an author we have published. I believe his count now would probably be forty-four or forty-five stories over the past seven years. We began with Jesse Stuart in the summer, I believe the September issue of 1936.

He is a true authentic regional writer whose locale is in the Kentucky hills. He is with serious intent what Paul Webb is with comic intent. Jesse Stuart is the voice of the hill-billy. 3711

Q. What about his national reputation? A. He has written these stories that are almost poetry in prose. The language is one that has survived and is being spoken by these hill-billy people in their isolated section, and it is a language that is a carry-over from Jacobean times, and

3712 these stories have won the admiration of critics and have been considered an important contribution to the literature of our time.

The "O'Brien Anthology," during the years of its existence, never failed to give three stars to a Jesse Stuart story. Every single time he came to bat he was a home run so far as O'Brien ratings are concerned.

His work for Esquire has been the difference—as he has often expressed to us—between literally life and death. That is between hardship and sustenance, because in the long row he had to hoe in winning literary and artistic

3713 recognition, financial rewards just didn't seem to follow.

Chairman Myers: Mr. Bromley, is this a convenient place to stop?

Mr. Bromley: Yes, sir.

Chairman Myers: I assume you will have some more further direct examination?

Mr. Bromley: Not much.

Chairman Myers: We will meet again at 9:30 Monday morning.

(Thereupon, at 12:02 p. m., the hearing was adjourned.)

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3715

PROCEEDINGS RESUMED.

Chairman Myers: Well, if we are ready, we will go ahead, gentlemen.

Mr. Bromley: Yes, Mr. Chairman. Call Mr. Gingrich.

ARNOLD GINGRICH, resumed the stand and testified further as follows:

3716

Direct Examination by Mr. Bromley (Continued):

Q. At the last session, Mr. Gingrich, you commented upon some of the contributors to the January and February issues of the magazine Esquire.

Will you now tell the Board about some of the other contributors who are found in the remaining complained of issues? A. Going through the issues I can comment as we reach various names but just recalling off-hand probably the most noteworthy contributors would be the man I think Mencken put at the top of our list, Theodore Dreiser (that is, in his opinion of the cited issues), Sir Norman Angell is one of the names we will encounter in going through the issues. Various well-known literary names as well.

3717

Some of the names are less well-known than others, but from where I sit I see the name Max Werner. He is an outstanding military authority; perhaps the best record of any of our military authorities in calling the turn on the shape of things to come from point to point in the present war. I believe he was almost alone at the time

the Russo-German war began, in correctly forecasting what
3718 would happen at the time when the so-called military experts among the commentators were unanimous in saying the Russians could hardly be expected to last more than six weeks at the outside.

Of course, our department names; regular appearances by George Jean Nathan, and up until the September issue, William Lyon Phelps.

It is rather a memory test to give you any list of names without having the list to refer to, really.

Q. I want you to look at the table of contents. A. All
3719 right.

Q. I want you to pick out just a few of the better known names. A. Well, Lieutenant J. K. Taussig, Jr. That is a very famous name in the Navy. He is a son of the Rear Admiral Taussig. A man whose name has meant a great deal in Navy annals. He himself was wounded at Pearl Harbor and spent a year in a hospital bed from which he wrote his story of his own experiences and those of his crew during the catastrophic 24 hours at Pearl Harbor.

Max Werner I have already mentioned, as is the case with Curt Reiss.

Clyde Vandeburg was in the O. W. I. in Washington at
3720 the time he wrote his article in the March issue. That is tantamount to an official article as of that period because it contained information about the war effort as regards aviation, which was being embodied as of that moment in an official O. W. I. folder about our aviation.

Hauptman Hermann, the author of the "Rise and Fall of the Luftwaffe", frankly uses a pseudonym. His real name, while we know it, because we used it to pay the checks for the articles, has never been published or publicly used in this country because he broadcasts for the O. W. I. on the

short-wave foreign language programs addressed to enemy territory, and was one of the insiders of the developing stages of the Luftwaffe. In other words, he was one of the key figures in the conversion of German civil aviation after the last war to the Luftwaffe during this war, during the so-called shadow stages or stage of German rearmament. 3721

The series, by the way, although written as of about September and October, 1942, and beginning publication January 15th with our February issue, very correctly called the turn on the coming phases of the battle in the air between the R. A. F. and the American Army air forces against the Luftwaffe, and while at the time that he wrote, none of the American planes had until that moment been over Germany proper—they had been over the French coast—he showed very clearly the inevitable future course of the battle for Germany in the air. 3722

Q. What about the author Gallico? A. Paul Gallico has had an interesting career. He was perhaps the best known of the sports reporters in the so-called era of wonderful nonsense in the '20's, all the glamorous big names of sports in that period, Babe Ruth and Jack Dempsey and so on throughout the million dollar gate period in America. It is a matter of record that he was the highest-priced sports writer that there ever was; and yet at that stage of his career when he was making a movie star salary, he threw it over to take a $60 a week job as a reporter because he wanted to get away from sports and felt that sports in that particular phase of the '20's was going to go into something of an eclipse. 3723

So, he turned his back on that and went into a totally different direction and started a new career and I believe in 1936 he began to devote himself to free-lance writing, where again he made almost a third phase, and he has since

3724 that time written books and magazine stories very successfully for a number of American magazines.

Q. I notice that Commander Attilio Gatti is a frequent contributor. Is he an outstanding writer? A. Commander Gatti is an outstanding figure in the field of scientific exploration and, perhaps today you could call him an outstanding writer in that he has written on his African explorations for many American magazines.

At the time he first contributed to our pages, however, he had never appeared in print outside of scientific journals, very restricted reports of scientific findings.

3725 But we first became interested in him through his photographs of African subjects which were obtained for publication in Coronet, and then in the course of discussing the background of all these pictures his own story began to seem so compelling that we encouraged him to put it into print, so you might in a sense say that he too is one of our discoveries. Some of the things he has done have had some of the widest circulation, and one of those things was serials for children based on his African experiences; they have run in the Ladies Home Journal and I think in Good Housekeeping.

Q. I notice in the September issue there is an article
3726 entitled "Private Snailspace Wins The War", by Ed S. Woodhead. Is that the Woodhead that is referred to by the Army publication in the excerpts "Shor Nuff"? A. Yes; that is the same man.

Q. What is that article that he wrote about, "Private Snailspace Wins The War"? A. You might call that an indoctrination article for a young man about to enter the Army. This is like a sophomore's advice to a freshman. Woodhead, as I think I mentioned, is in the Army himself. He is a lieutenant, and he takes your inductee by the hand

and tries to tell him the ropes of what is going to be his best way to get on in life in the Army. It is frankly a primer for the rookie. 3727

Q. I notice in the October issue an article by Maurice Hindus. Have you mentioned him and, if not, who is he? A. I have not. Maurice Hindus is a Russian who has been living in this country for a good many years. He writes for many of the New York papers, I believe for the New York Times. He has lectured widely and has written many books. He has made trips to Russia during the present war and has written very effectively since the beginning of the Russian campaign, serving as an interpreter of the Soviets to the average American citizen. 3728

Q. Who is Maxwell Bodenheim? A. I wanted to add, that since he is not a Communist himself, he had for a long time prior to the outbreak had what you would call anything but a fashionable pro-Soviet point of view. I think his opinion carried more weight in educating our citizens than anything with regard to the aims of the Russians than perhaps the average writer in that field.

Q. Who is Maxwell Bodenheim? A. He is one of the most colorful figures in our American literature. He was the partner of Ben Hecht in the period in Chicago in the '20's when they created a literary tempest in a tea-pot with the Chicago Literary Times. Hecht and Bodenheim went their separate ways after that period, and Hecht came to great riches and fame as the creator of Hollywood scenarios, but Bodenheim never did or perhaps did not want to make the same kind of conversion from the literary to the financial, so he has gone on as a poet, and he is a very fine one, and he is now as well-known, but the rewards of poetry are anything but sizeable, and Bodenheim has become a Greenwich Village character in New York who 3729

3730 has simply never managed to capitalize his particular fame the way so many of the others have.

Eugene O'Neill was also in the very same circle of activity as Bodenheim back 25 or 30 years ago. O'Neill went on to make a fortune, but Bodenheim never has.

We have printed Bodenheim very frequently and I must say that on many occasions the purchase of a Bodenheim sonnet has been the means of providing Bodenheim with a month's sustenance.

Q. Reference has been made by Mr. Hassell to the fact that in the August issue you used that "Take Thou" sign
3731 especially with reference to the article "Many Wives Too Many." Will you explain briefly how that sign came into use and describe it for us? A. Well, that sign is used exactly in the Take Thou connotation as a prescription sign is, being an indication that we consider it prescribed reading. That is what I consider prescribed reading in any given issue.

I think the reference Mr. Hassell made is in the March editorial where there was an explanation of that sign, and I would like to look back at it. This is in the left-hand corner of page 6 of the March, 1943, issue: "We put our own little private slug on it, that little R symbol by which
3732 we have for the last couple of years designated those of our editorial dishes which the chef couldn't bear to think of your passing up."

In other words, knowing that a magazine containing as much in the way of editorial content as the average issue of Esquire does, might not be read from cover to cover by every last reader, we have for a long time marked certain things in each issue in each of the categories, represented as being at least the editor's best guess as to what would be popular in the issue.

Now, the fact that I put my little symbol on a story or an article does not necessarily mean that I have thought it is the one of most literary value, that it is the best thing in the issue, but it does represent my best guess as to what will appeal to the greatest percentage of our readers in any given issue. 3733

For instance, here in the March issue I have indicated five things with the idea that I would hate to think of any reader missing any of those five out of anything else that they choose to read or not read in the issue.

The first one is the memorable story by Lieutenant Taussig of his crew at Pearl Harbor, which I considered one of the most amazing American documents I ever read. I had never seen anything in all my experience of reading of stories and war descriptive literature in anthologies and books except Stephen Crane's "Red Badge of Courage" that seemed to me to be as vivid an eye-witness account, and one that would as compellingly take the reader into the experience of actual warfare, as does this article by Taussig, and I not only gave my prescription sign to it, but devoted the page 6 editorial to an explanation of how we happened to get the piece and what I thought of it, and in an endeavor to persuade every last reader to read it. 3734

Incidentally, in that piece about getting the article there is a reference to the fact that Lieutenant Taussig himself, feeling that time was of the essence in the sale of any story of experiences at Pearl Harbor, because the Navy had lifted the ban on the Pearl Harbor episode, assumed that there would naturally be a period at which Pearl Harbor stories could be sold and they would very quickly lose their timeliness, so he sent this piece to three magazines simultaneously, and in his letter to me he said he hoped it would go into Esquire because he considered Esquire more of a man's 3735

3736 magazine and one most likely to reach the men he wanted it to reach in his story; that is, men in the Navy, so our prescription sign in this instance is given to the article.

Our prescription sign in this instance, too, is given to the article by Max Werner, whom I mentioned before as an outstanding military authority, and that is the piece on "Germany's Magic Circle Strategy". It represents a diagnosis for the layman of the underlying formula of German military success as it was first designed and carried into effect for the German general staff by von Schlieffen, from way back, in the old days of the last war, and it shows

3737 how and why that particular ace card which had won the hand in every previous German campaign in this war was bound to be trumped by the Russians when they tried to apply the same strategy formula to the Russian campaign.

Q. Do you use that sign particularly to point out articles that have nothing to do with sex? A. Well, looking over the page I see the rest of these that are marked, and there isn't any sex at all in any of them.

Q. Never mind the page. What is your policy about them? A. The policy is one of trying to high point the issue. I would try to do this. I would never use that sign on five stories and not touch on anything else in the issue. Here,

3738 for example, is one piece of fiction which is given the prescribed sign by an author, perhaps an author nobody ever heard of—B. A. Garside. That is certainly not a big name in the literary field, but this story, which is a story of the Chinese heroes in the present war who have gone underground after the enemy has overcome their provinces—is written by B. A. Garside. B. A. Garside is vice-president and executive director of United China Relief, and the story was written, as, let us call it, sugar-coated propaganda. He

wrote it more on behalf of the United China Relief than for any personal aggrandizement as an author. 3739

The next one is by Sidney Carroll, who represents us on the West Coast, and has done personality articles for us for years, devoted to the present phase of the Walt Disney production, which has been turned over entirely to the war effort, and this is an informative and inspirational piece on the way the total mobilization has gone so far as to include Donald Duck.

Q. To summarize it, you don't use it with any special reference to sex, but, on the contrary, to point out articles that you think are worth while? A. Yes. I wouldn't go out of my way to avoid putting it on a piece with some sex, any more than I would go out of my way to avoid putting it on a piece with no sex. 3740

Q. Will you refer to the February issue of the story of "The Unsinkable Sailor" and tell me who the author of that piece was? A. H. B. Lawrenson stands for Helen Brown Lawrenson. We never have used a feminine by-line in Esquire.

Helen Brown Norden, who wrote for us in the past, is married to a man named Jack Lawrenson, who is the vice-president of the National Maritime Union. Through him she was introduced to Showboat Quinn, whom Lawrenson considered such a picturesque character and typifying for him the outstanding merchant marine heroes of this war, and one who he thought might very well pose as a model for what might be considered a recruiting poster for the Merchant Marine. He wanted to show that all the heroes in this war were not in uniform, and all the colorful characters and colorful exploits are not in the air force, which has become the glamour branch of this war, and by this informal portrait of an unsinkable sailor, inferentially glorify the Mer- 3741

3742 chant Marine as being worthy of the roughest, toughest days of men who went before the mast and went down to the sea in ships.

The article is a faithful portrait. I know and would vouch for the honesty of approach and the validity of artistic handling of anything that Helen Brown Norden would do, and if she sat Showboat Quinn down before a typewriter the way an artist would sit his model down before an easel, I know Showboat Quinn has been faithfully portrayed.

Of course, he's a roguish spirit. The by-line here says: "Perhaps his roguish spirit has protected him through mis-
3743 haps that would have killed or shattered other men."

It is both picturesque and picaresque. He's a rascal and a rogue, and he is so identified. But if you are going to adopt that attitude you would have to junk such things as "The Golden Ass," you would lose "die Valkyrie," and, for that matter, you would have to throw out "Don Quixote."

Those are particular examples of this particular vein.

You can take Robin Hood, for example, and show how his misdeeds have been many, and yet, whether consciously or unconsciously his purpose has been good.

Chairman Myers: What about the "Three Muske-
3744 teers"?

The Witness: The same thing.

By Mr. Bromley:

Q. What connection did this author, Helen Brown Norden, now Lawrenson, have with the Merchant Marine, if any?
A. I thought I explained that to you.

Q. If you did it was so buried that I couldn't remember.
A. Jack Lawrenson is vice-president—I believe he is vice-

president—but he is the public relations boss and stands for the Merchant Marine. Through his Merchant Marine connection, that is the National Maritime Union connection, being vice-president of that— 3745

Q. That is what I want to bring out. The Merchant Marine Union is the National Maritime Union, affiliated with the C. I. O.? A. Yes.

Q. With headquarters in New York? A. Yes.

Q. And this author's husband is vice-president of that union? A. Yes.

Q. Did she ever have any connection with the union that you know of? A. Not that I know of. I think she has had none except by marriage. She is a skilled writer, formerly was one of the department editors of Vanity Fair. She has been one of the outstanding women writers in the upper circles of magazine writing for the last 25 years. 3746

Q. So you would not have expected her to write, or her husband to approve, the composition of an article which would hold the Merchant Marine of our nation up to ridicule, contempt or scorn, would you? A. On the contrary. Every indication is that they would do the opposite under those circumstances.

Q. Do you understand there was such a person as "Showboat" Quinn? A. We had a picture of him along with the article. 3747

Q. Is that his right name? A. "Showboat" is his nickname. Quinn is the last name. The real first name may be in the article.

Q. I didn't mean that. Is "Showboat" his name? A. That is the name he goes by. The photograph accompanying the article was a portrait study done by a well known photographer, but done in anything but formal attire for the camera. He looked just like the character you would imagine

3748 from reading this article. He is a very rough, tough character, and the scar across his throat—his necklace, as he calls it—

Q. I have been wondering why that piece was classed as an article rather than a story. A. Because it is a factual actual piece.

Q. It is not fiction? A. It is not supposed to be fiction at all. Showboat Quinn exists, and it would weaken the strength and purpose of the article if it were called fiction or done in a fictional manner.

This is meant to be just what it purports to be, a first-
3749 hand view or portrait of a hero.

Q. Now, in connection with the Varga girl drawings, have you in the course of the advertising of Esquire magazine published reprints of any of these drawings in newspapers, for example? A. Yes. The March Varga appeared in full page, or practically full page newspaper advertisements in New York, Chicago and some other cities.

The New York "Times," the New York "Herald-Tribune," the "Chicago Daily News," and a few other papers of similar standing, the most reputable and respected newspapers in this country carried this, and this drawing appeared in large size in those advertisements, and without any com-
3750 ment of any kind whatsoever from those newspapers about it.

They published it without any question or without any remark upon it when included in one of our series of advertisements that has been running throughout this year.

That is an institutional campaign addressed primarily to advertisers, endeavoring to make them see eye to eye with us on the desirability of the young men now under arms as a long-term market for steady cultivation at the present time.

Q. Is this sheet a full-page reproduction of the full-page ad that you have referred to? A. Yes. 3751

Mr. Bromley: Will you mark it for identification, please.

(The advertisement referred to was marked for identification as Respondent's Exhibit No. 94.)

The Witness: Incidentally, if I may comment on that further, the copy accompanying the reproduction serves as an explanation of the phenomena of the pin-up in present-day publishing, not only in our 3752 pages but in magazines and newspapers.

It goes on in the body of the text to explain what a pin-up is, defines it as any picture that a soldier would want to preserve and pin-up and look at more than once.

By Mr. Bromley:

Q. Speaking of your advertising generally, of which the last exhibit is an example, what can you say as to whether or not you advertise pictures of girls, whether your pictures of girls constitute the chief kind of advertising that 3753 you do? A. Oh, no. The campaign as a whole consisted of 28 advertisements run over a period from about the middle of February to the middle of October, and the campaign was given a budget at the beginning of the year as being our promotional effort for the period, and, of the 28 advertisements, half were devoted to heroic episodes, exploits of soldiers not only of the United States, but also of some of the other allied nations, and the remaining half which were exhibits out of the magazine itself, featured some of the stories— as I see one now, looking at it from here, a repro-

3754 duction in its entirety of a short story from one of the issues. others featured the airplane paintings by Leydenfrost, featured the various photographs and cartoonists.

One, for example, was a bit of soldier humor, the Time for Income Tax Day, a cartoon as of that moment, and, incidentally, a number of them were the various theatrical and Broadway photographs which were explained to the advertisers in the accompanying copy as our means of bringing Broadway to the boys.

One, for instance, was the "Eve of St. Mark," which has been cited in the material. That also appeared in the
3755 "Herald-Tribune," New York "Times," and Chicago "Daily News."

Q. Out of the 28 I can only find five which have any possible reference to pin-up girls or girls at all. Would you say that is about right? A. That is the probable proportion.

Q. And would you say the remaining 23 were in principle of a nature such as this one I show you which reproduces a Leydenfrost picture of a bomber? A. Yes. Whether they have a girl in the exhibit or not, they are all devoted to an explanation of the magazine's present editorial policy and its emphasis on the Army forces.

3756 Mr. Bromley: Will you mark this for identification, please.

(The advertisement referred to was marked for identification as Respondent's Exhibit No. 95.)

Mr. Bromley: I offer in evidence Respondent's Exhibits 94 and 95.

Chairman Myers: Any objection?

Mr. Hassell: No.

Chairman Myers: It may be admitted. 3757

(The advertisements heretofore marked for identification "Respondent's Exhibits Nos. 94 and 95," were received in evidence.)

Chairman Myers: This is advertising in other papers, isn't it?

Mr. Bromley: Yes. I offered a Varga girl picture to show that other papers carried pictures of that girl and not to leave the impression—

Chairman Myers: I understand that. It may be received. 3758

Mr. Bromley: I have all the other 28 advertising pages with me. I think I will not offer them all now but will rest on the description given by Mr. Gingrich. If Mr. Hassell wants to look at them, he may.

By Mr. Bromley:

Q. In the March issue will you refer to the Sultan cartoon at page 49 and explain to the Board your reason for publishing that cartoon and just where the humor lies in it? A. That cartoon is an example of the fatuous.

The obvious comment to make, it seems to me, is that one 3759
sentry outside the Sultan's palace is delightedly exclaiming to the other that he wonders how the Sultan knew it was his birthday, while really the girl isn't meant for him. She is being sent from one Sultan to another. It is his birthday, and one Sultan is sending him a birthday present, and she comes through the lines on this sentry's birthday, and it is just as if I would wonder how Roosevelt knew it was

3760 my birthday, to pick a day of national importance to celebrate. It is comparable to Professor Lamberti taking a bow for his mastery of the xylophone when really the strip tease in the background is causing all the applause. It is a case of fatuousness being the humor, the ingredient of the situation.

This is a basic type of cartoon that we have been running practically since we have been running the magazine. I think the Sultan cartoons have appeared virtually from the beginning, and, in general, the formula is that of tying up familiar terms to an unfamiliar realm of subject matter.

3761 It is as if one sea monster would exclaim to another sea monster the difficulty she is having with Johnny's school teacher. It is applying homely terms of our own practices to a foreign concept, to a world that is completely removed from our own. That, in general, would be the underlying formula for most of the Sultan cartoons.

Q. Does that explanation hold for the one that is cited in "Sold American"? A. The same thing.

Q. And the one that is subtitled "What am I bid for this 100 pounds of sugar"? A. That is right. Anything that is in our speech or in our consciousness, at the moment of publication, constitutes a timely reference or timely commentary on something that is timeless and unfamiliar. It is

3762 a twist; that is what they call it in the gag-man business, whether it is for a radio program or for a Sultan cartoon, or whatever it may be. It is the way of taking the oldest jokes in the world and putting them in new settings.

Q. Is that true of the fourth and last one complained of, "Such a neighbor, always borrowing"? A. There again the homely reference to something that is familiar in our life is applied to something that is completely unfamiliar to our ordinary experience.

Q. Now, Mr. Hassell has made some reference to the motion picture "DuBarry was a Lady." 3763

Were Varga girls used in that picture? A. The entire Varga calendar for 1942 served as the basis for a sequence in that picture. They had Varga come out to Hollywood and cast that sequence and pick out of the various girls available, brought together for that purpose by the studio, which one would most nearly approximate or fulfill his abstract concept as represented in the page for January, for instance, of the 1942 calendar. Then they costumed that girl.

As a matter of fact, they had him supervising the costuming as well as the making up and the original casting of each character. In other words, he has, as nearly as possible, translated into terms of real life people his calendar for 1942. Then the twelve girls, as I understand it—I didn't see the picture—the twelve girls acted a sequence in which the Varga girls came to life. 3764

Q. Now, does that mean in the January, 1942, issue you published a series of twelve Varga girl drawings just as you did in the 1943 issue of January? A. That is right. It was the January issue which contained the Varga calendar for that year just as our January, 1943, issue contains the Varga calendar for that year.

Q. Can you tell us whether or not before you published that calendar you obtained the approval of this Post Office Department? A. Yes, because we had the arrangement in existence at that time in regard to the specific approval or disapproval of the page for page item of every issue. In other words, we sent down beforehand the entire publication, the dummy, from front to back, and anything that was not approved was called to our attention and there was a substitution that was asked for, and after a substitution was made then the issue was, as a whole, approved. 3765

3766 Q. I mean for these twelve drawings which you submitted, were any of them disapproved? A. No.

Q. Was that true of the verses, too? A. The verses, there were some changes. There were, as I recall, not quite half of the verses that were complained of, and we wrote new verses and substituted them, so it was the verses and not the calendar drawings.

Q. Now, then, this that I show you are the drawings as they were published in the January, 1942, issue? A. Yes, this is the calendar bound as a separate item, outside of the pages of the magazine, but there is no change whatso-
3767 ever between the two sets of drawings, as published in the magazine, and as republished in the calendar itself. They are identical.

Mr. Bromley: I ask that that calendar be marked for identification.

(The calendar referred to was marked for identification as Respondent's Exhibit No. 96.)

Mr. Hassell: Mr. Chairman: I understand by the ruling on my motion to strike the portions of the answer, that it is the opinion of the Board that
3768 this matter going back prior to January, 1943, issue would be considered by the Board.

I would like to have an objection entered into the record concerning matter going past that issue.

Chairman Myers: The objection is overruled.

Mr. Bromley: I offer Respondent's Exhibit No. 96 in evidence.

Mr. Hassell: The same objection.

Chairman Myers: It is admitted.

(The calendar heretofore marked for identification "Respondent's Exhibit No. 96," was received in evidence.) 3769

By Mr. Bromley:

Q. Now, over what period of time by beginning and ending dates did you submit your magazine to the Post Office Department and receive approval? A. After the December, 1940, issue had one feature complained of by the Solicitor, I came down at that time and saw the Solicitor and arranged a change in that one item in the December, 1940, issue, and then from that period on we submitted the dummy in advance. That would be beginning with the January, 1941, issue, and we did the same with every issue through July, 1942. In other words, there were, I believe, nineteen straight months in which we had a prior clearance of the entire contents of each issue before publication. 3770

Q. Did you get a letter each month with respect to each issue? A. Yes. Before we mailed each month's number during that period we had a letter, and so did the Postmaster in Chicago have a letter, advising them the issue could be accepted for mailing, and in some instances explaining that this or that change had been made in the issue, so that each one of those issues had a letter, simply in a blanket way, saying that the issue had been seen and could be accepted for mailing, or saying that certain features to which objection had been taken had been changed, and that as changed the issue would be cleared for mailing, and could be accepted for mailing by the Postmaster in Chicago. 3771

Sometimes to save time, there was a telegram sent where there might be changes that came after we had gone to press

3772 or were very close to press time. To facilitate handling of it, Mr. Miles would sometimes send us a telegram, or once or twice we had a telephone call, a collect telephone call, but that was always confirmed by either a telegram or a letter.

Mr. Cargill: What was the date of the last letter that you received, or the last approval?

The Witness: The last such letter would have been in reference to the July, 1942, issue, but I believe it was May 21, 1942, that I received a letter which told

3773 us that we could no longer have our prior clearance, issue by issue, and that was a letter which simply said that from that time forward we would not be able to utilize the facilities of the Solicitor's office for prior clearance of issues; that we were on our own from that point forth.

Mr. Cargill: In other words, you were on your own responsibility?

The Witness: We were on our own responsibility.

Mr. Cargill: As of July, 1942?

The Witness: As of July, 1942. The difference between the dates of letters, you see, was that these

3774 things were clearances before publication. For instance, you might have one in April referring to June, in March referring to May, in February referring to April, and so on, you see.

The first one which refers to the January, 1941, issue I believe is dated about November, 1940, and they are approximately a month apart from there on right through.

Mr. Cargill: But you had no authorizations from the Solicitor's office after July, 1942?

The Witness: That is right, no clearance of any kind on any of our subject matter after the July, 1942, issue. 3775

I had brought down dummies and had occasionally, to facilitate the clearance of the issues, as they came through, had once or twice brought down a batch of cartoons and gone over them with Mr. Gregory, and thus had a guide as to whether they should be put into the issues or not. As I remember, we cleared two batches that way, and then we—

Mr. Cargill: Was that after July, 1942?

The Witness: No, that was before that.

Mr. Cargill: In other words, the issues complained of, though, here, were from January, 1943, on? 3776

The Witness: That is right; and, Mr. Cargill, the prior clearance that I spoke of—when I say I brought down batches of cartoons, of course we used up the cartoons quite quickly, so it would be only infrequent instances that Mr. Gregory had cleared, say, in the spring of 1942, certain matters, and it might run over into the cited period, because I brought down another batch after we had received this notification that we could not get the monthly clearance any longer, and I couldn't get those looked at; there wasn't any chance to do that. 3777

Mr. Cargill: Were any of the cartoons that were approved of by the Solicitor's office run in any of the issues after January, 1943?

The Witness: As I say, it was a relatively insignificant number because, for the most part, I would bring down a batch of cartoons that might be scheduled to appear, say, in the next three months and go over them with Mr. Gregory, sometimes changing a

3778 gag line or sometimes dropping one out entirely, but they would be used up, say, within a matter of three months after that, so it would be a matter of sheer accident if there happened to be something that was cleared by Mr. Gregory in March or April, 1942, that was not published, or would not achieve publication until 1943.

By Mr. Bromley:

Q. Coming back to Mr. Cargill's question, what about the
3779 postal card advertisement that was complained of in one of these issues? A. Well, that would be in this.

Q. Why don't you tell him about it. A. That is true. The Varga drawing with the glass hat, that is what you mean, which is a cited drawing in the "Esky" buy products advertisement first appeared in the December, 1940, issue, which had been passed and cleared as the first of this group. That is when the whole arrangement really began. In the December, 1940, issue, there was one verse complained of.

Chairman Myers: You mean the original from which the post card was taken?

3780 The Witness: That is right, the original from which the post card was taken was in the first of these approved issues, and when I say "approved" I mean if there was specific objection taken to anything complained of then that objection was met by a substitution or change in the contents, so that it was approved by the Solicitor's department.

Mr. Cargill: Is that the only one that you recall?

The Witness: Yes. I would have to check through to find any other possible thing of that sort.

Mr. Cargill: Well, it is not necessary for you to look it up. 3781

By Mr. Bromley:

Q. Now, what you have been referring to is the advertisement that appears on page 146 of "Esky Buy Products," and the figure of the girl in the middle card, the one down on her face with a hat on her back? A. That is right, that is in the Varga calendar for the previous year.

Mr. Hassell: What issue is that?

The Witness: That is in the December, 1940, issue, 3782 that I went over with Mr. Miles.

Mr. Bromley: That was for July, 1943, page 146.

By Mr. Bromley:

Q. Now, was the same Sultan type of cartoon which appears four times in the 1943 issues a regular feature for many years in the magazine? A. Yes, it had appeared with comparative regularity virtually from the beginning of the magazine. I don't recall whether there was one in the first actual issue, there may not have been, but certainly as of that following spring of 1934 the Sultan cartoon began and has appeared with regularity ever since. The Sultan cartoon is one of the oldest features in the magazine. 3783

Q. So in the nineteen issues which were approved by the Post Office Department, there were many Sultan cartoons? A. There would probably be a dozen. In the course of the average nineteen issues there would be at least a dozen Sultan cartoons. It is something that appears at least issue for issue.

3784 Mr. Cargill: How did it occur that you made any arrangements with the Solicitor's office to give you a ruling on that before it was published?

The Witness: Why, the December, 1940, issue, the big December issue, was in the mails, or had come to the Post Office for mailing, and we suddenly got a telegram—I believe it was a telegram—saying that the Solicitor's office held that the verse on page so and so of the December issue was unmailable.

That was one of these gate-fold features which was called "The Knight Before Christmas" and consisted

3785 of a whole series of drawings, and with those accompanying verses underneath, and, of course, the magazine was all complete. At that moment we had the finished magazine available and the only thing that could be done about it was to make a quick change in the verses and then reprint in black over the page with the new verses appearing in white on the black background. In other words, in reverse. The complained-of verses were in black on a white background. So I flew down and met Mr. Miles that night, to go over the verses, and try to substitute new verses for the ones complained of, so he and I worked over the

3786 verses, and then checked, as I recall, with both Mr. Hassell and Mr. Gregory, and I flew back with the revised verses, and I said that we would be very glad to change anything at any time in the magazine to which any objection was taken, but it was certainly difficult to do it after a magazine was all printed.

I said that as of the future if there were any comparable changes to be made we would like to know about them as soon as we could, that we would at least be informed as to them, so he said if we would

send down the dummy as we had the dummy complete that they would go through it and if there was any objection to be recorded they would tell us about it instantly. 3787

They would tell us about a substitution and we would have time to make it before completing our printing processes, so, having been through the December, 1940, issue we sent down the dummy for January, 1941, right after my return and we did that after that for every month from then on, for 19 issues.

The first six months I don't believe there were any substitutions or any objections whatsoever. That is, clearances came through automatically month-by-month from January, 1941, through and until August, I believe, of 1941 was the first issue in which there were any changes to be made. 3788

By Mr. Bromley:

Q. I was looking for one of the letters which Mr. Miles sent to you covering one of those issues January-August, 1941. Have you got them? A. Yes. I think I have them in my brief-case (handing letter to Mr. Bromley).

Q. I show you a letter dated November 19, 1940, addressed to Publisher of Esquire, and ask you whether that is typical of the letters which you received for the first six or seven months of 1941? A. This is typical of the last stage of that process each month. After we had been informed by the Solicitor's department that the issue was cleared for mailing, then the Solicitor's department informed the postmaster in Chicago that the issue was cleared. 3789

Then, as the last stage in the correspondence the postmaster in Chicago would send us a letter confirming the fact.

3790 either by telephone call or wire or letter, that the Solicitor's department cleared the issue for mailing.

Mr. Bromley: Will you mark this letter of November 19, 1940, for identification?

(The document above referred to was marked Respondent's Exhibit No. 97 for identification.)

Mr. Bromley: I offer 97 in evidence.

Mr. Hassell: Subject to the general objection I made before.

3791 Chairman Myers: Same ruling. It will be admitted.

(The document heretofore marked Respondent's Exhibit No. 97 for identification was received in evidence.)

Mr. Cargill: Had you run into any difficulty with the Post Office Department prior to this time? That is, prior to 1940?

The Witness: Not for a number of years. We have had an occasional communication saying that this or

3792 that item of an issue had been regarded as non-mailable by the Solicitor's office, and we had had none since, I believe, 1938. We had had no communication of any kind concerning anything in the issues from 1938.

Chairman Myers: I got the impression a while ago that there was a telephone call or a telegram sent about one of the 1940 issues, about the Varga girl.

The Witness: That was it. I say until the December, 1940, issue we had had no communication con-

cerning anything in any issue for at least two years and as of the inception of the magazine we have had perhaps twice, I believe in 1936 and 1938, notices where we had this or that specific item called to our attention, saying that the Solicitor of the Department has ruled that page so-and-so of your issue for such-and-such a month has been ruled unmailable. Please govern yourself accordingly and exercise caution so that in the future you will not again publish items which are deemed unmailable. 3793

So the relationship we established as of the end of 1940 was something new in our experience and represented the first opportunity we really had ever had to establish a standard with the Post Office because prior to that anything called to our attention was called to our attention only after the fact and only as a matter of record saying, at some time after the instance, the thing you published a couple of months ago has been considered non-mailable. 3794

Mr. Cargill: Do you recall off-hand without any research how many of those issues were ruled non-mailable by the Solicitor?

The Witness: Now, which do you mean, Mr. Cargill? Before 1940? 3795

Mr. Cargill: From the inception.

The Witness: From the inception?

Mr. Cargill: Yes.

The Witness: I would say that there were two or three items in 1936. Perhaps not two or three issues, but there might be two or three items in an issue and I think it was twice in 1936, and I think we were notified as of the same notification, in saying that the issues for March and April you had the following pages

3796 which were regarded as unmailable; so my recollection of it is two instances of that kind in the whole previous history of the magazine from 1933 to 1940.

So that when we got the notification concerning the December, 1940, issue I called up here to see what could be done about the complained of page in that issue because it was just barely physically possible to get the forms—we couldn't get all of them. That had in some part gone through in the original form. Those copies were put on the newsstands. I think it was a matter of twenty or thirty thousand of them, but then

3797 by reprinting over that page we used verses that were acceptable and we were able to get all the rest of it in the new form, and then every copy that went in the mails was in the new form. That is how we got out that issue.

By Mr. Bromley:

Q. Coming back to the question, you mean that prior to 1940 there were only two occasions on which you had had only two complaints from the Post Office Department, as best you remember? A. Yes. As I recall it, it was in 1936 and in 1938. That is, there was nothing from 1933 to 1936

3798 and only a couple of issues until the year 1940 when we had this one of which I have been speaking.

Q. So, there was no complaint from 1933 to 1936? A. That is right.

Q. And you think only one or two items complained of in 1936 out of one or two issues? A. Yes.

Q. And again in 1938 one or two complained of items out of one or two issues. Is that what you mean? A. That is right.

Q. And then nothing until the end of 1940? A. That is right. 3799

Q. And then this system went into effect which lasted until August, 1942, right? A. That is right.

Mr. Cargill: When this matter was complained of and called to your attention and you changed it, do you recall what that matter was?

A. Yes. I have it here, as a matter of fact. It was drawings by Pachner and verses by Phil Stack. It is the same type of verses that accompanied the Varga drawing and it was called "The Knight Before Christmas" and one or two of the 3800
instances had two lines of verses beneath to which exception was taken, so between us really we rewrote those verses to get around that objection, and then printed a black background over the page so the new verses could appear in white type against the black background, and then blotted out the white verses.

By Mr. Bromley:

Q. Have you got the page complained about? A. Yes.

Chairman Myers: Suppose we take a ten minute 3801
recess now.

(Whereupon, a brief recess was taken.)

Mr. Bromley: Will you mark for identification this gate-fold entitled "The Knight Before Christmas"?

(The document above referred to was marked Respondent's Exhibit No. 98 for identification.)

3802 *By Mr. Bromley:*

Q. Is Exhibit 98 for identification the gate-fold as it appeared originally in the December, 1940, issue? A. Yes. This is the form in which certain verses were held objectionable by the Solicitor.

Mr. Bromley: I offer it in evidence.

Chairman Myers: That is what they ruled out originally, is it?

The Witness: A couple of these verses which are changed in the revised form.

3803 Chairman Myers: It may be received.

(The document heretofore marked Respondent's Exhibit No. 98 for identification was received in evidence.)

Mr. Bromley: Will you mark for identification the Esquire issue for December, 1940?

(The document above referred to was marked Respondent's Exhibit No. 99 for identification.)

3804 Mr. Bromley: I offer Respondent's Exhibit No. 99 for identification in evidence.

Chairman Myers: It may be received.

(The document heretofore marked Respondent's Exhibit No. 99 for identification was received in evidence.)

By Mr. Bromley:

3805

Q. Will you indicate which panels were changed? A. Panel 9, "And he started at once making passes at her", and then on down to panel 14. Those are the two most noticeable changes.

In other words, the objection was taken to—

Q. Take panel 9. What was it before it was changed and what was it after it was changed? A. "And he started at once making passes at her" is the way it read in the original form and after the combined versifying efforts of Mr. Miles and myself it read "Whose false face revealed a stray husband of hers."

3806

Q. And the other panel? A. It originally read "Then just as the dawn started lighting the sky", and we changed that to read "But long before dawn would start lighting the sky."

Q. Otherwise, the thing appeared and was approved by Mr. Miles in the form in which it was prepared. Is that right? A. I would hate to say that because there may be some minor changes elsewhere in it, but the objection taken was that there was no clear way of showing that this was her husband and we put that in.

Q. I will read panel 1. "'Twas the night before Christmas". A. That is right.

3807

Q. "2— And all through the flat". A. That is right.

Q. "3. There wasn't a sign of a cane or silk hat." A. That is right.

Q. "4. Poor Doris was lounging in her silken bed"— A. That remains the same.

Q. "5. With visions of mayhem in her pretty head." A. That remains the same.

Q. "6.— When on her penthouse roof there arose such a clatter". A. That remains the same.

3808 Q. "7.— She sprang to her feet to find what was the matter". A. That is the same.

Q. "8. When in stepped a gent who was all dressed in furs". A. That remains the same.

Q. "9.— And he started at once making passes at her." A. That was changed to "Whose false face revealed a stray husband of hers."

Q. "10.— He drank of her Scotch and he drank of her charms." A. That was changed to "She gave him a drink and a casual hug".

Q. "11.— And he held her enslaved in his two manly
3809 arms." A. That was changed to "While wondering whether to pardon the lug".

Q. "12.— Resistance from Doris was not very strong." A. That was changed to "With Christmas soon coming temptation was strong."

Q. "13.— And somehow the moments just drifted along." A. That was changed to "To let by-gones be by-gones, although it was wrong."

Q. "14.— And just as the dawn started lighting the sky." A. That was changed to "But long before dawn would start lighting the sky."

Q. "15.— He sprang to his feet and he kissed her good-
3810 bye." A. That is the same.

Q. "16.— And she heard him exclaim as he started to leave." A. That was changed to "But." It reads "But she heard him exclaim as he started to leave."

Q. "17.— Just rehearsing, my dear." A. That remains the same.

Q. "18.— I'll be back Christmas Eve." A. That remains the same.

Q. And the pictures remained the same? A. Yes, throughout.

Q. Now, I show you a letter dated May 6, 1942, signed by Vincent M. Miles, and ask you if that is typical of the kind of letter you received from Mr. Miles after the middle of 1941? A. Yes. 3811

Q. It is? A. Yes.

Mr. Bromley: Will you mark that letter for identification, please?

(The letter referred to above was marked Respondent's Exhibit 100 for identification.)

Chairman Myers: You didn't change any of the pictures, did you? 3812

The Witness: No, we reprinted a black background around the pictures so that the new verses came through in white over the old verses.

By Mr. Bromley:

Q. Did you change any of the pictures? A. No. They were already printed with the verses beneath them, so without any change we reprinted an over-lay of black and allowed the new verses to come through in white.

3813

Mr. Hassell: Was this offered?

Mr. Bromley: Yes, I offer it in evidence.

Chairman Myers: It may be received.

(The document heretofore marked Respondent's Exhibit No. 100 for identification was received in evidence.)

Mr. Bromley: Mr. Chairman, I should like to offer in evidence now all of the remaining 19 issues of the

3814 magazine in the form in which they were approved. Subject to your ruling, may I make the offer now and have them marked at some recess time?

Chairman Myers: Yes.

Mr. Bromley: I offer in evidence all the 19 issues subsequent to that of December, 1940, which were specifically approved as testified to by Mr. Gingrich.

Mr. Hassell: I object to the receipt of this matter and I want the Board to understand that if we go into this we must necessarily go into considerable details in the files of this office to show the whole pic-

3815 ture. This only shows part of it.

Chairman Myers: It strikes me, Mr. Bromley, that we are getting pretty far afield. All this testimony has been directed to the allegations set forth in your answer, but to put all those issues in it looks to me like is just cluttering up the record.

Mr. Bromley: I had in mind a specific purpose, Mr. Chairman, and that is to show in this way what seems to me a complete item of proof, as to what current standards were recognized by the Post Office Department.

I do not expect to rely on any theory of estoppel

3816 of the Post Office Department. I don't think it is competent for that purpose. But it does seem competent to show the judgment of this Department about current standards of morality.

Chairman Myers: Haven't you that in the record by what you have shown by this witness?

Mr. Bromley: I have that they approved them, but not what they approved.

Chairman Myers: You have in one issue, the last of the exhibits prior to this, where the changes have been made.

Mr. Bromley: Yes, sir; but that is only one-nineteenth of what the Post Office Department approved and I think an inspection of those nineteen issues will show an approval of everything which is now here disapproved. 3817

Mr. Hassell: May I say a word before you make your ruling, Mr. Chairman?

Not in support of counsel's contention to the admission of this matter, but I may state that the answers to questions by Mr. Gingrich on direct thus far have opened this entire matter up. I understood—perhaps I should have objected to each one of those questions— 3818
but I understood the position of the Board was that it was going into this matter. Manifestly, if I am shut off from cross examination in developing this whole story—

Chairman Myers: You won't be. They have already touched on it to such an extent that on your cross examination you can go into everything, but it seems to me on this point that this objection should be sustained subject to future development.

If we consider it necessary later to have them in, we can change the ruling. For the present the objection is sustained.

Mr. Bromley: I would like to limit my offer to 3819
the August, 1941, issue and attempt to prove that is typical of the others.

By Mr. Bromley:

Q. I show you the issue of Esquire for August, 1941, and ask you whether in the form in which you see it it was approved by the Post Office Department? A. Yes, sir.

3820 Mr. Hassell: I object to this. This witness has used this form of testifying that a certain thing is typical—recently with respect to a letter this office wrote. I understand it is not at all typical.

You are trying to get this matter in based on a picked issue of this publication and if we do that I think we should go into all of it.

Chairman Myers: Would you prefer to have the whole nineteen put into the record?

Mr. Hassell: I don't think any of it has any pertinence in this issue and I so stated in my objection, but if we are going into one issue to show it is typical,

3821 naturally I will have to go into others to show it is not.

Chairman Myers: I think you are entitled to.

Mr. Bromley: Well, let me finish my offer.

Chairman Myers: Yes. Suppose we solve the question this way: by admitting the entire nineteen issues so that Mr. Hassell will have a free field for his cross examination. They may be marked at a later time.

You will reserve 19 numbers.

(Thereupon, Respondent's Exhibits Nos. 101 to 119, inclusive were reserved and subsequently

3822 the Reporter marked the issues of Esquire Magazine from January through December 1941 and January through July 1942, respectively, Exhibits Nos. 101-119, inclusive.)

By Mr. Bromley:

Q. Now, will you refer to the July issue of 1943, at page 81, which is the paste-your-face cartoon, and explain to the Board the purpose and significance of that feature? A. This was offered to us as a series of three photographs by Erwin Blumenfeld, depicting the Army, the Navy, and the

Marines. The pictures, of course, were received complete with Blumenfeld's crayon indications of how to cut out from the complete photograph the indicated area in order to provide a place for the individual Marine or soldier or sailor to substitute his own features, his own likeness, over that of the one who posed for the picture in the first place. 3823

Q. When you say "complete", do you mean the sailor's face appeared in the photograph? A. Yes. As they came in the complete photograph came, marked as to what should be blacked out in order to create the blank for the substitution of one's own likeness for the features of the man in the original cartoon.

Q. Is this thing that I hold in my hand the original photograph? A. That is the original for August, the second of the series. 3824

Q. Second of the series? A. Yes.

Q. I show it to the Board (holding up before the Board). You mean the face of the sailor was in there when it came to you? A. That is the original photochrome from which the page was printed.

Mr. Bromley: Can the Board see it?

Chairman Myers: Yes.

The Witness: Then you can see marked in red crayon over the photochrome to show how to cut it out. 3825

By Mr. Bromley:

Q. What was your purpose in publishing that series? A. Our purpose was to provide entertainment for the members of the armed forces from which they could get some amusement. It is the type of thing that seemed to us to have a great deal of appeal to the individual member of these various services.

3826 We had immediate response, as a matter of fact, to this Marine picture from the mothers of two of the boys, as I recall, who had received the pasted-in pictures from their sons. One was a woman whose boy was in the South Pacific area somewhere and she commented on the fact that as it happened he had the very same medals and campaign ribbons that are on the breast of the marine who posed for this picture, and she was pleased and amused by the rest of it.

Q. Coming to the paste-your-face picture in the August issue, complained of, did it ever occur to you that the
3827 phrase "paste-your-face here", on the white head could have any indecent significance or connotation? A. No. We began the previous month and, of course, we continued the same technical form of carrying the picture with the instructions summarized for brevity, and in connection with all three of them we explained in the accompanying copy at the left-hand page at great length, just how to go about pasting your face here.

We told them how to clip the picture and to use some library paste—I think we said "flour from the cook's galley will do."

Q. And then you said "Paste your likeness in the indi-
3828 cated blank space," did you not? A. Yes.

Q. Was the phrase "Paste your face here", used on each of the other two of this series? A. Yes, a standard phrase went through the series.

Mr. Cargill: Who selected that phrase?

The Witness: I suppose I did. I think I must have done that. I remember working on the series with our production man who would normally ask me on anything like this going through, for instructions

as to what it should say, whenever there is anything that is to be inserted into a mechanical arrangement where there is a combination of type and pictorial, whether it is a sub-head to go beneath one of our sporting prints or an identifying caption of a reproduction of a painting—he will always ask me "How do you want this to read," and I will give him a phrase. 3829

I will write it on a slip and he will attach it to the piece of art work in sending it through for plates to be made.

Mr. Cargill: Did you have any discussion with anybody about that phrase? 3830

The Witness: Not other than with him. Probably I wrote it out for him or I may have written it right on the lay-out. It is the shortest way to summarize what we say in practically a paragraph on the page opposite.

Mr. Cargill: If you had used the phrase "Paste your photo here" instead of "face", would that have been as short?

The Witness: It would not have been quite as true, Mr. Cargill, because it is only that portion of a photo which would fit this spot that is meant. That is, your face in place of the face that would be here. In other words, put your face in place of what would be the face. 3831

And a more detailed discussion is over here (indicating).

The possibility of there being any other connotation in "paste your face" certainly never entered my mind in any of them. The standard phrase, as it happens, began with this one, which is the first. The man is standing there.

3832 Mr. Cargill: Did you select the order in which they would appear?

The Witness: I believe so. They all came in at once, so they were all put into work at about the same time, but whether one began it or another began it, was more or less happenstance. I think the only thing that may have induced me to start with the Marines, rather than the Army or the Navy was that we had several complaints saying "You are always running something for the Army or the Navy and the Air Force, and what is the matter with
3833 the Marine Corps?"

That would have been the compelling motive to begin with the Marines.

I think it is a matter of sheer chance as to whether the Army came next or the Navy came next on the rest of the order.

By Mr. Bromley:

Q. Now, will you please tell us something about this man Varga who draws the Varga girl drawings? A. Varga is a Peruvian by birth but a European by education. He spent very little time in Peru but was taken by his family
3834 to France in his early youth and most of his schooling was received—I believe all of his schooling was received in either France or Switzerland, and his art studies along with his other educational preparation, were in Europe.

He came to the United States about 1915, as I recall it, 1914 or 1915, just after the beginning of the last World War, and the first professional work he did in the art field was for Ziegfeld. He began making posters for the Ziegfeld Follies as of about 1916, and all the various Ziegfeld girls

were portrayed by Varga in large posters which were used for display in the lobby of the New Amsterdam roof and the theatre display posters, and for a long time, until Ziegfeld's death, he did do other work, but for the most part his patron really was Ziegfeld. 3835

After Ziegfeld's death he moved west, and he went to Hollywood and he lived in California for a period from perhaps 1928 or 1929 to 1940. He didn't do as well in Hollywood as he had done in the twenties in New York. He had a job in the M-G-M art department and he was doing layout work in conjunction with the scenery, that is, the sketches for the various elements of the motion picture productions, and he had done some portrait work from time to time, but aside from that he had not been in his stride, let us say, of doing the kind of thing he had done best in the Ziegfeld period. 3836

Q. Do you have him under exclusive contract or does he work for others? A. We have him under contract and he does do work for others, but subject to the provision that we have first claim on his time. He can accept and has accepted advertising work and the only proviso is that he can do it but he cannot let some advertising deadline interfere with our work.

Q. Do you remember the reference in "The Sound and the Fury" which Mr. Hassell pointed out, from some reader, that these pictures are made from nude models? A. He may have his wife hold a pose to observe muscular play or something of that sort, but they are not done as a matter of representation of any living person. As a matter of actual practice we are very apt to provide him with things to utilize in creating these various poses. 3837

We will make a clipping of some attractive new hair-do or costume or pose out of the newspapers and magazines

3838 and snip it out and send to Varga as a suggestion for future Varga girls.

Often he will make one that may be a composite of three or four such clippings.

I recall in the case of February in the calendar, the hair-do there came from a clipping that was out of the New York Times, and the pose of the girl came from another clipping, and that, as it happened, was from a photographic magazine, I believe Popular Photography. The clipping for the lower half, below the head, was the nude, and she was at the side of a spring or by the water, so he did the drawing as he does all of these—he drew the body completely and 3839 then drew the costume as an over-lay superimposed. He does that to get the anatomy in true proportion and to make sure that the muscular play in these various poses is completely life-like before he superimposes the costume.

As a matter of hearsay, it is quite possible that this reader who says "I have heard that Varga works from nude models" may have seen some publicity to the effect that the drawings are done in their entirety in the nude before they are completed as costumed drawings.

That is different than saying you would work from nude models.

3840 But the composite source of his various poses is quite a procedure, in this case in point being the hair-do and the pose of the head from one picture, superimposed on the body pose taken from another.

And then, as a third phase of the completion of it, the selection of the costume and the superimposing of that on the completed drawing.

Q. Now, in connection with the review of the "Star and Garter" which appears in the issue of January and which you hold in your hand, by Gilbert Seldes, is there anything more

frank or forthright in that description of what is presented on the stage than there is in theatrical reviews where shows such as these are reviewed? A. Oh, no. As a matter of fact, I would say Seldes is less lingering in his emphasis upon detail of that nature than the recent reviews of the Katharine Dunham dance recital in New York, where the intent and purpose, I know, is an artistic one. 3841

Katharine Dunham has studied for years, enjoying the subsidy of the Rosenwald Foundation, to develop in our dance form some of the native dances of Haiti, and yet the reviewers viewed her latest performance like little boys behind the barn.

Q. Is this review by Ray Barrett, in the September 21, 1943, issue of the New York Daily News, typical of the kind to which you refer? A. Yes. I was recalling this phrase "bumps and grinds". 3842

Mr. Bromley: Will you mark this for identification, please?

(The document above referred to was marked Respondent's Exhibit No. 119A for identification.)

Mr. Hassell: I object to this. 3843

Chairman Myers: The objection is sustained. You may make an offer of proof.

Mr. Bromley: The offer of proof is contained in the article itself and the description of the dance. That is all.

3844 ***Cross Examination by Mr. Hassell:***

Q. How long did Esquire run as a quarterly, Mr. Gingrich, before it was converted to a monthly? A. There was only one quarterly issue. After its appearance as a quarterly the decision to change it to a monthly was made almost instantly upon the magazine's appearance. There was only one issue called a quarterly.

Q. Was that issue of Esquire known as "Autumn"? A. Autumn, 1933, yes.

Q. 1933? A. Yes.

3845 Q. I believe you testified that when you started out with Esquire the idea was to give it a certain stag party flavor. Is that the term you used? A. I said that the humor in the first phase of the magazine, during the first year, when it was limited to about 100,000 circulation; I mean, the humor of both cartoons and articles was of the stag party variety. Yes, I used that phrase.

Q. What did you mean by that? A. Well, I had this in mind: If you recall in my direct testimony at that point, Mr. Hassell, I tried to emphasize that I was speaking relatively, as of between the beginning and ending phases of this magazine's development, from then until now, and I said that we ran the stag party type, or we called it the
3846 smoking room type of humor because we felt that the magazine was in restricted circulation.

Now, I would like to again emphasize that point, speaking of manners and conventions among men subjects, men are out together, hunting or fishing; two men go on a hunting expedition or camping expedition, and one or both step over to a corner fence post and urinates in plain sight of each other, but away from people. That would be something that was in keeping with the nature of the company present;

whereas if they did such a thing at a formal dinner party with ladies present it would be an indecency. 3847

Now, the whole thing has a relative point, that things that you find are appropriate in one setting would be distinctly out of place in another setting, so as the circulation broadened we got away from the original emphasis on the men only angle; that is, the anti-feminist or feminized viewpoint; both in our fiction and in our cartoons.

It was an opening phase of the magazine that was quickly outgrown by the circulation and by the broadening of the audience.

Q. That applies to the fiction and the cartoons and the jokes in the magazine? A. Yes, it applied I think most notably to the cartoons but also in that phase we rather emphasized it in the articles and in the stories, too. 3848

In the earliest phases of the magazine it stressed always the attitude of men alone, men apart from women. Now, that is a developing phase that has been considerably modified and changed since the magazine has gone on.

Q. Now, how does that apply to the pictures such as the Varga girl pictures you publish? A. Well, the Varga girl pictures are certainly a kind of thing we would see no objection to presenting in mixed company; in fact, we consciously do present them in mixed company in the sense that we know we have both men and women in our audience now, and the women readership is a large one. 3849

Q. Now, referring to the early policy of the magazine, did you carry pictures of that sort? A. Oh, we had full page cartoons. The only thing that you could call in any way comparable to the present pin-ups size and the pin-up treatment of the Varga girl was the first phases of the Petty girl, but even there there was quite a difference because in the original presentation the Petty girl was only a type of

3850 cartoon like the others, with a gag line, usually with two or three figures in the cartoon, so you can't really find a parallel in the early issues of the magazine, oh, up until 1940 with the Varga feature; that is in this later phase of the magazine. We had no such feature at that time.

Q. I believe you testified that the Varga girl feature has been an outgrowth largely of the demand brought about by the war? A. Yes, the pin-up—the emphasis I think is something that resulted from the war, our reaction from the British Army and armed forces went through its first couple of years and constituted the first demand for a pin-up type
3851 of material, and then, of course, as the conscription program got under way in the fall of 1940 we began to anticipate the demand because we were guessing that it would be comparable in this country as we got into the war, to what had been in the British services as of the previous couple of years.

Q. Now, you referred to, I believe you named it the girl-gag type of humor. A. Yes.

Q. What did you mean by that? A. I had in mind a magazine that is made up almost exclusively of leg art, girl gags. We call that gold-digger gags, where all of the cartoons have only one very narrow vein of humor, that is
3852 confined exclusively to sex jokes, chorus girls, gold-diggers and that sort of thing, and where the magazine as a whole contains no other type of either text matter or pictorial matter; citing that as a girl-gag magazine where that predominates and pervades and consists of virtually the entire content of the magazine.

Q. I believe you testified on direct that Esquire had become conspicuously successful in this type of humor and that brought about imitators, and you mentioned the girl-gag

and leg art publications as being imitators of Esquire. A. I said imitators of one phase. 3853

Q. Of one phase of Esquire? A. Yes. And I said that because they distorted or over-emphasized or played up only one facet of the magazine's original formula, they cheapened for us and made less desirable to us that aspect of our original formula.

They coarsened, I wouldn't say coarsened, but they cheapened almost the desirability and value of that kind of material by making it a commonplace, whereas we had thought of it as being a smart and an exclusive type of feature.

Q. Now, you have gone into some length of your editorial formula. In response to questions asked you on direct you undertook to give the percentage of material devoted to each editorial feature as I understand it. Isn't it a fact, Mr. Gingrich, that Esquire has had an editorial policy to carry in the magazine these jokes that we refer to as girl-gag jokes, cartoons dealing with a sexy matter, the Varga girl pictures, and other matters such as were called attention to previously in this hearing? A. In their proper proportion in the context, the magazine as a whole, yes, we have cartoons that do feature sex. 3854

Q. I say that is a part of your editorial policy? A. That is a part. I agree it is a part, yes.

Q. The articles or letters carried in "The Sound and the Fury" in these eleven issues or in some of these eleven issues of the magazine, I believe you said were to reflect the range of comment made by writers to you? A. Not to reflect the entire range of the comments that are sent in to us. You can't do that in the limited space you have, only to pick out from the reactions you get, those that seemed most noteworthy from the point of view of their own value as entertainment. I mean, if you made an attempt to reflect every 3855

3856 reaction received to the magazine you would get first of all a very dull feature there by having to put in the letters that come in that just say "I like this" or "I like that" or anything that would be deadly dull, so in reflecting the reaction of the readers we tend to skip or pass over the average fan letter type which comes in and says "This is great" or "I like this" or "I like that". In that type there is no entertainment, and we tend to play up those where a fellow either is a sorehead or is a wisecracker or does an entertaining job of giving us a going-over.

3857 It is the old formula of the comedian who lets his stooges push him around. Jack Benny has made a fortune doing just that, letting them make him out to be a dope, and that is in general what happens to us on those pages in the kind of letters we do tend to emphasize.

Q. You did not take objection to the characterization of the cartoons carried in Esquire in this letter or article that you reproduced on page 6 of the January issue "Shor Nuff" where the cartoons were referred to as spicy? A. If we—

Q. Do you think it is a correct reference to these cartoons? A. I may not agree with that characterization, but if I had to limit the things I publish in the magazine to the things I agree with I think it would be vitiating the editorial

3858 content. My own conception of what it may be is perhaps a prejudiced one, but in any case the function of an editor is not to publish only the things with which he agrees or even to limit the publication to the things of which he would say that he approves them by publishing them.

In other words, the same thing would be true of the "Goldbricking" feature, the Army camp jokes, that if I thought every one of those was hilariously funny or confined the page only to the ones that I thought were hilariously funny, I am afraid we couldn't fill out the spread.

Q. I say, you didn't take this characterization of the policy of Esquire contained in the first paragraph of this "Shor Nuff" as being derogatory or libelous, did you? A. Oh, no; I wouldn't feel that way. I thought it was a good humored reference and one that was perfectly in keeping with the tongue-in-cheek attitude as a whole. He is kidding the shirt off the magazine, he is kidding the writer himself, it is a kidding reference, and I certainly would not be insulted by such a reference to the point of deleting it or changing it. We never do that with those things that we reprint in "The Sound and the Fury", and that type of thing, as we have done it off and on throughout the magazine's history, is something where we follow the old phrase "Don't omit my moles; don't pretty me up; don't leave anything out" even in that type of sorehead reference that we get we print it. We think the magazine's reputation can stand any such characterizations as appear in "The Sound and the Fury" or that type of reference which appears there. 3859 3860

Q. Have you printed in "The Sound and the Fury" or these other places in your magazine any letters you may have received from persons objecting to the salacious character of that matter appearing in Esquire? A. Yes, we have had letters in the course of years, which are extremely vituperous, and while I would not agree with your characterization in your question of the matter as salacious matter, we have had letters which we have printed, taking us to task and sometimes expressing the most narrow-minded point of view. 3861

I can recall printing letters in "The Sound and the Fury" that took exception to the language in various stories and articles and may have put in an editor's note explaining the reason for the matter complained of, but we have certainly often enough published that kind of reaction to our content, I will say.

3862 Q. Can you point out instances in these eleven issues where that is so? A. I think that there is one instance where there is a letter "Burned out at the age of ten".

Q. What issue is that in? A. I don't recall. I don't have any reference for it, Mr. Hassell. I mean it is just in the course of looking through "The Sound and the Fury" I remembered it. I think that as long as the page as a whole is in evidence as it is in all of these eleven issues, that the point I make is that the average letter is one that is panning us rather than one that is praising us, and that will be perfectly apparent by looking over them all.

3863 Now, they are panning us for any one of a dozen reasons. Some say that we have become so prosaic that we are more of a Woman's Home Companion, and they are disgusted with us, the magazine has lost its freshness and its kick. That may be one of them.

I referred to "Burned out at the age of ten", but in answer to your general question as to what we did as a matter of policy, I was telling you of my recollection of "The Sound and the Fury" as an institution over the past ten years, and we have had many letters of the type to which you have referred, and certainly if we have had fewer of them now in these eleven issues than we have in the past,

3864 it is simply that it would reflect the fact that they find fewer things of that kind to take exception to than was true in the early days of the magazine. Perhaps we do not offer the grist as we did in the earlier days.

Q. Esquire has and does enjoy the reputation of being sophisticated and risque? A. No, I don't think it does nor have I been able to see any evidences of it. The magazine is known as a sophisticated magazine, I think that is perfectly true, but the reputation of the magazine as a whole. I would say that the common references to it by audiences

and comedians on the programs, by references on the stage, by references in print when you come across them, that the number one connotation would be a man's fashion magazine, and that the number two connotation would be a sophisticated magazine, but by and large over the years and even now the average reference to Esquire, the one that you will encounter in print, whether it is in a novel or another magazine story or wherever it is seen, is "He looked as though he had just stepped out of the pages of Esquire". That is a way of saying that "He looked as though he had stepped out of a band box", so that is the characterization with which we are most familiar. That is the type of reference which we encounter most frequently. 3865 3866

Q. You referred, I believe, to the article "Marriage Makes Strange Bedfellows", page 44 and 175 of the January issue. A. Yes.

Q. As being one of a piece in your policy to educate a man in the understanding of women. I believe that was the reference you made to it? A. Yes—

Q. I notice in the first paragraph of the text on page 176 you make reference to a book, in the center of the complete paragraph on that page, you say "Even in countries where there's practically complete sexual freedom (for instance, the Trobriand Islands as described by Dr. Bronislav Malinowski in 'The Sexual Life of Savages') men and women end by pairing off and settling down in a comparatively permanent and exclusive union." And so forth. A. Yes. 3867

Q. Are you familiar with that book "The Sexual Life of Savages", by that author? A. No. I assumed that it was a book that would be of a relatively restricted type; that is, as a study for students in the field. I have never seen the book, no.

3868 Q. You don't know whether the book is obscene or not? That is, for general circulation? A. Oh, quite possibly, because in my own reading of that I assumed that such a book would be a case study type of material, like Krafft-Ebing or anything else. It may be a study of sexology and many of those things are not available for general circulation, I don't know that it is and I don't know that it is not, but I rather assume that it probably would be. When a foot-note type of reference like that, in an article in substantiation of a statement of general customs of the country appears there, I would accept it to be a sexologist's refer-
3869 ence book or case source book type of thing.

Q. But you didn't look it up to see whether that was an obscene book and this reference to it might be in effect an advertisement of it? A. No. As a matter of fact, the very fact that we have no mail coming in asking us about that book clears my own mind of any feeling that there might have been an advertisement of that book by a textual passing reference like that. Certainly a citation in the middle of a sentence that is justifying marriage not merely as a convention of our society but as a natural thing in countries where customs do not impose it, would seem to me the last place to incite somebody to look for obscene material. The sen-
3870 tence begins and ends with anything but an inflammatory reference.

Q. You referred to the cartoon on page 59 of the January issue, Mr. Gingrich. A. Yes.

Q. As being a tendentious cartoon. What did you mean by that? A. I can't imagine without knowing what the context was. As I recall, I was talking about different varieties of humor and I don't think that that is where I could have used the word tendentious; without bothering to go back for the record, I did mention a cartoon some-

where near there as being a propaganda type of cartoon. Tendentious in that it was advancing our interest as opposed to that of the Japs. I think that is where I used that adjective. 3871

Q. The prior one, page 57. A. Oh, yes; that was the one.

Q. How did you classify that? Let us leave that tendentious business and turn over to page 59. How do you classify that cartoon? Is that one of your classified cartoons like the Sultan cartoon? A. Yes. That is a recognized classification. That is the dumb female specialty of Shermund. She has done it with extreme skill for us and for a number of other magazines—the New Yorker and occasionally Colliers—and the whole field for Shermund, who is herself a woman and enjoys perhaps a back-stage advantage in that respect, is to take the silly remarks of empty-headed creatures—I mean empty-headed females—and usually they are in what you would call roughly a dumb-blonde category, and she has made herself a very fine living out of it for the past ten years. They are all the kind of humor that lies very often in verbalization, where the girl makes a remark that if made by a more understanding person with a greater amount of I. Q. would have a quite different significance than coming out of, as it were, the mouth of a mental babe. That is Shermund's specialty in other words. 3872 3873

Q. Do you know why the breasts of the female shown in this cartoon are shown as being so much over-emphasized? A. It is a family trade-mark of Shermund's work. She has specialized in the obvious exaggeration of all the curvacious element of the female form. In virtually every cartoon she ever drew in her life she has done that. I don't think Shermund could by now draw them any other way.

She has been perfecting this typical Shermund girl for

3874 ten years, to my knowledge, and fashion is beginning to catch up with her in that respect because the degree of over-emphasis to which she indulged seven or eight years ago was much more out of keeping with feminine fashions than it is today. Feminine fashions are beginning to give the same over-emphasis now that she has been giving for years.

Chairman Myers: One member of the Board has a rather important matter that requires his staying away somewhat longer, so we will adjourn now until two o'clock instead of one-thirty.

3875 (Whereupon, at 12:00 o'clock noon, the hearing was adjourned until 2:00 o'clock p. m.)

AFTERNOON SESSION

(The hearing was resumed, pursuant to the adjournment, at 2 o'clock p. m.)

Chairman Myers: Proceed, gentlemen.

3876 ARNOLD GINGRICH resumed the stand and testified further as follows:

Cross Examination by Mr. Hassell (Resumed):

Q. Mr. Gingrich, you testified that you sold enormous quantities of the Varga calendar, the Varga girl calendar. A. Yes, the calendar outside the pages of the magazine itself, as a separately bound unit.

Q. You enter into a circulation campaign to sell those, do you, aside from the advertising appearing in Esquire? 3877
A. There have been some sales by agents and, I believe, there has been some advertising in media that go into that field. That is not so much advertising of the calendar as advertising for agents who handle things of this sort.

Q. Do they use this so-called Esquire Service Man's Kit to make their sales? A. I don't recognize from that name, Mr. Hassell, whether that is a kit used by agents or not. I don't recognize it by that term.

Q. These Esky Buy-Products, what do they include? A. That began with the Varga calendar and has been expanded to include playing cards with Varga designs, oversize post cards which have carried reproductions of various color features that have appeared in the magazine in the past. 3878

They include Hurrell photographs, caricatures by Arthur Szyk, the Polish caricaturist, a selection of color cartoons, bird and dog sporting cuts by Walter Bohl, perhaps one or two other subjects, and then also the date book which has in some years been featured by the Petty drawings and in some years by various photographic features.

The current date book is made up of a number of features out of the magazine, both text and pictorial.

That is about in general what the line comprises. Anything that we may want to make a side sale out of aside from the pages of the magazine would be characterized as Esky Buy Products. 3879

Q. I believe you said you had a department devoted to the sale of those? A. There has grown up within our organization a reprint department which is now called the Varga Girl Calendar Sales Division. That is almost a separate business. Those people in there are concerned en-

3880 tirely with the handling of the Varga calendar sales, both through agents and through the pages of the magazine itself. They also handle any of the other Buy Products; that is a separate department.

Q. Is E. R. Crismier the head of that? A. What is that name?

Q. E. R. C-r-i-s-m-i-e-r? A. I don't recognize the name. I don't know.

Q. I show you a letter which appears to be a circular letter, signed E. R. Crismier, Esquire Magazine for Men, to which is attached a circular, and ask you to state whether
3881 that is the type of letter that has been sent out, a circular letter? A. Yes, this is apparently a circularization to firms to send this material to employees now in service. Now, as it happens the name is one that is not familiar to me, but it is a typical mailing piece, yes.

Q. As a result of sending out circular matter of this sort, did your company sell these hundreds of thousands of Varga Girl Calendars that you refer to in the record? A. No, the increasing sale of the Varga calendars that I mentioned from one year to the next was very largely accounted for through the magazine itself. It is in the last years or so that with the addition of the various Buy Pro-
3882 ducts and the increased activity of this division of our company that we broadened out the activities in this way. There have been some different varieties of the Varga calendar in the past year than there had been prior to that time. Originally it was simply as featured in the magazine, and it was really a reprint business. That is, copies of the calendar bound separately as the one we introduced in evidence of the January, 1942, issue this morning.

Q. You do feature Vargas on playing cards and the date book in addition to the calendar? A. I think I am wrong

if I even included the date book, because there have not been any drawings by Varga in the date book. That has been photographic material, and sometimes cartoons, but not Varga drawings. With the exception of the date book, I would say that that is true that there is a Varga series in the post cards, and that there are Varga playing cards. 3883

Mr. Hassell: I would like to offer this circular, with certain material attached to it in connection with the witness' testimony.

(The circular referred to was marked for identification as Post Office Exhibit No. 28.) 3884

Mr. Bromley: No objection.

Chairman Myers: It may be received.

(The circular heretofore marked for identification "Post Office Exhibit No. 28," was received in evidence.)

By Mr. Hassell:

Q. Mr. Gingrich, have you solicited or attempted to sell any other features in Esquire than those referred to in this exhibit? A. Yes. Men's fashion color charts and men's fashion style books. 3885

Q. How does the sale of those compare with the sale of the Varga calendar, and the playing cards, and so forth? A. Well, the most intensive exploitation, of course, has been done on the items that are featured in the Esky Buy Products. We have never had any comparable sales facilities for anything else.

But through the pages of the magazine we have from

3886 time to time offered books on cooking, books on dress, and at the time of the New York World's Fair we had a guide to New York. That sold very widely. I think we sold something better than 50,000 or 60,000 copies of that. The response to dress charts has been somewhat less than that. I would say that on an average we would run to somewhere around 25,000 on that type of feature.

I neglected to mention the jig-saw puzzles in mentioning the Buy Products before.

Q. You referred on direct to a reproduction of some cards received by you from German prison camps—that was page
3887 197 of one of the issues here, I have forgotten which, perhaps the January issue— A. Yes, January.

Q. —with respect to this matter being a morale builder. Have you received any intimation, Mr. Gingrich, that a good many men in the service don't want scantily clad females with a view to building up their morale? A. It would be hard to relate that question to my own experience.

Q. You mean you never have gotten any letters from any service men saying that they were not interested in Varga girls? A. No, not making that the chief point of their communications.

3888 We have had a great many letters from service men about virtually every aspect of the magazine's contents. It is quite possible that we have had some from men who said they were more interested in the sports features than in the cartoons, but I don't recall any letters from service men objecting to the magazine as a whole.

They may have expressed preference for one part of its contents over another.

I do recall a letter in one of the "Sound and Fury" pages saying they didn't like Salvador Dali and that is a common reference to liking some one feature more than another.

Q. Did you see the recent statement of Adolphe Menjou after returning from North Africa as an entertainer, with respect to the service men about to go into battle not being interested in salacious matter? A. No, sir; I didn't see that. 3889

Q. Published on page 48 of the New York "Daily News" on October 27, 1943, reported in this style:

"Adolphe Menjou, just back from overseas, where he put in 5½ months, telling Greer Garson and this reporter at 21 that acts going overseas should delete the dirty stories they add to their routine. 'Soldiers and officers deeply resent the attitude of some U. S. O. camp show performers who apparently feel the men want filthy gags,' fumed the veteran movie star," etc. 3890

You had not seen that? A. No, I recall seeing a story by Larry Adler in the Chicago "Sun," who had been entertaining troops in North Africa along with Jack Benny, and the story came to my attention chiefly because he referred to the omnipresent sight of the Varga pin-ups, but I didn't see the Menjou story at all.

Q. Did Esquire receive any complaints that had been circularized with this letter, Government's Exhibit 28, with respect to the distribution of that sort of matter? A. No, I think I would have known of that because as a matter of policy all comments that are received along with orders for material are routed over my desk—that is, if a man orders a subscription, or any of these things that are done in solicitation, and pens any side comment, whether the comment is a complaint or whether it is a boost, either way I get it. 3891

Q. In that connection I call your attention to a letter—it is a copy of a letter—which purports to be—it is a

3892 signed copy addressed to Esquire, 919 North Michigan Avenue, Chicago, under date of October 2, 1943, the envelope of which was mailed at Cambridge, Ohio, on October 2, 1943, which is attached, signed "Walter O'Malley, Secretary-Treasurer, Cambridge Glass War Service Committee."

That appears to be such a letter as you have been talking about, doesn't it? A. Yes, and that letter and any other letter that I have had since October 2d would probably be on my desk since I have been busy with other matters since that time.

3893 Mr. Hassell: I offer a copy of that letter in evidence in connection with Mr. Gingrich's testimony.

(The letter referred to was marked for identification as Post Office Exhibit No. 29.)

Mr. Bromley: Objected to as immaterial.

Mr. Hassell: I might state that a copy of this letter was sent along with the circular matter already in evidence as P. O. Exhibit 28.

Chairman Myers: Objection overruled. It may be admitted.

3894 (The letter heretofore marked for identification "Post Office Exhibit No. 29," was received in evidence.)

By Mr. Hassell:

Q. What connection, if any, do you have with the circularization of the book called "Bedside Esquire," Mr. Gingrich? A. No connection whatsoever. The book was originally published by Robert M. McBride & Company, and I have

a personal connection with it in that I wrote the introduction for that edition, and that I assisted in the selection of 3895
the items contained in it.

Since its original edition it has been reissued to another publishing house in a reprint edition, and I understand that in this last year or so it has been widely distributed and quite often we get mail about it that comes to us, but we don't have any publishing connection with it whatsoever.

Q. Does that contain matter taken from Esquire? A. That is a selection of textual features, both stories and articles, selected, as I recall it, about in the spring of 1939 and issued 3896
as an anthology of Esquire writing. It ranges over selections made from the very beginning up until that time.

Q. Is it true that this book was edited by you, Mr. Gingrich? A. Yes.

Q. And the cover of it so shows? A. I made the selections of the material and wrote the introduction to the book.

Q. Did you approve of this circular advertising the book that I show you? A. No, and as a matter of fact we were forced to make representations against these people because we felt that they were very unfairly advertising the book and attributing to it a lot of characteristics that we did not think it possessed.

We saw the advertising of the original edition that Robert 3897
McBride & Company published and we approved it, and had offered to us all advertising matter in conjunction with the book. Then later this Herald Publishing Company, and several other publishing companies, advertised in a manner that we distinctly did not approve, the reprint edition.

Finally as a result of our threatening to sue them we arrived at an agreement with Mr. Feldman, of the Harlem Book

3898 Company, who were the wholesalers of this popular edition, that he would control the distribution of the book, confine it only to reputable book stores and department stores, and not allow any advertising that we did not have a chance to see and specifically approve. That has been in effect for about three months, I would say.

I recall recently having read for our approval an advertisement to be published in the Hartford "Courant." I would say about a month ago.

This and many other circulars and advertisements appeared in the interim, some of which we had called to our
3899 attention and many of which we may not have seen, but those that we did see we so vigorously disapproved of that we had to make legal representations to these people.

Q. Do you know the Herald Publishing Company is the concern that publishes a good many sex books, books that are questionable? A. I don't know that of my own knowledge, but the manner of presentation of this book by many of these publishers, Herald Publishing Company and two or three others, that were apparently purchasers of lots of this edition, was contrary to our own ideas of how a book of this character could properly be advertised, and we went after them on that ground.

3900 I don't know what else they may publish. We didn't like the way they handled this.

Q. Just how didn't you like it, Mr. Gingrich? Did you think they misrepresented the contents of the book or they played up the sexy features of it, or what? A. Yes. The book was a very good cross-section from a literary standpoint of some of the most representative writings in Esquire for the period of its inception up to the time of publication.

It had many stories and articles of a most serious nature.

It had in it very few—relatively out of the entire book as a whole—light and trivial pieces, but their manner of 3901
exploitation would have given the reader the idea that it was made up of that kind of thing almost entirely, and that it was a sexy book. It was not a sexy book as a whole.

We felt they were misrepresenting it to a point of nearly approaching fraud.

Q. Will you look at the description of the stories in this book on the back of that circular and tell me whether they present a true representation of what is in those stories? A. To the best of my recollection, this is a full list, yes. I don't recall anything that was in it that wasn't in this list.

Q. I see. If Esquire did not enjoy a reputation of con- 3902
taining risque and racy matter, Mr. Gingrich, can you understand why that company or any other companies which you have mentioned here should get out circular matter of that sort respecting excerpts from Esquire? A. I didn't follow the first part of your question, Mr. Hassell.

Will you read it back?

Q. I believe you testified that Esquire does not enjoy the reputation of being risque and I am wondering what you would like to say about this and similar companies getting out circulars advertising the contents of Esquire in this manner? A. We disapproved of it—

Q. You disapproved of it, yes. A. —so heartily that we 3903
felt obliged to take action against them.

Q. But nevertheless those circulars were gotten out advertising the "Bedside Esquire"? A. Advertising it most unfairly, highpointing isolated passages, and trying to cast over the book as a whole the suggestion that everything in there was comparable or was other and similar related matter which, of course, was an unfair characterization of the book.

3904 The book stands and speaks for itself very well. It is a very fine collection of very splendid writings of some very splendid authors of our time.

The list of contents in this circular does, in that respect at least, fairly represent the book.

The whole manner of presentation of the book is what we objected to and we are not in any way ashamed of nor do we disapprove the contents of the book, but we felt that the manner of hawking it about was decidedly a misrepresentation.

3905 Mr. Hassell: I offer that circular as the next Post Office exhibit number.

(The circular referred to was marked for identification as Post Office Exhibit No. 30.)

Mr. Bromley: Objected to as immaterial.

Chairman Myers: Well, I think it is immaterial principally, but it explains in a way what the witness has testified to, that he objected to it and thought that it was a fraud.

Mr. Hassell: I submit it has another connotation, too, I believe, Mr. Chairman. We have gone rather
3906 far afield and gone into the distribution of Esquire in order to establish its reputation and standing as decent literature, and I think this has a very distinct bearing on that, if you are going to take into consideration those other matters.

Chairman Myers: Well, I think, generally speaking, that is correct, but the thought I had in mind was that that should be proved by another witness than this one.

It is admitted, however.

(The circular heretofore marked for identification "Post Office Exhibit No. 30," was received in evidence.) 3907

By Mr. Hassell:

Q. Mr. Gingrich, I believe you said with respect to this article "Many Wives Too Many," you recall that article in one of these issues here, that is Dr. Joad's six wives article, that you didn't think this had very great literary value but it was selected for inclusion in the magazine as an article that would appeal to the largest number of readers.

Now, is it your thought that the general run of readers of Esquire are interested in exploring the experiences of a man who had had six wives on his hands to entertain throughout the day and night? A. Oh, I think that is a very unfair way of asking that question, Mr. Hassell. That article speaks very well for itself. It is a humorous debunking of a proposal solemnly made by a distinguished English philosopher. It takes the homespun approach to it of the American family man, explaining the trouble he has with one wife to keep happy and then projecting what would happen if he had six. 3908

Now, if you call that exploring the experiences of a man who has six wives, I simply couldn't agree with your characterization of the article; that is all. 3909

Q. I just wondered what interest that would have to the average ordinary reader of Esquire. A. I think it is very interesting. He would find recognition value in it. As a married man I read it and got extreme enjoyment out of it, and also got a chuckle out of it as a man who has one wife, and the article has recognition value. It is the most homely sort of American humor; its moral point and moral under-

tone is certainly an obvious one, that here is a man joking
3910 on the obvious impracticality of the proposal made by Professor Joad.

Q. Well, you think the article is purely humorous? A. Oh, it certainly takes full advantage of every humorous implication possible in Dr. Joad's proposal. It seems to me in the whole tone of the article, and the article's view, it is distinctly that of a humorist.

Q. Now, you said the article, or the story—I believe you said it was an article—the "Unsinkable Sailor," by H. B. Lawrenson, was actually written by a woman? A. That is right.

3911 Q. Helen B. Lawrenson? A. That is right, Helen Brown Lawrenson.

Q. Why wasn't her name written out, Helen B. Lawrenson? A. Because we have had a policy from the very beginning not to use a feminine by-line in this magazine, because we have the standing subhead on the front cover, "Magazine for Men," and we have deviated from that policy only once, to my recollection, in nine years. That was when we had an article written by a woman gift shopper on advice to men picking out gifts for women, and there it seemed to us to be justified to use her name as the full by-line because it was a subject on which a woman's advice should be sought.
3912 but without exception whenever an article is written by a woman we put in the initials only just to preserve that tradition or custom.

Q. You referred to this article as describing what I believe you called "picaresque," a picaresque character. What do you mean by "picaresque"? A. Picaresque is a label you can apply to the activities of a rogue.

Q. Is that "p-e-e-k"? A. No, p-i-c-a-r-e-s-q-u-e.

Q. Oh, I see. A. Picaresque. I said it was both picturesque and picaresque.

Arnold Gingrich—for Respondent—Resumed—Cross.

Q. Now, Mr. Gingrich, you started with the December, 1940, issue of Esquire, I believe, in connection with the al- 3913
leged approval by the Solicitor of the Post Office Department of the publication? A. Yes, with the December, 1940, issue.

Q. Why didn't you start with the November, 1940, issue? You know what happened to that, don't you? A. I don't recall anything happening to that.

Q. Don't you recall that issue was held to be non-mailable and you were warned through the Third Assistant Postmaster General through the Postmaster at Chicago that the continued carrying of non-mailable matter in your publication might result in revocation of your second class privi- 3914
lege? A. It is quite possible we learned those two things simultaneously. The word about objection being taken to the "Knight Before Christmas" feature in the December issue came so late in relation to that issue's preparation that my only recollection of the circumstances is that we received a wire or possibly word from the Post Office in Chicago—I don't recall how—but I know we did call up here to speak to the Solicitor and see what could be done about the page to which objection was made.

I don't recall anything about November, but there quite possibly was at the very same time.

Q. Would you say that you did not receive a letter from the Postmaster in Chicago late in October, 1940, or early in 3915
November, 1940, informing you that he had been directed by the Third Assistant Postmaster General to warn you about carrying non-mailable matter in your publication? A. I wouldn't say that we had not received such a letter. I would simply say that in recalling the circumstances of how we began the policy of submitting dummies of each issue, I recall it began with the objection to the December, 1940, copy.

I didn't recall there was any objection taken to the Novem-
3916 ber issue. If there was, it was something that took place after the event and one in which we had no opportunity to make a change.

It is possible that such a letter was received at that time because it was about then, about November, 1940, as I recall, that our contact with the Solicitor's department began, the one that I explained this morning.

Q. I show you a copy of a letter from the Third Assistant Postmaster General to the Postmaster at Chicago, dated October 26, 1940. Of course, I can establish the mailing of this letter.

3917 I wonder if that refreshes your recollection with respect to having received a letter from the Postmaster at Chicago shortly after that time, on that subject? A. I imagine, Mr. Hassell, that my awareness of the objection to the December, 1940, issue probably preceded my acquaintance with this letter. This, I don't recall having been aware of at the time.

My recollection now is we were informed of the objection to the one specific feature in the December issue. I don't for a moment question the letter, no. Obviously we received it. But simply, as I recall it, I didn't know of or remember, that is, anything about November, but simply the objection to the December issue.

3918

Mr. Hassell: Now, I will be glad to produce Mr. Wentzel and have the file copy of this letter put in, if counsel wants it.

Mr. Bromley: If you assure me that is what it is, that is enough for me.

Mr. Hassell: I get that from the Third Assistant Postmaster as a letter having been sent out.

Mr. Bromley: Then I do not object to it on the ground of competency at all.

Chairman Myers: Is it marked for identification?
Mr. Hassell: Not yet. 3919
I wish to offer it in evidence.
Chairman Myers: It is received.

(The letter referred to was marked "Department's Exhibit No. 31," and received in evidence.)

Mr. Hassell: I may state, Counsel, I will be glad to produce Mr. Wentzel if you wish to ask any questions about this letter.
Mr. Bromley: I do not. 3920

By Mr. Hassell:

Q. Mr. Gingrich, have you from time to time been advised of action being taken against the distribution of Esquire by local law enforcement officers? A. Not recently, but, say, as of about 1936 or thereabouts there were a number of such incidents, perhaps for about three years. At that time there was something of a wave of local activities of that kind.

I don't remember exactly, but we had some incidents of that character in New England, and I believe scattered points here and there over the country. I don't recall as of 3921
recent date having had anything of that sort brought to my attention.

Q. Do you recall such action as that taken in Tennessee and in Texas? A. Yes, I think so. I don't remember specific places. My recollection is a general one, but there have been, yes, local newsstand drives from time to time.

Q. I call your attention to a letter addressed to the Solicitor of the Post Office Department by Mrs. Mary E. Allen,

Women's Bureau, Department of Public Safety, Knoxville,
3922 Tenn., dated April 30, 1936, to which she appends a list of publications about which she states she has received numerous complaints against them, among which is Esquire.

Do you recall having heard of any activities at that place and by that department with respect to Esquire? A. No, but that is the period to which I referred, 1936, so while I didn't recall the specific place I did remember in general that there had been similar instances over a couple of years there, 1936 and 1938.

Mr. Hassell: I would like to offer that in evidence,
3923 not to prove anything except as a bearing on the reputation of the magazine.

(The document referred to was marked Department's Exhibit No. 32 for identification.)

Mr. Bromley: I object to it as irrelevant and immaterial.

Mr. Hassell: I submit—

Chairman Myers: Are you willing to withdraw your objection to the tender made by the Respondent of the list of the National Organization of Decent
3924 Literature? If this is going to be admitted, that is going to be admitted too.

Mr. Hassell: This has a bearing in connection with the testimony of Mr. Croteau and the witness, Mr. Gingrich, as to the reputation of this magazine.

Chairman Myers: But it was offered in Mr. Croteau's testimony and that tender was made then and you objected to it and we ruled it out. Now, if you are offering this we will admit that one.

Mr. Hassell: I don't recall that that was tendered in Mr. Croteau's testimony. 3925

Chairman Myers: It was.

Mr. Hassell: Except the general statement was made.

Chairman Myers: No, the exhibit was tendered and it was excluded, but if you are willing to take that position on this, we will admit the exhibit that was tendered when Mr. Croteau testified.

Mr. Hassell: Well, of course, I think anything going back beyond the first issue involved here is immaterial, and I am offering this because a lot of that material went in, and I think by reason of the fact that it has gone in, it is up to me to show what I can about the reputation of the publication prior to that time. 3926

Chairman Myers: Well, of course, that would be admitted for the same reason if you desire to have it in. If you want it in we will admit the other.

Mr. Hassell: Well, I do not particularly want this one in. We have the testimony of the witness.

Chairman Myers: Which would you prefer?

Mr. Hassell: Well, leave this out. I don't see that it has very great bearing. I think this has more bearing than the other one which they offer. 3927

Mr. Bromley: Now, I move to strike out all of the testimony of this witness with respect to this 1936 complaint.

Chairman Myers: No, I think the testimony is proper as bearing upon the reputation.

The objection is overruled. It will not be admitted as such.

3928 (The document heretofore marked Department Exhibit No. 32 for identification was rejected.)

By Mr. Hassell:

Q. Now, Mr. Gingrich, do you recall ever receiving from the Solicitor of the Post Office Department in the latter part of 1941 a letter with respect to advertisements of so-called party records in Esquire? A. Yes.

Q. In that connection I show you a copy of a letter dated November 22, 1941, addressed to you as editor of Esquire magazine by the Solicitor of the Post Office Department and
3929 what purports to be your reply, dated November 26, 1941. A. I recall my reply and the original letter.

Mr. Hassell: I offer those files as the next Government exhibit.

(The documents above referred to were marked Department Exhibit No. 33 for identification.)

Mr. Bromley: No objection.

Chairman Myers: It may be admitted.

3930 (The document heretofore marked Department Exhibit No. 33 for identification was received in evidence.)

Mr. Hassell: This letter from the Solicitor of the Post Office Department addressed to Mr. Gingrich, dated November 22, 1941, reads:

"Mr. Arnold Gingrich, Editor, Esquire Magazine,
"919 North Michigan Avenue,
Chicago, Illinois.

My dear sir: The attention of this office has been called to several advertisements of Rabsons, 111 West 52 Street, New York, New York, and the Sherman Record Company, Chicago, Illinois, which appeared in the December issue of Esquire magazine offering for sale certain so-called 'party records'. 3931

A number of these records have been declared unmailable under the postal obscene statute, and advertisements thereof are likewise unmailable.

This notice is given you in order that advertisements of these records may be eliminated from future issues of your publication. 3932

Very truly yours,

Vincent Miles, Solicitor."

Mr. Gingrich's reply, dated April 26, 1941—

Mr. Bromley: November 26th.

Mr. Hassell: November 26th reads:

"Our January issue carries two of the advertisements of the party records offered by the Rabson's Music Shop, similar to those in the December issue. As you know, our issues are made up weeks beforehand and since we had no previous information, prior to your letter of November 22nd, as to the unmailability of these records, and the consequent unmailability of advertisements featuring them, there was no possibility of our taking any action on this matter with respect to the January issue. 3933

However, for February no advertisements of this character have to date been received and we are check-

3934 ing with our advertising department now to preclude the possibility of our again carrying any advertisement featuring any unmailable matter."

By Mr. Hassell:

Q. Mr. Gingrich, do you recall that the November, 1937, issue of Esquire was held to be nonmailable by the Solicitor? A. Quite possibly that is what I was referring to this morning when I said I recalled previous instances where isolated issues had been referred to afterwards as having been unmailable.

3935 Q. That you also learned that the July, 1937, issue of Esquire was held to be nonmailable? A. If those are the identifying dates of the various issues which I referred to that had been so declared, without recalling the dates, why that undoubtedly substantiates my testimony that there had been issues in that period declared nonmailable. I don't recall the exact dates of them; that is the only difference between us on that matter.

Q. In connection with "The Knight Before Christmas" matter appearing in the December, 1940, issue of Esquire, isn't it a fact that the Solicitor wrote you a letter on November 1, 1940, setting out the objected to textual matter in con-
3936 nection with those pictures and the text of those which he would not object to? A. He promised—

Q. I show you a letter. A. He promised to follow that with a letter after I left to confirm the matter that we discussed on my visit here. Yes, this is the letter he said he would write.

Q. And you received that letter? A. Yes.

Mr. Hassell: I offer that as the next Government's Exhibit.

Mr. Bromley: No objection.

Chairman Myers: It may be admitted. 3937

(The document above referred to was marked Department Exhibit No. 34 and was received in evidence.)

Mr. Hassell: I may say in connection with this letter that the textual matter is written in poetic form continuously. You don't have to pause between each picture and you can get the sentiment much better than picking out excerpts from it.

3938

By Mr. Hassell:

Q. Mr. Gingrich, is it a fact that the matter submitted by you to make up the August, 1941, issue referred to as a dummy, was held to be unmailable by the Solicitor? Do you know that to be a fact? A. I know that objection was taken to one cartoon and a substitution made. As I recall it, Mr. Hassell, that objection came from you and I spoke to you on the telephone about a substitute for that particular cartoon.

You approved the substitution and I believe that I had a letter from you concerning the mailability of that issue after 3939
substitution of the cartoon for the one to which you took exception.

Q. This matter you submitted down here in dummy form, was that in black and white or did the cartoons and drawings and all appear in colors? A. Some in color and some in black and white. Sometimes we have to have even a blueprint from the pages on which the color work had not been completed at the time the dummy was submitted. I believe

3940 you still have the dummies as you retained them in your files, and examination of them would show that many of the features were in color and that many of the color features were not in color in the dummy, but were in black and white, rough proof form.

Q. After matter in a dummy was objected to, did you then prepare in final form and submit to the office of the Solicitor, the final completed copy as it would go out in each instance? A. I believe so. The substitutions were always sent to the post office in Chicago.

Any time there was exception taken to any feature in the
3941 issue we would send over to the post office in Chicago a before-and-after exhibit showing them which feature had been objected to and showing them what had been put in its place, so that the dummy was at all times brought up to date.

Q. But you didn't submit the completed form of the publication down here to get an approval on that, did you? A. Yes, I believe as a matter of routine two copies of the completed publication were always forwarded by the postmaster in Chicago to the Solicitor in Washington.

I believe that always was true.

Q. You say it was forwarded by the postmaster? A. Yes to the office here.

3942 Q. It was never done, Mr. Gingrich. A. That was my understanding of it.

Q. We never got them.

Chairman Myers: We will have to adjourn at three-ten for a few minutes, so suppose we adjourn for a regular recess right now and that will give you a chance to get your things together.

(Whereupon, a brief recess was taken.)

Chairman Myers: Go ahead, Mr. Hassell.

Arnold Gingrich—for Respondent—Resumed—Cross.

By Mr. Hassell:

3943

Q. Mr. Gingrich, referring to the August, 1941, Esquire dummy, I show you matter in black and white appearing on page 33 of this dummy. It appears to be a cartoon showing the sign "No swimming allowed", and the head of a young woman that looks like she is in the bushes and under which appears: "But, officer, we're not swimming."

Do you recall that to be the objectionable cartoon in this issue? A. Yes.

Q. That is in black and white, isn't it? A. Yes, that is one of the color forms in which the plates were not finished at the time the dummy was submitted. In all such pages the 3944 representation is in black and white,

Q. In this dummy the Varga girls and most of the cartoons are in black and white. aren't they? A. I wouldn't say most without going through it. Quite a few of them as you see as you are leafing through it are in color.

Q. You say this one on page 53 that is in color? A. Yes.

Q. The Mountain Boys, that is in color? A. Yes.

Q. The one on page 134 is an advertisement? A. A fashion plate.

Q. A fashion plate. 123 and 124 are in color? A. Yes.

Q. Another fashion plate, 105 and 106 in color? A. Yes.

Q. That appearing on pages 87 and 86 in color? A. True. 3945

Q. And a cartoon at 65 you call that color? A. That is color.

Q. And the balance of the matter in this appears to be in black and white, doesn't it, Mr. Gingrich? A. Yes.

Q. And this generally speaking did not contain any advertising? A. No. The editorial content was always complete in the dummy. All carry-over material and all cartoons.

3946 Mr. Hassell: I would like to have that marked for identification in connection with this witness' testimony, this cartoon we have been talking about appearing on page 33.

(The cartoon above referred to was marked Department Exhibit No. 35 for identification.)

By Mr. Hassell:

Q. Do you know how that cartoon appeared in color as to the finished form? A. It didn't appear.

3947 Q. I see. A. We removed it and substituted another one.

Q. You didn't ever carry that cartoon? A. No, that never ran.

Q. With another gag line? A. No; I think that because at the time we suggested a change in the by-line from "we" to "I'm", and I discussed that with you, my recollection is on the telephone, discussing this cartoon with you and suggesting changing it to "I'm" and you said you would prefer to have it dropped entirely and I sent you subsequently a new cartoon to replace it.

Q. Showing a fat woman in a bathing costume? A. Yes.

3948 Mr. Bromley: Mr. Hassell, would you be willing to state now in connection with this issue that the whole issue was approved by you except one cartoon to which you have referred?

Mr. Hassell: The Post Office Department advised the postmaster that the publication might be accepted for mailing if that cartoon was left out. The Solicitor's office did not approve it.

Of course, as counsel has called attention heretofore, this is a criminal statute and the Post Office De-

partment does not approve matter and thereby give immunity to persons using the mails in violation of the statute, from criminal prosecution. 3949

Mr. Bromley: I should have said the only thing you held to be nonmailable in this issue was this cartoon.

Mr. Hassell: That is true, on the basis of this dummy, practically all of it that Mr. Gingrich has stated was in black and white. That particular cartoon, I think you will agree, we couldn't tell what it was going to look like in finished form.

Mr. Bromley: After you got it in color you didn't hold any of it to be nonmailable. 3950

Mr. Hassell: As a matter of fact, none of those publications in finished form came back to this office.

Mr. Bromley: They went through the mails and at no time did you ever hold any of it to be nonmailable. That is all I want the record to show.

Chairman Myers: Is there any objection to that?

Mr. Bromley: No, sir.

Chairman Myers: It may be admitted.

(The document heretofore marked Department Exhibit No. 35 for identification was received in evidence.) 3951

By Mr. Hassell:

Q. Mr. Gingrich, were you ever called to an interview by the United States Attorney or Assistant United States Attorney in Chicago with respect to the November, 1940, or December, 1940, issues? A. No.

3952 Q. Were you and Mr. Smart interviewed by a post office inspector with respect to those matters? A. We had a call from an inspector. My recollection is that it referred to those earlier issues that were held to be nonmailable—I believe you supplied the dates a while ago—1937, I believe you said it was—I don't recall such a visit in 1940.

Q. Did you receive a visit from two post office inspectors and were those inspectors Mr. Alford and Mr. V. V. Sugg? A. Yes, that sounds like the name, I think so.

Q. As a matter of fact, another inspector called on you, Mr. Jerome Williamson, about December, 1940, about the
3953 December and November, 1940, issues? A. I don't recall an inspector's visit at that time. There were two inspectors, as I recall it, in the earlier visit, but I don't remember a visit from another inspector except that one.

Q. You don't recall having told this inspector, that is, you and Mr. Smart, on December 3, 1940, that it was your desire and intention to comply with the postal laws with respect to matter under the postal obscenity statute, that you had conferred with the Solicitor on October 31, 1940, with respect to the mailability of the November and December, 1940, issues, and that the revision in the latter issue, December, 1940, was made at an expense of about $2,000 as it was ready
3954 for mailing? A. No, I don't remember that unless Mr. Alfred Smart and I both saw the inspector on the previous occasion to which I referred.

Q. That was the earliest date. I am talking about December 3, 1940. A. Am I supposed to have been present in the interview referred to here, or was that an interview with Alfred Smart? It is just possible that it was, I just don't recall it. I do recall the other occasion where Alfred Smart and I both talked to the inspector, Sugg.

Q. And Alford, Inspector Alford? A. I don't remember

that name. Sugg is familiar to me. I remember there were two of them. 3955

Q. You recall, Mr. Gingrich, that the October, 1941, dummy was disapproved on account of the cartoon in there? A. Possibly. There were, I believe, eight or nine issues out of the nineteen in which there was no substitution, but on the rest there were, so probably October, 1941, was one of those in which substitutions were made.

Q. I call your attention to page 74 of the dummy for October, 1941. That is the full page cartoon in black and white under which is the legend: "Heavens, would four Martinis do that?" 3956

Do you recall that that was one of the things objected to? A. Yes, I do.

Mr. Hassell: I would like to have that marked.

(The document above referred to was marked Department's Exhibit No. 36 for identification.)

By Mr. Hassell:

Q. Mr. Gingrich, the November, 1941, issue contained a number of things, did it not, that were objected to by the office of the Solicitor? A. I believe so. 3957

Q. I show you the dummy for November and call your attention to the gate-fold which is opposite page 59, and a cartoon, this happens to be in color, on page 67, and a cartoon at the top of page 69, which is also in color. Is this a Varga girl? A. No, that is a Petty drawing.

Mr. Hassell: I would like to have those three items in this book marked.

The gate-fold, you say that is a Varga?

3958 The Witness: A Petty.

Mr. Hassell: It is a Petty picture in black and white, opposite page 59.

(The document above referred to was marked Department Exhibit No. 37 for identification.)

Mr. Hassell: The color cartoon full page on page 67 with a legend underneath: "Is this a mistake or has the railroad added the finishing touch to their service?"

3959

(The document above referred to was marked Department Exhibit No. 38 for identification.)

Mr. Hassell: The cartoon in color appearing at the top of page 69 under which appears: "Now, are you convinced that I have no defense plans concealed on me, Major?"

(The document above referred to was marked Department Exhibit No. 39 for identification.)

Mr. Bromley: Mr. Hassell, while we are on that
3960 subject, in the issue which I mentioned in evidence this morning, November, 1941, at page 58, I would like to show the Board the substitution of the Petty girl. The one you showed them is the one that did not run because you objected to it, and I would like to show them the one that was permitted to run.

Mr. Hassell: The one that actually ran is in color and the other one is in black and white.

Mr. Bromley: The point is that the second one was approved and the first one was not.

Mr. Hassell: We never approved this. We objected to it. 3961

Mr. Bromley: Let's ask the witness about it. You certainly don't make the charge that after you disapproved the thing we deliberately went and ran it, do you?

Mr. Hassell: I don't know. The Solicitor's office didn't get the finished copy and this is what we objected to.

Mr. Bromley: How do you explain it, Mr. Gingrich?

The Witness: Objection was made to this drawing on the ground that it was too revealing anatomically, as referring to the nates. By telephone I discussed it with Mr. Miles and explained that the drawing was finished as of the time that this objection was received but we would be able to run through on our plates and reduce the objection he had made to the picture at this point. 3962

On that ground he said, "All right, proceed, do what you can to it as long as your plate is made." That is what we did, and that is how we changed the plates from the form in which it was received here.

Mr. Cargill: Will you point out to me where it is changed? 3963

The Witness: Yes. You see the extremely defined line right here with the deep shadow showing there. That was all removed by running through the plate to avoid centering of interest as was present in the original drawing.

3964 *By Mr. Hassell:*

Q. The finished picture was not submitted here, was it, Mr. Gingrich? A. Only in the sense that we maintain that always the finished matter is submitted to you by the Postmaster in Chicago. That has been our understanding for years on end.

Q. In that connection perhaps we had better get the file.

I call your attention to a letter dated September 4, 1941, signed by you, on the letterhead of Esquire. Is that related
3965 to this letter? A. That is right. This is the correspondence confirming the telephone conversation.

Mr. Hassell: Mark this.

(The document referred to was marked for identification "Department's Exhibit No. 40.")

By Mr. Hassell:

Q. Mr. Gingrich, I show you a copy of a telegram sent to the Postmaster in Chicago following the receipt of your letter. A. Yes.

3966 Q. Were you advised by the Postmaster in Chicago that this matter would be accepted as changed? A. We received the copy from the Postmaster of this telegram, yes.

Mr. Hassell: I offer this telegram from the Postmaster.

(The document referred to was marked for identification as Department's Exhibit No. 41.)

Mr. Hassell: Now, I offer both the letter and the telegram in evidence. 3967

Chairman Myers: Any objection, Mr. Bromley?

Mr. Bromley: No objection.

Chairman Myers: They may be admitted.

(The documents heretofore marked for identification "Department's Exhibits Nos. 40 and 41," were received in evidence.)

Mr. Hassell: The letter reads, letterhead of Esquire, Arnold Gingrich, Editor, dated September 4, 1941, as follows—addressed to Mr. Miles, Solicitor, 3968
Post Office Department:

"Pursuant to our two telephone conversations of today, I include proofs of cartoons which we have substituted for the cartoons now appearing on pages 67 and the upper half of 69, both of which were held objectionable by your department. As for the large gate-fold cartoon occupying pages 57 and 58 in the November issue, we are proceeding, as I outlined in our telephone conversation, to remove this drawing's objectionable features.

"The revision of the plates, of which we are now proceeding, will reduce the present accentuation of 3969
posterior lines to a point where they are no more prominent than the slight depression now noticeable in the backbone, in the drawing's present status. In view of these measures taken to obviate any objectionability from these pages, we trust that you will advise the Post Office here in Chicago, as you have in previous instances, that the issue is mailable as corrected.

"I appreciate the difficulty of arriving at a hard

3970 and fast set of rules in matters of this kind, particularly in view of the fact that such court decisions as are available for reference all date from another era, and I am inclined to believe that we will soon find it advisable to have recourse to a test case, for an attempt at clarification of the issue.

"Meanwhile, I would very much appreciate an opportunity to meet with you again in Washington for a 'refresher' session, for our guidance in making up future issues of Esquire.

"I should also appreciate your letting me know,
3971 whenever the pending conferences with the Postmaster General have been held, advising me of a date that would be convenient to you for this meeting.

"Cordially."

Forty-one is a copy of a telegram to the Postmaster in Chicago, which was sent collect—that is, for the publisher to pay for—reading:

"This office has been advised by publishers of Esquire that objectionable portions of advance copy November issue submitted by you have been corrected in view of which revised issue may be accepted for mailing.

3972 "Collect charges hereon from publishers."

Chairman Myers: Now, to keep the record straight, Mr. Hassell, you are just going to start to offer those other exhibits that were marked for identification. You didn't do that.

Mr. Hassell: I want to offer all these exhibits which have been marked to date.

Chairman Myers: Any objection?

Mr. Bromley: No objection.

Chairman Myers: They may be admitted.

Arnold Gingrich—for Respondent—Resumed—Cross.

(The documents heretofore marked for identification "Department's Exhibits Nos. 36, 37, 38, and 39," were received in evidence.) 3973

By Mr. Hassell:

Q. Mr. Gingrich, that correspondence does not disclose that any finished copy of this gate-fold picture was ever submitted to this office, does it? A. No, it simply confirms the telephone conversation to which it refers.

Q. In other words, it was revised by telephone, wasn't it, by a telephone conversation? A. We were given an assurance by telephone that if we made the changes discussed, the 3974
issue would be considered acceptable for mailing, and I sent —oh, I believe in that instance, Mr. Hassell, and an examination of your files should show this, I did send copies of the before and after status of the drawing. I know we always did that with the Chicago Post Office. Every time there was a substitution we would, to keep their records clear, send them a copy of the cartoon or whatever it was to which objection had been made, marked "before" and another one marked "after" so they could check against the issues as mailed to see what had been objected to and what had been substituted.

In the case of this one which was a gate-fold, having made 3975
the changes in the plates after this telephone conversation, I believe we sent that revised form of that both to Chicago and to this office. That is my recollection of that particular one.

Q. Will you check on that because a diligent search of the files of this office does not show that any such thing was received. A. Yes, I will check the files.

Q. And if you find that that was done, will you put that in evidence? A. All right.

3976 Q. Mr. Gingrich, the dummy for the 1942 issue of Esquire was held objectionable, was it not, on account of the cartoon on page 54 thereof? I will show you the cartoon in black and white on page 54 of the January, 1942, issue. A. Yes. I recall that.

Q. That was the objected-to-cartoon, was it not? A. Yes.

Mr. Hassell: I offer this.

Mr. Bromley: No objection.

Chairman Myers: Admitted.

3977 (The cartoon referred to was marked "Department's Exhibit No. 42," and received in evidence.)

The Witness: Was your question that that was the only thing objected to, or one of the things objected to?

By Mr. Hassell:

Q. That is the thing objected to. A. There were changes in the verses accompanying the Varga calendar in that issue, a number of substitutions made in the verses.

3978 Q. I show you a telegram with respect to that, Mr. Gingrich, dated November 1, 1941. That telegram purports to have come from you. Was it your telegram? A. Yes, this is a telegram I sent.

Mr. Hassell: Will you mark this as Exhibit 43?

(The telegram was marked for identification as Department's Exhibit No. 43.)

Mr. Hassell: This telegram reads: 3979

"Have removed both cartoons on page 54 of our January issue. No substitutions made because we have more advertising than we expected and had to take out one page of cartoons in any event. Trust you will advise Chicago Post Office in due course that objectionable cartoon has been removed. Just for the record, page 54 now carries cartoon which in your dummy previously occupied page 58."

I offer Government's Exhibits 42 and 43. 3980

(The documents heretofore marked for identification "Department's Exhibits Nos. 42 and 43," were received in evidence.)

By Mr. Hassell:

Q. Now, Mr. Gingrich, I show you matter appearing at page 12 and page 128 of the March, 1942, dummy of Esquire, and ask you to state whether those were objected to in this issue? A. I recall both of them as being material which was objected to, and for which substitutions were made.

Mr. Hassell: Will you mark these for identification. 3981

(The documents referred to were marked for identification as Department's Exhibits Nos. 44 and 45.)

The Witness: Mr. Hassell, I would like to clarify my identification on these in each instance as being

3982 subject to anything else being in my file. That is both of these having been objected to and having been removed, but I don't know that that was all there was in the issue.

Mr. Hassell: I want to offer those in evidence.

Chairman Myers: Any objection?

Mr. Bromley: No objection.

Chairman Myers: They will be admitted.

(The documents heretofore marked for identification "Department's Exhibits Nos. 44 and 45," were received in evidence.)

3983

By Mr. Hassell:

Q. Mr. Gingrich, I call your attention to matters at pages 38, and 38 is a gate-fold, at the bottom of page 48, at the bottom of page 94, the top of page 102, the bottom of page 112, on page 135, and ask you to state whether those items were the items objected to in this April, 1942, issue of Esquire? A. Yes, I recognize them and identify them.

Mr. Hassell: Mark these.

3984 (Documents were thereupon marked for identification "Department's Exhibits 46, 47, 48, 49, 50, and 51.")

Mr. Hassell: I offer these in evidence as marked.

By Mr. Hassell:

Q. Is this the Varga or Petty? A. Varga.

Mr. Hassell: I understand the record fails to show that this Exhibit 43 was received. I want to offer them all up to this point. 3985

Mr. Bromley: No objection.

Chairman Myers: Exhibit 43 may be admitted. Also Exhibits 46 to 51, inclusive.

(The documents heretofore marked for identification "Department's Exhibits Nos. 46, 47, 48, 49, 50, and 51," were received in evidence.)

By Mr. Hassell:

3986

Q. Mr. Gingrich, I believe you testified that the May, 1942, issue was the last one. A. No, my recollection is that July, 1942, was the last one.

Q. I show you the May, 1942, dummy and call attention to pages 18, 28, 43, and at the top left of 44 of this issue and ask you to state whether it is in accordance with your recollection that these are the cartoons or matters that were objected to in this issue? A. Yes, I recall all of those that were identified.

Mr. Hassell: Will you mark this as Post Office Department's Exhibit 52 and this as 53 and this as 54 and this as 55? 3987

(The documents referred to were marked for identification as Department's Exhibits Nos. 52, 53, 54, and 55.)

Mr. Hassell: I offer these exhibits as marked.

Chairman Myers: Any objection?

Mr. Bromley: No objection.

3988 Chairman Myers: They may be admitted.

(The documents heretofore marked for identification "Department's Exhibits Nos. 52, 53, 54, and 55," were received in evidence.)

By Mr. Hassell:

Q. Now, Mr. Gingrich, I call your attention to matter appearing on pages 21 and 43 of the July dummy issue of Esquire, and ask you to state whether these were matters objected to by the solicitor in this dummy? A. Yes.

3989 Q. The last one of these—would you call that as a Sultan type cartoon, Mr. Gingrich? A. Yes, that is in the Sultan series.

Q. Do you recall whether you changed the gag line on that and still it was objectionable with the changed gag line? A. It is so identified in the dummy as having a new gag line. You will recall in referring to one of the previous issues where objection was taken, you will recognize the same drawing as having been submitted with another gag line in a previous issue.

3990 Mr. Hassell: Now, have these marked as Post Office Exhibits 56 and 57.

(The documents referred to were marked for identification as Department's Exhibits 56 and 57.)

Mr. Hassell: I offer these as Post Office Exhibits 56 and 57.

Chairman Myers: Any objection?

Mr. Bromley: No objection.

Chairman Myers: They may be admitted.

3991

(The documents heretofore marked for identification "Department's Exhibits Nos. 56 and 57," were received in evidence.)

By Mr. Hassell:

Q. I show you a copy of a letter addressed to you by the Solicitor of the Post Office Department on May 21, 1942, and ask you to state whether this is a letter that stopped the dummy business? A. Yes, that is the letter to which I referred.

3992

Mr. Hassell: I offer this as the next Post Office exhibit.

(The letter referred to was marked for identification as Department's Exhibit No. 58.)

Chairman Myers: Any objection?
Mr. Bromley: No objection.
Chairman Myers: Received.

(The letter heretofore marked for identification "Department's Exhibit No. 58," was received in evidence.)

3993

Mr. Hassell: This letter reads, addressed to Mr. Gingrich on May 21, 1942:

"For your information as a publisher using the United States mails, your attention is invited to the fact that the law does not require the Post Office Department to make a ruling as to the mailability of

3994 matter that is not in the mails or that has not been deposited for mailing. Since the Post Office Department cannot, by a ruling, relieve a mailer of responsibility for a violation of the postal statutes affecting obscenity, the Department declines to deal with the question of mailability of any matter which the sender feels may be in violation of such statutes, in advance of its actual deposit in the mails addressed for delivery to addressees.

"If one harbors doubt as to the mailability of the material offered, because of the statutes relating to
3995 obscenity, a sense of decency and good morals should compel him to conclude that the material should not be sent through the mails.

"The dispatch by postmasters and postal employees of matters deposited in the mails constitutes no guarantee of its mailability under the postal obscenity statutes. The postal obscenity statutes in question are criminal laws, and one must, of course, accept full responsibility for depositing any matter in the mails which is in violation thereof."

Mr. Bromley: Do you concede, Mr. Hassell, that that letter was sent to all publishers who had been
3996 submitting their magazines to this department, and not only Esquire?

Mr. Hassell: I will concede it was sent to a number of other publishers. I think it was the intention to send it to all publishers who were submitting their material in advance.

Mr. Bromley: That is what I said. It was sent to all publishers.

Mr. Hassell: I think it was the intention to send it, to so send it, but I couldn't say whether it was done or not.

Arnold Gingrich—for Respondent—Resumed—Cross.

Q. Mr. Gingrich, it is a fact that during this period in which you were submitting dummies here, there was a good deal of correspondence back and forth between you and this office, and the postmaster at Chicago, and you made a number of trips down here, didn't you? A. Yes, I think I came down three times, to the best of my recollection. Twice I came down with batches of cartoons that were not scheduled for publication, to get them reviewed in advance, came in to Mr. Gregory's office with them, and went over the batches of cartoons with him. That was done on two occasions. 3997

On a third occasion, after the receipt of this letter of May 21, 1942, I came again with another batch of cartoons, but Mr. Gregory explained that because the dummies were no longer to be reviewed he could no longer go over batches of cartoons, so they were not— 3998

Q. You came to me with those, didn't you, Mr. Gingrich? A. No, I think I came to Mr. Gregory with them and he said that they could not be examined because the Department was no longer in position to approve either cartoons or dummies.

Q. I told you that, but it doesn't make any difference. A. Well, on various trips I talked to various people. I do recall the discussion with you. Quite possibly it was that time—we were going over some of the material in the College Humor case. I remember your going over that with me. I also talked to Mr. O'Brien. 3999

Q. I gave you a copy of the press release in the College Humor case, didn't I? A. Yes, I think that is true. My point, however, is that I brought down three batches of

4000 cartoons, two of which were gone over by Mr. Gregory and one of which was not.

Q. Now, can you show us any Sultan type cartoons like those involved here in this cited material, that were approved by the Solicitor of the Post Office Department? A. Yes. In the issues from December, 1940, to July, 1942, I believe we have segregated—as a matter of fact, just for easy reference—all the Sultan cartoons which did appear during that period.

Q. Do you think they were all of the same character as the cited material involved in this case? A. I would
4001 like to call attention to them on the basis of posing that as an open question. I don't think my opinion of them is particularly important.

Since all the issues in this period are in evidence I would like to direct the Board's attention to page 46 of the March, 1941, issue, the Sultan cartoon reading: "I know I am two months late with these girls, but next time you try to get them past the British blockade;" to the Sultan cartoon of page 31 of the issue for April, 1941, the line reading: "Please don't haggle over the price right in front of her—do you want to give her an inferiority complex"; to the Sultan cartoon on page 62 of the issue for July, 1941, with
4002 the gag line reading: "Around here every day is father's day"; to the Sultan cartoon on page 35 of the issue for October, 1941, with the line reading: "I got the idea from an air line company"; to the Sultan cartoon on page 63 of the December, 1941, issue with the line reading: "I have a friend who can get one for me wholesale"; to the Sultan cartoon on page 46 of the issue for June, 1942, with the line reading: "Have you got that one in a size larger?"

Chairman Myers: These are all in those issues that you introduced?

Mr. Bromley: Yes.

Arnold Gingrich—for Respondent—Resumed—Redirect.

By Mr. Hassell:

4003

Q. Mr. Gingrich, did the postmaster at Chicago write you letters when matters on your dummy submitted through him were held to be objectionable by this office? A. They gave us either a phone call confirmed later by a letter or wrote us. I think as a matter of general practice whenever there was a question of a substitution to be made that they simply called us up and said that they had received a message from the Solicitor holding that pages so-and-so and so-and-so and so-and-so were objectionable. Then we immediately sent down, sometimes through them and sometimes direct, depending on how urgent the matter was on a question of press time, the substitutions. Then after the substitutions were approved we would again get a telephone-call followed by a letter, so that as a matter of routine we always were advised by the postmaster at Chicago of what had transpired on each issue, whether it had had any objection taken to any of the pages or not.

4004

Mr. Hassell: That is all.

Redirect Examination by Mr. Bromley:

4005

Q. Will you look at this folder labeled "Varga 1941" and tell me whether this is composed of tear sheets from the 1941 issues of Esquire already in evidence showing the Vargas which were approved in that year by the Post Office Department? A. It seems not to be complete because I don't see one for April. April, 1941, is not here. It is complete except for that.

Q. Here (handing the above mentioned article to the witness). A. With that included, that does represent the

4006 Vargas for the year 1941 which were in the issues submitted for ruling by the Post Office.

Q. Will you do that for 1942?

Mr. Bromley: I would like to show the Board these pictures rather than going through the magazines.

By Mr. Bromley:

Q. Does the folder for 1942 contain the Varga girls that were approved for 1942 by the Post Office Department? A.
4007 Yes; that is complete starting with the calendar, continuing as far as the approval of the dummies went. That is through July 1942.

Q. Now, is it a fact, Mr. Gingrich, that all of the issues between October, 1940 and July, 1942, which have not been specifically referred to by Mr. Hassell in your cross examination, were all mailed without objection by the Post Office Department? A. That is a fact, yes.

Q. And indeed in each of the instances to which no objection was made by the Post Office Department at all, you received a letter either from the Post Office Department or the postmaster at Chicago specifically telling you you
4008 could go ahead and mail? A. That is correct.

Mr. Bromley: Mr. Hassell, I will ask you to concede this, if it be true, that you have pointed out everything which was declared non-mailable by the Post Office Department in any issue from October, 1940 through July, 1942.

Mr. Hassell: With the exceptions of the few instances, counsel, where substitutions were considered bad and other substitutions were supplied.

Mr. Bromley: Well, would you concede, Mr. Hassell, that Esquire never published anything during this period in any of its issues to which the Post Office Department made objection? 4009

Mr. Hassell: I don't know as I could concede that. Of course, we have this Petty girl that some alleged change was made in the indentation in the nates. I never saw that before; that is the finished product, before this afternoon. It was not in the files of the office.

Now, just how that was changed, I don't know.

By Mr. Bromley: 4010

Q. I will ask you, Mr. Gingrich, did you ever publish in any issue submitted to the Post Office Department, any item to which any objection was taken by the Post Office Department? A. No, in none whatsoever.

Q. Is it a fact that in every instance where objection was made by the Post Office Department during this period, you agreed to eliminate and did eliminate the matter complained of? A. Yes.

Q. And was this Petty girl to which reference has been made, the only instance in which you made a change in the plate as distinguished from eliminating the matter al- 4011
together, that was complained of? A. Yes.

Q. Is all the correspondence in evidence which relates to the change made in the plate of the Petty girl? A. I believe so. The letter confirming the telephone calls has been introduced in evidence and I have already called the Board's attention to the changes made in the plate in the December, 1940, issue.

That also was confirmed by letter. That correspondence is in evidence.

4012 There is no other loose thread left hanging, to my knowledge, in the matter of substitutions. I have all of the substitutions, but, of course, since the issues are in evidence, they show what substitution was made for each of the complained of items.

I believe they are complete in that regard.

Q. In connection with Post Office Exhibit 30, which was an advertisement for "Bedside Esquire," you said you hired a lawyer to threaten these people who got out this advertisement with suit. A. We didn't hire a lawyer for that purpose. We referred it to lawyers who had handled other

4013 matters for us.

Q. Who was that? A. Greenbaum, Wolf & Ernst.

Q. Is that the New York law firm of which Mr. Morris Ernst is a member? A. Yes, sir.

Q. Did they take it up at your instruction with the publishers and reach an agreement with them, or with their lawyers, which you had mentioned? A. Yes.

Q. Did that result in cessation of that type of advertisement for "Bedside Esquire"? A. Yes, with the proviso made that in the future advertising, advertising of any kind would be subject to our formal O. K.

Since that agreement there has been only one advertise-

4014 ment come through which I referred to as being intended for the Hartford "Courant," which we did O. K. within about a month.

Q. You never had any contract or arrangement or dealings with the Herald Publishing Company or any of the other publishing companies who got out the ad to which you objected? A. None whatsoever.

Q. They got their rights to publish or distribute the book "Bedside Esquire" without your consent or knowledge, from the McBride Company with whom you made an original

arrangement to publish the book? A. We knew nothing of any such transaction until we saw some of those advertisements. We knew nothing of arrangements for distribution of the book whatsoever. 4015

Q. And your arrangement with the McBride Company, unfortunately, and perhaps due to an oversight, did not contain any prohibition against the McBride Company assigning their rights, did it? A. That is right. Upon examination of the contract to see what our rights were, I must confess that I had apparently overlooked a clause in the original contract, which they tell me is a standard clause concerning cheap editions.

We had never thought of the possibility of there being a cheap edition of a book of this kind and we had made no proviso to lock that door. 4016

Q. So that when McBride assigned to Herald and the others, and you found out about it, there was nothing you could do because McBride had the absolute right to assign? A. That was the position.

Q. How did you succeed in reaching an agreement with Herald and the others whereby they agreed to submit their advertisements to you for approval? A. We offered to buy up the plates, we offered to reimburse them for any expenses of books outstanding in stock, but, as I recall, the arrangement finally made was that they were not willing to give up this sale of such books as are now in existence, but have promised at the expiration of the year 1943, I believe, to discontinue the printing of any subsequent editions. 4017

They are, in other words, going to finish out the year and they will not continue distribution of the book beyond that time.

4018 Q. Well, you got them to do that by paying them some money, didn't you? A. Well, I presume so, yes. We had made many offers of settlement on the matter to prevent the possibility of any more of these books getting into the hands of this type of publisher that were misrepresenting them.

Q. Don't you know that you paid them, as a matter of fact, $10,000 in order to get their agreement? A. I don't recall what the actual monetary settlement finally was. I remember we had so many offers that were made and it has completely gone out of my mind what they did receive.

Q. You know there was an ultimate monetary settle-
4019 ment whereby you paid them money? A. Oh, yes, that I would no doubt assume because the negotiations were so protracted and there were so many meetings held and we tried to arrive at an amicable settlement. We simply wanted the advertising stopped and wanted the possibility of this book being misrepresented ruled out in the future.

Q. So you got their agreement by paying them some sum of money? A. Yes, by paying them some sum of money and I have forgotten what the final settlement was.

Q. In connection with Post Office Exhibit 29, being a letter of protest from somebody about the contents of your magazine, I show you a letter dated October 7, 1942, and ask
4020 you whether this is a letter from Frank M. Folsom? A. This is a photostatic reproduction of a letter we received from Frank M. Folsom, yes.

Mr. Bromley: Will you mark that for identification as the next Respondent's exhibit?

(The letter referred to was marked Respondent's Exhibit No. 120 for identification.)

By Mr. Bromley:

4021

Q. Who is he? A. He is the assistant chief in charge of procurement of the Navy.

Mr. Bromley: I offer it in evidence.

Mr. Hassell: I would like to inquire whether Respondent's Exhibit 120 is offered in the form of a testimonial for Esquire.

Mr. Bromley: Well, you opened the door by complaining about us. Now I want to show that we get many more letters of approval than we do complaints.

4022

Chairman Myers: It may be admitted.

(Respondent's Exhibit No. 120, previously marked for identification, was received in evidence.)

Mr. Cargill: How many such letters do you intend to put in, Mr. Bromley?

Mr. Bromley: Well, I guess we get many, many hundreds.

Mr. Harding: Thousands.

Mr. Bromley: Thousands. I have selected perhaps a dozen.

4023

Mr. Hassell: As I recall, the complaint was from the Knoxville Women's Bureau, which I offered in connection with this testimony. That is the only contrary testimony I recall putting in.

Chairman Myers: As I understand it, this is directed to the matter of reputation of the magazine: is that the purpose?

Mr. Bromley: Yes.

4024 Mr. Hassell: That was the purpose of the other matter. Now I have some material like it in our files. If you want to go into that, why, we will have to put all these files in. I object to it.

Mr. Bromley: The letter to which I had reference was Post Office Exhibit No. 29. Letter of October 2, 1943, from Cambridge Glass War Service Committee, which I understood was received in evidence.

Mr. Hassell: That was about the Esky Buy Products.

4025 Chairman Myers: Yes; that is correct.

Mr. Bromley: Then there was a statement by Adolph Menjou which you read into evidence.

Mr. Hassell: That was with respect to how service men going into battle and about to die would not be interested in dirty stories.

Chairman Myers: I did not get that as a matter of reputation of the magazine.

Mr. Hassell: It did not mention Esquire.

Chairman Myers: Why don't you pick out about three of the characteristic ones and put those in for the purpose of saving the records? Mr. Hassell can pick out what he wants on his side.

4026 Mr. Bromley: You mean limit each side to three of these?

Chairman Myers: Yes.

Mr. Cargill: Mr. Bromley, do you think that three is a reasonable number?

Mr. Bromley: Well, I think together with testimony from Mr. Gingrich as to how many similar letters of approval he has received, three is all right.

Mark this for identification.

(The document referred to was marked Respondent's Exhibit No. 121 for identification.) 4027

Q. Respondent's Exhibit 121 for identification is a letter dated October 14, 1943, enclosing a petition on behalf of the Varga girls from West Lafayette, Indiana, signed by members of the armed forces. Did you receive that letter and petition? A. I did.

Q. Have you received any other petitions from soldiers or anybody else, encouraging the Varga girl or the magazine? A. We have had many letters which were signed by group signatures, sometimes extending into a considerable number of signatures on one letter. I don't recall another petition of this nature. 4028

Mr. Bromley: I offer Exhibit 121 for identification in evidence.

The Witness: We have received copies of petitions sent to the Postmaster, just a copy to us, that were from ships in the fleet. I believe there were two such instances where we received copies.

Mr. Hassell: May I ask the witness about this?

Mr. Bromley: Yes.

Mr. Hassell: This document or petition was solicited for use in this hearing, wasn't it? 4029

The Witness: They wrote in and offered to take up a petition if we would send them the drawings in question. We said certainly we would and sent them to them and they made the investigation, with the resultant petition that is there offered.

The original, however, offer for the petition was volunteered upon hearing about this matter. We accepted the offer and the petition was then sent to us.

4030 **Mr. Hassell:** I would not object to this if I can put in the same number.

Chairman Myers: If it relates to this hearing, I don't think it ought to go in myself. But I think you can put in the same number of general character as they have. If that is something that relates to this hearing, I don't think it should be received in evidence.

Mr. Bromley: Well, Exhibit 29, which was received in evidence did relate to this hearing and to our magazine.

4031 **Chairman Myers:** This is one of the three?

Mr. Bromley: Petitions, yes.

Chairman Myers: In the light of that, it may be admitted.

(Respondent's Exhibit 121, previously marked for identification, was received in evidence.)

Mr. Bromley: Exhibit 121 is a letter and dated October 14, 1943, signed by Leonard Gordon, sergeant, at West Lafayette, Indiana. It reads:

"Enclosed please find the petition on behalf of the Varga girl. My room mate, Mike Winkler, and I

4032 were kept by the pressure of other work from getting the petition completed sooner. We sincerely hope that it will be of some help for your hearing on the 19th.

"A poll among the service men here would reveal 90 percent of the men strongly in favor of 'Esquire' as it has been, less than 10 percent indifferent, an almost non-existent fraction in sympathy with the move to withdraw your mailing rights.

"So, from all the boys, the best of luck,

Leonard Gordon."

Then, a signed petition with the typewritten heading: "We, the undersigned, members of the armed forces, note with alarm any attempt to censor the contents, both in text and illustration, of 'Esquire,' on the alleged grounds of pruriency, particularly where it is further alleged that the magazine has deleteriously affected the morals of service men. In no case do we, constant readers of the magazine, feel that we, or any other service men, have suffered in any way by reading 'Esquire.' On the contrary, we have always thoroughly enjoyed it and to the extent that any magazine can contribute to the service men's enjoyment at their leisure, and thereby, to their morale, 'Esquire'—Varga girls, Campbell cartoons, fiction and everything else—has done so. We therefore earnestly petition that 'Esquire's' mailing privileges not be withdrawn." 4033 4034

And, there are seven pages of signatures.

And, I offer Exhibit 122 for identification in evidence.

Mr. Hassell: No objection, if I can offer three similar matters.

Mr. Bromley: This is a letter from Army Air Base, Williams Field, Higley, Arizona. It is signed by Robert H. Ebenreiter and reads: 4035

"Dear Mr. Varga:

"I am writing this letter for 250 hard-working, high flying Aviation Cadets who are to graduate, commissioned, and off on their way to sky action in the far corners of the earth this forthcoming February 3d.

4036 "We have been plugging, flying and studying together for seven long months, and are now almost at the end of the trail where we will receive our Wings and Commission! As is customary, we are publishing a classbook which is going to serve as a resume of our cadet days.

"Other classes before us have put out books like this, but they have been only nominally impressive. We are determined to supersede any of their efforts and produce the finest classbook ever turned out by any aviation cadet class at any Army Flying

4037 School in the United States!

"That is why we are turning to YOU at this time.

"Your drawings have been great attractions for all of us lads. I know for sure that if we could include some of them in our book we will have taken a major step forward in reaching our objective of producing the best flying school classbook ever seen on the nation's training fields.

"Therefore, we would like to make a bid for one of your shapely lovelies, enticingly clad in a very thin aviatrix's uniform, which would do the trick just beautifully. Our class is known as the 'Class

4038 of '43—B.' An effective angle would be to have your lovely damsel giving her best wishes to the boys of 43-B. Whether you want to have her on a plane or not is all up to you. In case you do, make it on a plane similar to the one I am enclosing inasmuch as this is the one in which we have done all of our training. You will note that this is a two-engine ship. However, remember that if you do not wish to use a plane in the drawing it is entirely OK with us. Matter of fact is, if you would like to submit

several drawings, we surely would appreciate them.

"Also, please pen your personal best wishes on the drawing, because a word from you in our book would mean as much to us lads as the drawing itself. 4039

"The size of the page we are using is 8 by 11, if that information would be of assistance to you. We want to devote one full page to your drawing.

"And, as usual, prompt dispatch is necessary. Our deadline is set for January 15.

"Could you meet this deadline and honor us with one or more of your famous girl drawings? I can assure you that the appreciation of everyone of us flying cadets will know no bounds for your contribution! 4040

"Loyally yours,

"Robert H. Ebenreiter.

"P. S.

Important: I almost forgot to mention that these drawings must be in black and white inasmuch as our budget doesn't warrant colored drawings."

I offer in evidence Exhibits 121 and 122 for identification. 4041

Chairman Myers: That constitutes your three, does it?

Mr. Bromley: I will offer in evidence Exhibit 123, which—

Chairman Myers: Did Varga send one of the drawings?

Mr. Bromley: He did and it was used in the cadet book.

4042 The Witness: To my knowledge he has never turned down a request from service men. They come in such increasing numbers and he has filled them to a point to where we have been worried as to whether we would get our own work done.

Mr. Bromley: This letter is from the Army Air Base, Ephrata, Washington, and reads:

"Dear Esky:

"Your magazine should receive the Army-Navy 'E' for efficiency. Efficiency at keeping up morale.

4043 "In my book, the Varga drawings and the Hurrell photos are the favorites. The Henry Waxman and William Ritter photos are another dead heat for second. Stage door Esquire is third by a whisker with the Esquire Canteen fourth. The entry of John Falter and Paul Gallico are pushing the leaders very hard and may even win out. As far as magazines go, 'Esquire' is so far in front that there doesn't appear to be any second in the race.

"Not being a literary sort of a fellow, I am not going to attempt to rate the writers. George Jean Nathan, William Lyon Phelps and Gilbert Seldes

4044 are my favorites.

"Incidentally, don't waste time sending the enclosed order. My morale needs another boost.

"So long, Esky. Sherman was wrong only because he didn't have 'Esquire' to look through.

"One who hopes you will never change."

That is signed "Corporal John Green, with his address.

By Mr. Bromley:

4045

Q. Now, are these letters, the last two I have read, one in 1942 and one in 1943, typical of other letters that you have received? A. I would say so, yes.

Q. And the other letters generally run into what figures? A. Well, it would be into the thousands surely. There is never a day that goes by that the mail folder does not cross my desk with at least 25 to 30 letters from service men, and then in addition to that, I get the blue sheets from the subscription department, enclosing comments that were sent in with the subscription correspondence. Also, we have had a great deal of V mail as of the last few months since the V mail facilities have been available, so that the percentage of our mail from overseas is very great.

4046

Mr. Bromley: That is all.

Mr. Cargill: I would like to ask you one question.

The Witness: Yes.

Mr. Cargill: Can you tell me something about this man Gordon that got up the petition?

The Witness: No; other than he wrote in at the time that the Post Office citation had just been published, saying that the members of the flying group in West Lafayette, Indiana, would like very much to be of help in this matter. "If there is any value to you in having a poll or petition taken, we would like to do it; if you would send us the materials complained of."

4047

So I think, as I recall, we just answered it, stating that we would welcome it from them and sent the material. I did not meet him at all and I don't believe we had any conversation by phone.

4048 Chairman Myers: What were the materials that you sent?

The Witness: The drawings, the Varga drawings for the year.

Chairman Myers: The eleven issues?

The Witness: Yes. At that time our only knowledge of the citation was confined to the original, I think, of 23 items, most of which, 17 I believe, out of that 23, were Vargas, so that they didn't get the very last thing that subsequently was included, but as of that moment, yes, we sent in everything we

4049 knew at that time.

Mr. Cargill: Well, was this citation given publicity generally at the time it was issued?

The Witness: Yes. We knew nothing about it ourselves until after we had been called by any number of press services, and people who had heard it on the radio and were asking for information. I know my phone rang from Sunday noon until well on into Monday morning. One reporter of one press service after another asked me about this and I asked the first three of them to read me what they knew, because I had no knowledge of it, and from then on

4050 I was simply in the air until I got the citation.

Mr. Hassell: I might say that the press release was issued with a deadline. We sent out four and some of the press services and one radio commentator put it out the day before. That was on Sunday. It should have gone out on Monday, the time we told them to send it out.

May I offer these three letters?

Chairman Myers: Yes.

Mr. Hassell: Mark these for identification, first.

(The letters referred to were marked Department's Exhibits 59, 60 and 61 for identification.) 4051

Mr. Hassell: I picked out the last three in the file of recent date; one from an educator, one from a business firm, and another from a sailor on board a vessel.

I would like to offer in evidence the following letters:

Post Office Exhibit 59 being from W. M. Kethley, president of Mississippi Delta State Teachers College of Cleveland, Mississippi, who writes to the Postmaster General as follows: 4052

"Dear Sir:"

"My attention has been called to a notice under a Washington date line that you have taken steps to restrict the free use of the mails to several of our current magazines and periodicals on account of lewd and indecent publications carried therein.

"I am writing to commend you for this action and to assure you of the support, the confidence, and esteem of many citizens in the United States. I express my personal appreciation of your stand and trust you will not deviate therefrom. 4053

"Very truly yours."

No. 60 is from L. J. Schott Company, signed by L. J. Schott, of Akron, Ohio. This is addressed to the Post Office Department, Legal Division, under date of October 23, 1943, and reads as follows:

4054 "Gentlemen:

"We write in connection with the denial of mailing privilege to 'Esquire Magazine,' and in which case a hearing is now going on.

"We have been surprised in the past that this magazine has been permitted to be mailed, and it seems that they must have had some special privileges.

"It is undoubtedly one of the most obscene and shameful magazines on the newsstands, and in our
4055 opinion the move to shut off mailing privileges should be pushed to its logical conclusion."

No. 61 is from Russell L. Sink, an air mail letter dated October 28, 1943, and is addressed to me. It reads:

"Dear Sir:

"Am with you one hundred percent in keeping the over-worked mail clerks from delivering all the filthy mags or even a part of them to the public.

"There must be a few Christians left and now is the time for them to come forward in behalf of our
4056 young peoples.

"The bible has plenty to say about such filthy stuff.

"After reading some of the testimonies of the leaders of our young people, it is no wonder they are delinquent."

That is all.

I offer these three letters in evidence.

Chairman Myers: Any objection?

Mr. Bromley: No.

Chairman Myers: They are received. 4057

(The letters referred to, previously marked for identification, were received in evidence as Department's Exhibits 59, 60, and 61.)

Chairman Myers: Have you any further witnesses, Mr. Bromley?

Mr. Bromley: Two.

Chairman Myers: We will resume in the morning at 9:30.

4058

(Whereupon, at 5:15 p. m., the hearing was in recess until 9:30 a.m., Tuesday, November 2, 1943.)

4059

HEARING OF NOVEMBER 2, 1943.

4060

HEARING RESUMED.

Chairman Myers: Proceed, gentlemen.

FRED E. LUCHS a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Bromley:

4061

Q. Reverend Luchs, will you give us your full name, please? A. Fred E. Luchs.

Q. And you live where, sir? A. Athens, Ohio.

Q. How long have you been in Athens, Ohio? A. Six years.

Q. And you are there the pastor of a Presbyterian Church, are you? A. Yes, sir.

Q. Will you give us the name of the church? A. The First Presbyterian Church.

Q. And it is in Columbus, Ohio, is it? A. Athens.

Q. Now, tell us something about the church, your parish.

4062

A. The parish itself is almost 700 members, but it is a church which deals with the students.

Our student audience is about 80 percent of the congregation on a Sunday morning. There are 300 to 450 students every Sunday, these students not being all Presbyterian. They are all denominations, mostly Presbyterians, or some preference students who belong to no church.

Q. And from what part of the country are your students? A. All parts of the country and the 600 A. S. T. P. Army cadets.

Q. What university is that? A. Ohio University, separate from Ohio State University, which is at Columbus. 4063

Q. How near the campus is your church? A. One block.

Q. Are you the only pastor of that church or do you have assistants or associates? A. I have a woman director of the student work.

Q. You are an ordained Presbyterian minister, are you? A. Yes, sir.

Q. For how long have you been such? A. Six years in the Presbyterian Church and six years in the Reformed Church, which is an allied body.

Q. Where did you receive your theological training? A. 4064
At the Eastern Theological Seminary at Lancaster, Pennsylvania, which is in a sense part of the Franklin Marshall College. I had a year at Harvard and two years graduate at the University of Chicago in the seminary divinity school and school of psychology.

Q. Do you teach at Ohio University? A. I occasionally lecture on speech, journalism, and such.

Q. Now, have you ever served as exchange professor in foreign countries? A. As exchange minister in 1939. The itinerary was cut short by the war coming on, but I preached in England, Scotland and Germany—the American church in Berlin is the only church I preached in in Germany.

Q. Did you conduct any studies abroad and, if so, where? 4065
A. I studied one other time at Palestine, Jerusalem, at the American School of Archeology, and in 1934 was on a study tour with a group of students and teachers which took in about a dozen or more countries of Europe.

Q. Have you been a contributor to periodicals on the subject of youth problems? A. Yes. Christian Herald, Christian Century, the Christian Century Pulpit, Social Frontier, Pennsylvania Farm Review, International Journal of Religious Education, and several others.

4066 Q. Have you had any experience in conducting summer camps for young people? A. Yes. Four years in Pennsylvania with rural youth groups; north of Pittsburgh.

Q. Now, does that cover in general your training, experience, etc., Reverend? A. Yes. I worked with soldiers. I have been camp pastor at Fort Jackson last winter, and I am social adviser to the Army boys on our campus.

Q. And I suppose like many ministers during your various pastorates you have preached around the country in churches other than your own? A. Yes. I preached once in Washington at the New York Avenue church.

4067 Q. That is a Presbyterian church, is it? A. Yes, sir.

Q. Is it true that you have preached elsewhere? A. Yes. In Chicago, Milwaukee, and other smaller places.

Q. Now, there is before you on the table a collection of eleven issues of Esquire to which the Post Office Department has made objection in part. Have you examined the material in those eleven issues which we have called to your attention as having been complained of? A. I had examined them, I haven't read every word, but have looked at the criticisms made and have read those criticisms.

Q. Based on your examination and your knowledge and experience, will you tell the Board whether you find anything
4068 in the material objected to that is in your opinion tending to corrupt morals of youth as you have come to know them in your contacts as a minister?

Mr. Hassell: Same objection.

Chairman Myers: Overruled. Will you answer, please?

The Witness: No, I have found nothing of that sort.

By Mr. Bromley:

4069

Q. In your opinion, Reverend Luchs, would any of the objected to material have any tendency to lower the standards of right and wrong as regards the sexual relations in normal people generally? A. No.

Q. In your opinion, would any of the material which has been objected to have any tendency to stimulate the impure thoughts or acts among any class of normal adult human beings? A. I don't think so.

Q. Taking the matter which has been objected to, either singly or collectively, is it your opinion that they are obscene, lascivious, lewd, indecent or filthy? A. Neither of those terms you have described. 4070

Q. And, finally, in your opinion, would any of the material objected to have any harmful moral effect upon the normal average human being? A. No, I don't think so.

Mr. Bromley: That is all.

Cross Examination by Mr. Hassell:

Q. What is this average human being that you had in mind when you answered the question of counsel just put to you? A. I was thinking of the normal student, a normal youth, as one who is not badly maladjusted, who is not in any sense a pervert; the average run-of-mill student on our campus. 4071

Q. Do you generally regard the family as the basis of our society, sir? A. I do.

Q. Do you regard jokes dealing flippantly with the sanctity of marriage the type of matter that is not calculated to have a debasing moral effect? A. No. Under humorous conditions I have felt that humor dulls the edge of that kind of obscenity or what we call stimulation. That under the im-

4072 petus of humor the sex stimulation is almost nothing because of the humor which is attached.

Q. You think, then, a dirty joke that carries with it humor, is perfectly decent and proper? A. Not a dirty joke.

Q. Do you regard a joke that in effect puts a decent, reputable citizen who has standing in his community, in bed with a luscious blonde, as a dirty joke or as a perfectly decent joke? A. That could be both. I am thinking of a particular kind of joke now. From what I have seen in the case here I have seen nothing that would be obscene about that sort of thing.

4073 Q. Nothing that would be obscene or that would put a married man who has a reputation for decency and morality in his community, in bed with a luscious blonde whom he had never seen before? You say there would be nothing indecent about that, sir? A. Not in what I have found in this magazine.

Q. Will you answer the question? Would there be anything indecent in that sort of situation? A. A man being in bed with a blonde, yes, it would be indecent.

Q. Now, will you refer to page 94 of the November issue of Esquire, the first column, the bottom of the column, reading:

4074 "The corporal was going home on a furlough and was lucky enough to have a Pullman reservation."

He found the two luscious blondes in his berth and said: "I am deeply sorry, ladies, I'm a married man—a man of respect and standing in my community. I cannot afford to have a breath of scandal touch me. I am sorry—one of you girls will have to leave." A. That to me is a joke in reverse. That is, it must have come not realizing what he was saying, caught unawares.

First, I think it could not have happened, but he was caught unawares with what he was saying.

Q. You didn't consider that this joke, if joke it may be called, appeared in a man's magazine intended for men, did you? A. This is the Army material, is it? 4075

Q. I am talking about Esquire magazine which purports to be a magazine for men. You understood that, didn't you? A. Yes.

Q. You didn't think that would lend any different color or aspect to the joke? A. Well, I don't think it would make any difference.

Q. You don't think that would make any difference? A. No.

Q. If this joke is not designed to lend or to introduce the thought that this respectable married man was about to get in bed with a luscious blonde whom he had never seen before, what is the purport of it? A. It is the surprise element that with two nothing happens, but he doesn't realize what he is saying. 4076

Q. Of course, the article or joke doesn't go on to say what happens, does it? A. No, it would not be a joke then.

Q. He says, "I am sorry, one of you girls will have to leave." You don't think there is any indecent import or connotation to be attached to that? A. No, the man being caught unawares just didn't realize what he was saying.

Q. Will you look at the 27th item on page 95, which is the last item on the second column: 4077

"The beautiful Army hostess, newly arrived in camp, thought she would take a nude dip in the clear blue lake", and she is surprised in the nude swimming in the lake by a rookie K. P. and the chilling water forces her to come out. She finds an old dishpan half buried in the mud and she holds it in front of her and then there follows this language:

"You wouldn't have such a smirk on your face if you knew what I'm thinking", she said.

4078 "Oh, I know what you're thinking all right", said the K. P. "You're thinking that pan's got a bottom in it."

Now, Reverend, where do you think this person was holding the pan or concealing what part of her anatomy? A. Here (indicating).

Q. Her pubic area, is that right? A. Yes.

Q. That very definitely points to that, doesn't it? A. Yes.

Q. Now, here we have in this joke a rookie K. P., a young soldier, recently in the Army, sees this woman coming out of the water in the nude and this dishpan serves to focus attention on one part of her anatomy, and he says: "I know
4079 what you're thinking all right; you think that pan's got a bottom in it".

What would you think of a picture, a photograph, which depicted such a scene as that of a young soldier viewing that portion of a nude woman's anatomy coming out of the water? Would you say that that would be indecent? A. I would say the same thing I would say of the story, that I don't like the taste of it; I just don't like its being there. It is a matter of taste.

Q. You don't think it is indecent, though? A. No, it is a matter of taste.

Q. It is perfectly decent for a young apparently unmar-
4080 ried soldier to look at a nude woman or that part of a nude woman under such circumstances as this? Is that your position? A. It is a matter of taste.

Q. Well, I am asking you whether you think it is perfectly decent? A. Yes, but not of taste.

Q. What do you mean by taste, sir? Is it shocking to any moral sensibilities you may have, sir? A. Well, may I give an example?

Q. I would like you to explain what you mean by taste. You may do it in any way, fashion, or shape you wish. A.

If I would go out here on the street and meet some important man, as our President, and would slap him on the back and say, "Hiya, Franklin", that would be bad taste. You don't call it indecent. 4081

Q. I see. How does that compare with this situation you have here? A. Well, it is a case of taste.

Q. Well, I am sorry. I don't get what you mean by taste. You refer to taste as respecting morals. A. It would be a relative term; To my taste it is bad, to somebody else's taste, probably not.

Q. You think it is good taste for an unmarried person to spy upon the private parts of a nude female when he is not wanted around? A. That is in bad taste, I would say. 4082

Q. But it is not contrary to morals or to decency, is it? A. No.

Q. Is that your position? A. That is right.

Q. That is correct, is it not? A. No.

Q. You know about the habits of nudists in nudist colonies, do you not? A. Slightly.

Q. Do you favor nudism? A. No. From what I have seen I think we are better off with clothes on. I think it is a fad of extremists.

Q. Do you think pictures of perfectly nude women or nude men and women together without being retouched, showing front views, are indecent or obscene? A. Perfectly nude people I would not favor. 4083

Q. You wouldn't favor them but you wouldn't think or consider them indecent or obscene, would you? A. Well now, in art work, of course, we see them, the Renaissance and Reformation Artists painted them. We don't think of that as indecent.

Q. I am speaking not with reference to art, but I am speaking of pictures, of perfectly nude men and women

4084 such as you find in a nudist book or nudist magazine for general distribution. Do you think those are indecent or obscene? A. Yes, I do.

Q. But in this instance here where we have a picture conjured up by language as plainly as it can be conjured up, showing just that sort of a situation where a clothed young man is viewing those parts of a nude woman, you say that is not indecent? A. The word picture there is not strong enough. There is no play on that to produce that as such.

Q. There is no what? A. There is no word picture pow-
4085 erful enough to present that as a nude picture. There is no dealing on it with all the sexual connotations.

Q. Well, we have here the clear statement that she is nude and she is surprised taking a bath in this clear blue lake by this rookie K. P., and when she can no longer stand the chilly water she comes ashore and discovers this dishpan with which she attempts to cover herself. In other words, her gestures are perfectly modest but the K. P. sees all and the joke is so designed as to prevent even the densest person from thinking about the part of the lady's anatomy that is the point of the joke. Isn't that true? A. But it is not strong enough to make a sex desire there.
4086 There is no perfect word picture there. There is no picture given in itself. It leaves too much to suggestion. You could go on and on.

Q. I see. Turn to 31, the last item on column 3 of page 95. That reads:

"Pardon me, miss", said the sentry, "but it's against regulations to swim in this lake."

"Well, for heaven's sake", exclaimed the maiden, "why didn't you tell me before I undressed?"

"It ain't against regulations to undress, lady".

Don't we have the same situation in that alleged joke, except the particular portion of the lady's anatomy called attention to is not pointed out, as it were, by the joke. Would you say that is in bad taste? A. No, that one doesn't disturb me like the one up there. 4087

Q. That one isn't in bad taste at all. Is that your statement, sir? A. No, as I read it first—and I have read it again—it hardly registered with me. It made no mark with me.

Q. Didn't you gather from that that the young lady had already undressed when the soldier spoke to her? A. Yes, yes.

Q. In other words, when she was spoken to she was in the nude, wasn't she? A. Yes. 4088

Q. In front of this soldier or sentry. And that embodies no indecent connotations? A. Well, it just didn't appear that way to me as I read it.

Q. How does it appear now? A. I can't say that it is indecent.

Q. You can't see that it is even in bad taste? A. No, not in the sense the other one is.

Q. So, if you had a situation like that among the members of your flock, the young men, you would tell your young communicants that looking at a lady under those circumstances would be perfectly proper and decent, would you? A. I wouldn't advocate it, but it might come up. 4089

Q. Now, look at the cartoon in column 95, the cartoon picture showing the soldiers camouflaged as trees, some peeping behind others, looking at two girls apparently nude in the water, and another one preparing to go in. Underneath: "You're sure there are no soldiers around here?"

Do you think that joke or whatever it may be called is entirely decent? A. It borders more on taste.

4090 Q. You would put this joke in the same class as the item 27 about the dishpan? A. But not so strong, not in such bad taste as that one.

Q. Not in such bad taste. It is all right for soldiers to camouflage themselves and peep surreptitiously at young girls in the nude in bathing. Is that perfectly proper and decent? A. I haven't thought of the soldiers as stationing themselves there for that purpose, but just as being there and the girls came by.

It borders on accident rather than wilful intent or mal-intent.

4091 Q. But wouldn't it have been the decent thing for the soldiers to let the girls know before they started to undress that they were there? A. Well, knowing soldiers, I don't—

Q. You think it is perfectly proper for young, possibly young unmarried soldiers to do things of that sort? A. Well, what could have been done? They were there probably on some maneuvers and not to move.

Q. The soldiers very well could have made themselves known that they were there. If they couldn't move, they could have yelled to the girls that they were there, that there were soldiers there and they should not divest themselves of their clothes, couldn't they? A. Knowing soldiers

4092 as I do, I don't know.

Q. In other words, you are fitting your moral code to the habits and customs of the soldiers you know rather than to some other doctrine? A. Well, looking at it realistically, soldiers are soldiers.

Q. And it is perfectly all right for them to peep at young women in the nude in bathing? A. Well, here is a situation by accident, it wasn't wilful design, it wasn't in a sense of creeping up on them. As I look at that joke I don't think it is wilful design, it is just an accident that it happened.

Q. Why do you think it was put in this magazine, sir, for men? A. Are these the Army stories? I believe they are. 4093

Q. What difference does it make? I am talking about the magazine Esquire, the magazine for men. A. Your question again is what, sir?

Q. I say, why should such a joke, or such jokes as I have read to you be put in a man's magazine? A. Because they are taken from men's magazines.

Q. You think that that is perfectly decent entertainment for men, do you? A. Well, these are taken from magazines which go into all our homes. I have seen them myself. Soldier boys send them to their homes. It is the sort of thing that happens, the same sort of thing, and this doesn't reach as many homes as these boys' papers do. 4094

Q. And suppose if that were so, would it make it any more decent or any less decent, the fact that they happened to be published in some other magazine? A. That in itself would make no difference.

Q. It would make no difference? A. No.

Q. Now, look at item 36 on page 95, fourth column, the next to the last item from the bottom, underneath the camouflaged trees joke:

"A beautiful young lady went for a swim in a secluded spot but forgot to take a towel. She had a swell swim and then came out on the bank and was allowing nature's balmy breezes to dry her when she heard a rustling in some near-by bushes." She asks who is there and there was a reply in a rather high-pitched voice and she asks "How old are you, Willie?" and the answer came quickly, '79, darn it." 4095

What is the connotation or implication from that joke, Reverend? A. Well, the man is aged, he is as aged as the story is.

4096 Q. Why is he sorry that he is 79? A. At that age there is no thrill, probably.

Q. In other words, he is bemoaning the fact that he can't derive sexual delight from peeping at this girl behind the bushes, is that right? A. Well, of course, sexual delight, it could be artistic delight.

Q. A young potent, virile man peeps surreptitiously from behind bushes at a girl or girls in the nude, and you think that is artistic delight? A. I don't think a man necessarily would have sexual thoughts looking at a woman. A woman in the nude is a beautiful thing and he can look

4097 at her without stimulation.

Q. You think the activities of the so-called peeping Toms are perfectly all right? A. Peeping Toms are perverts.

Q. Well, this man is alone, isn't he? Peeping at her from behind this bush? A. There is no sign that he is a peeping Tom, is there?

Q. You think that joke is perfectly decent? A. It is so old and it has been heard so often that I don't think anyone would get a kick out of it, having heard it so many times before.

Q. Its antiquity lends decency to it? A. Its antiquity softens anything that we might think of as that sort of

4098 thing. I suppose almost every soldier has heard that in one form or another.

Q. You can conceive of young soldiers raised in ordinary respectable households who never heard of that joke, can't you, Reverend? A. Oh, it could be; it is one of the more or less widely known jokes, however.

Q. Will you refer to matter at pages 104 and 105 in the October issue of Esquire? Did you read this article or story which purports to relate to sports: "Luberta worked in a munitions plant; she needed a rest". A. Oh, yes.

Q. And she went on a vacation. A. Yes.

Q. And on a vacation, when she undertakes to play tennis she had men who were taken with her physical charms, who sought to assist her, in the same way with golf, swimming, and so forth. She finally gets on the train and starts home and in the last column, page 105, beginning with the sixth paragraph from the bottom, it is stated on the train when she gave the conductor her ticket she growled: "I will slug the S. O. B. who says I am not doing this right." 4099

What does S. O. B. mean, Reverend? A. I think it means son-of-a-bitch.

Q. I see. Then it goes ahead: 4100

"The conductor gulped but said nothing to Luberta. To a brakeman he whispered, 'Keep an eye on that woman. She's nuts.'

"When Luberta got home she spent the rest of her vacation sitting around the house or in movies or saloons. She married a 4-F guy and they were very congenial, having 21 progeny just as fast as Nature would allow.

"One day her husband said: 'Kids are handy as tax exemptions, but when I think of bills I feel faint.'

"Luberta went to her spouse and patted him tenderly. 'I know, honey, but you don't realize how much fun something can be without so damn much advice.'

"She meant doing the children's washing, possibly." 4101

Did you know what she meant, Reverend? A. By a stretch of the imagination, having children.

Q. Yes. The fun in having children, that is, the fun in having sexual intercourse. Isn't that it? A. I may be rather thick. I had to have that pointed out to me. I just didn't catch that story at all.

Q. We have four columns in this article, the sporting scene, and isn't it a fact that every word in that article

4102 points to this climax or this conclusion? Without that it would be so much gibberish. Isn't that a fact? A. That is really what it meant to me. I didn't get that out of it.

Q. Now, do you say that is a perfectly decent thing to make sport about in a magazine of this sort? A. I can't see anything indecent about it. It is rather a listless article. I just don't see anything to it and I would never have finished reading to the end if it had been picked up in a magazine.

Q. You say you didn't read to the end? A. If I had picked this up in a magazine in my home I would never have finished it. I don't see anything to it.

4103 Q. If there is something to it as I have pointed out to you, you still think it is perfectly decent and proper? A. It takes too much imagination to figure out just what is meant there and I can't imagine any soldier reading that unless he is a sophisticate, and knowing what it means.

Q. Do you think that the use of the word "S. O. B." in this article is filthy or indecent? A. Usage, I think, has cleaned it up. At one time any reference to it—but especially these soldiers' diaries are so full of it and our trend of education—it is like so many things that were indecent a generation ago and are not indecent now.

4104 Q. In dealing with soldiers and young men, which is the more important, their amusement or their morals? A. Their morals.

Q. Now, will you look at page 38 of the September issue of Esquire, being what is known as a gate-fold, the Varga girl and "Military Secrets." Would you say that the clothing on this model serves to conceal any part of her anatomy, Reverend? A. The position does.

Q. Her position, but I am talking about her clothing? A. The clothing, nothing.

Q. Her clothing emphasizes her nudity, doesn't it? A. Yes. 4105

Q. Did you read the verse? A. May I read it again? I read it once.

Q. "Military Secrets," and note the diary in her hand and note the expression on her face. She apparently has a boy friend in the Army and one in the Navy and one in the Marine Corps. Do you think in view of those facts, as I have pointed out, coupled with the nudity of the model, there is anything indecent in that picture? A. I can't see it.

Q. Do you think that there is anything in that picture 4106
that would be calculated to sexually stimulate young men? A. My interpretation on this one, like all these Varga girls, is an overplay of artistry, they are not realistic to me. Just as an idealistic boy has an idea of the wife he wants to marry and probably never does. This one measures up to that probably, but it is an overplay. There is something unreal here.

Q. Will you answer the question I asked?

Mr. Hassell: Will you read the question, please?

(Question read.)

4107

The Witness: Not a normal young man, average.

By Mr. Hassell:

Q. Do the young men in your parish, or those with whom you come in contact as a spiritual adviser, confide in you as to what sexually stimulates them in the form of pictures or printed matter? A. Just last Sunday morning I asked boys if this thing did stimulate them.

4108 Q. You asked what boys? A. Boys at church.

Q. How many boys? A. Three boys.

Q. How old are they? A. They have been there a year or two, I know. One boy has been there three years.

Q. Are they in the Army? A. No. One was turned down, and the other two, I don't know.

Q. Do you think 4-F boys are perfectly average and normal? A. They can be. There are some 4-F's who were turned down for emotional rather than physical reasons.

Q. And what did these boys tell you? A. I asked them about the magazine and its popularity. They told me it

4109 was less popular than certain other popular magazines. They knew one or two boys who read the articles, but nobody else. They read the jokes mainly.

Q. These jokes were read by these boys and the boys looked at the Varga girl pictures? A. Most of them. They said they felt only one or two ever read the articles.

Q. These boys were interested in the jokes and the Varga girl pictures? A. Yes.

Q. Why do you think they were interested in those only? A. Boys just don't have time for reading when they are in college. They don't read much about the regular context. But you can look at a picture or read a joke before meal time and it doesn't interfere with scholastic studies.

4110 Q. Have these boys ever told you just what reading matter or pictorial matter has excited them sexually? A. I don't recall their naming any particular things that stimulated them. They never mentioned anything of that nature.

Q. Would you admit, Reverend, that pictures and reading matter can sexually excite and stimulate? A. Yes.

Q. Mindful of the fact that Esquire is humorous, or supposed to be, and is representative of the down-to-earth plain language so that the ordinary person, undeveloped as to

education and character, can read it and understand it, that it is rather profusely illustrated by cartoons and photographs, and that it readily comes into the hands of the immature, do you think that it meets the standard of morality society has the right to demand of publications reaching such readers? A. Yes; but I realize it will fall into the hands of people who should not get it, but, I mean, any magazine will do that; you can't keep these things out of everyone's hands. 4111

Q. You think there are certain persons that should not have this magazine, Reverend? A. Yes; I am thinking of one boy particularly who was in the Army and was sent home. I hadn't talked to the boy, but, knowing his case history, juvenile-delinquent case, he is the type of boy—I wouldn't want to put the magazine into his hands. 4112

Q. If it be a fact, Reverend, that 90 percent of all boys masturbate at one time or the other.—if that be a fact do you think this type of material should be placed in the hands of 90 percent of the boys? A. May I quote a reference? I had an experience—

Q. Yes. A. —I talked to one of my Sunday-school teachers who has had that magazine in his home; he has a girl that must be around the age of 12 and a boy around 10; and he claims they look into it and close it and never look at it again; it doesn't appeal to them. 4113

Q. They haven't reached puberty, however; is that right? You wouldn't expect it to have any effect on children who have not arrived at the age of puberty; would you? A. Well, there might be some curiosity.

Q. But the impressionable age would be after puberty; wouldn't it? A. More so, yes.

Q. The adolescent stage and the post-adolescent stage; isn't that true? A. Yes.

4114 Q. Do you subscribe to Esquire? A. No. One of the co-eds bought it for a boy who stayed in our home, two years ago, and I looked at it at that time; I didn't read all of it, just interested in certain features.

Q. You don't urge your flock or people you are acquainted with to buy and read Esquire; do you? A. I urge them to buy religious papers; that is all.

Q. Do you have any children, Reverend? A. Yes.

Q. Adolescent children? A. No.

Q. Isn't it a fact that things which appeals to prurience are contributing factors in the matter of the prevalence of
4115 sexual disorders, venereal disease, and so forth? A. May I have that question?

Mr. Hassell: Read the question.

(Question read.)

A. That is, obscene material helps to produce syphilitic people?

By Mr. Hassell:

Q. Obscene material contributes to the so-called sexual disorders, venereal diseases of the various kinds? A. Yes.
4116 I have seen some pictures which I know would definitely stimulate and lead to that sort of thing.

Q. Well, isn't it a fact that anything which does contribute to prurience will aid in bringing about that result? A. That result? Meaning venereal disease?

Q. Meaning sexual disorders. In other words, promiscuity leads to sexual disorders. A. Promiscuity?

Q. Yes, in sexual matters. A. Yes.

Q. Which leads to sexual diseases? A. Yes.

Q. And the prevalence of sexual diseases? A. Yes.

Q. So, anything that would tend to increase promiscuity, 4117
such as salacious material, would contribute to the prevalence of sexual disorders? A. Meaning, by disorders, diseases?

Q. Yes. A. Yes; but, of course, probably not everyone who indulges becomes diseased.

Q. Reverend, have you ever attended a burlesque show? A. Yes.

Q. Did you see the "Star & Garter" show in New York? Did you read the review of Star & Garter show at pages 83 and 119 of the January issue of Esquire? A. Yes, sir— 4118
Not every word; I skipped over some.

Q. You skipped some of them? A. Yes.

Q. Well, in the first column there, the first paragraph, about midway of the paragraph, it says:

"And merely as an incident Gypsy Rose Lee is the defendant against whose navel Clark finally blows a paper-tickler."

Do you think that is an indecent reference to part of a woman's anatomy? A. I don't like it.

Q. But you think it is entirely decent? A. Well, I would have to see the thing; I don't get enough of—I just don't like it.

Q. Now in the next paragraph, down toward the bottom: 4119
"Weaving and winding his frame around tall show girls, peering through his non-existent glasses into the bosoms he isn't tall enough to see unless he jumps"—

Do you see that? A. Beginning with "Weaving and winding"?

Q. Yes.

"Weaving and winding his frame around tall show girls, peering"—at the bosoms; and so forth. Do you think that

4120 is an entirely decent statement or reference? A. I don't like it. It is a matter of taste.

Q. The next paragraph. It is stated:

"Burlesque patrons are single-minded, if that's the right word."

Do you know what that means? A. They are out for stimulus.

Q. Sexual stimulus; is that right? A. Yes.

Q. And, going on down toward the bottom of that column:

"So, you have girls stripping to a riotous dance or you
4121 have girls stripping not to a dance, and since this is uptown stuff you have the odd spectacle of Gypsy Rose Lee stripping awkwardly and self-consciously, which may be a novelty but isn't very good fun. Certain little gestures as she fluffs the ruffles on her jacket are enticing but the major part of her strip she does from under the cover of a bouffant dress, working strings and letting petticoats drop—and down to the planted scream in the audience and the laughs Miss Lee manages every night after the scream—it is just this side of the simple, honest denudation she was capable of five years ago."

Do you think that is a decent description to be contained
4122 in a magazine generally circulating throughout the United States? A. This is speaking of the article as a whole: It is more of a debunking article.

Q. Look down in the next paragraph. You will see at the center of that paragraph the beginning of the sentence:

"There is also a character from the night clubs who makes her breasts jiggle, and this is considered funny, but I didn't think so even at the night clubs, where her frankness was greater, her skill no more engaging. A stripper who does an orgiastic dance verges on the erotic."

And before you read that, there is a sentence just before it:

"In this particular show there is also a young, slender dancer named Leticia, who does a wonderful trick ballet dance—it is a trick because it is actually erotic, whereas so many of the hip grinds are not."

Do you think that is an advertisement through a review of an erotic show? A. That is only one part of the whole article; I think you have to finish the article to get the whole gist of it.

Q. I understand that, but isn't it a fact that such statements are calculated to induce persons who have not ever seen a burlesque show to go see this, persons who want to see an erotic show? A. I think it is the opposite; if a person really is seriously thinking of it it debunks that sort of thing.

Q. Burlesque would not have to be debunked for you; would it, Reverend? A. I went to one and I didn't care for it.

Q. One time in your life you went to one and you didn't care for it— A. Yes.

Q. —and, so, you think the balance of humanity would probably do just as you did? A. No.

Q. You don't find anything indecent in that article? A. Well, taken as a whole, it debunks it.

Q. You think that would discourage people from patronizing that show, which is a sell-out every night, as I understand it? A. Seldes is a good writer; I like some of the things he has written and I would have faith in it.

As a whole, he is debunking it, and, rather than taking one thought here and one thought there, the thought they would have after they read the whole thing was—

Q. You didn't read the whole article but you arrived at

4126 the conclusion that Seldes was attempting to debunk burlesque by that article; is that right? A. Yes.

Q. You didn't obtain that impression by talking to counsel before coming here? A. They showed me the article.

Q. Did they tell you it was a debunking article? A. No; that is my term.

Q. And you got that without reading the whole article? A. I read through it, just glancing through it.

Q. Do you think that Esquire has the reputation of being a spicy, racy, sophisticated magazine for men? A. I have heard it referred to as sophisticated; that is the term

4127 I have heard referred to mostly.

Q. And you think it has a reputation of being a sophisticated magazine? A. Yes.

Q. At page 10 of the August issue, midway of the column of that page, there is a paragraph headed "Considered Opinion", and it reads:

"In your May issue (this year, too!), page 93, article entitled 'Broadway for the Boys,' it is said: '20 percent don't, 20 percent do, and 60 percent might.'

"While in no way representing the opinion of the Navy Department, it is the considered opinion of this patrol squadron that 20 percent don't, 20 percent do, and 60 per-

4128 cent don't get the opportunity. Now you guess which category we fall in!"

What do you think that "don't.", "do", and "don't get the opportunity" refer to in this? A. Being on the water—

Q. Don't get the opportunity to be on the water? A. Being on the water, don't get the opportunity—I was thinking about being away from land.

Q. Don't get the opportunity? A. Well, having read the play—

Q. Don't have the opportunity to read the play? A.

This is referring to Maxwell Anderson's play; isn't it?

Q. It says "Broadway for the Boys"; it is referring to an article about Broadway for the boys. 4129

But particularly this "20 percent don't, 20 percent do, and 60 percent don't get the opportunity"?

Mr. Bromley: "Broadway for the Boys" refers to the play, "The Eve of St. Mark", Mr. Hassell, as you well know.

Mr. Hassell: It refers to the article entitled "Broadway for the Boys".

By Mr. Hassell: 4130

Q. What does "do", "don't", and "don't get the opportunity" refer to in this article here now? A. Sexual intercourse. I happen to know that because I have read the play, but I would not have judged it from reading this letter here.

Q. What would you have thought it referred to from reading this? A. I don't think there is enough here to tell you what.

Q. You think it is a lot of nonsense? A. I suppose the boys themselves had in mind— But the reader— This is August— This is several issues back. I can't see where anyone would, if they had not read the play or had some other background— 4131

Q Do you think you are perfectly competent to testify as an expert on obscenity, lewdness, lasciviousness, indecency, and so forth? A. No more than any other minister who deals with young people.

Q. You don't have any confession in the Presbyterian church; do you? A. I have kids who come to my home, my study, and tell me things that have happened.

4132 Q. But you don't have any confessional such as they have in other churches? A. No.

Q. Is it an ordinary thing for young people in your congregation to come and confess to you their sexual peccadilloes and what induces them to commit them? A. I never remember anyone telling me what induces them; they just do. I don't recall anyone having said to me, "I did this because of" so and so and so and so; it is just a matter of losing their heads.

Q. You don't recall anyone having told you what induced them to reach that state of mind? A. I don't recall any-
4133 one ever having told me.

Q. But you think you are competent to pass on matters which might be calculated, in the opinion of some, to induce such acts? A. Just one individual.

Q. In other words, you are stating your opinion and not anyone else's? A. That is right, at this moment.

Q. Everyone else is entitled to his own opinion on the subject? A. Yes.

Q. Reverend, will you look at the March issue, page 49? What do you think a soldier, apparently a French soldier, in possibly the north-African desert, would be doing with a personable, well-formed, almost-nude native young woman
4134 given to him as a birthday present? A. This whole series of sultan-harem pictures seems so ludicrous to me, having visited that part of the country and—

Q. Who told you this—

Mr. Bromley: Let him finish; won't you, Mr. Hassell?

Mr. Hassell: I thought he had finished.

Mr. Bromley: He had not.

A. I have seen women and their black attire from neck to toe, the market place, with its ...isanitary conditions. It is ludicrous that anything like this could happen. It is anything but a sex stimulation to see these women because they are not beautiful and the whole environment is one of dirt. 4135

By Mr. Hassell:

Q. I see. So, you searched back in your prior experience to get a decent explanation for this? A. These have been here for some time and I have always had that view about them.

Q. Do you think it is perfectly decent and proper to exhibit a thing of that sort, indicating that a slave-girl is being given for immoral purposes to a soldier? A. Well, just in the realm of the Jules Verne tales, it is so impossible. 4136

Q. Who told you that this is one of a series of cartoons? Did counsel tell you that? A. No; I have seen them. This is a harem thing where the fat chap has the turban on his head; this is all in a series.

Q. You mean that it is a series that is featured in Esquire magazine regularly? A. Yes; over some years now.

Q. You have been following Esquire over a period of years? A. Well, two years ago, I think, I read maybe every issue, but I see it in the men's faculty club, at the dentist's, at the doctor's, and so forth. 4137

Chairman Myers: How many wives had King Solomon?

A. In the neighborhood of 1,000, they say.

Chairman Myers: That was almost a harem; wasn't it?

By Mr. Hassell:

4138 Q. Will you look at page 65 of the September issue, the cartoon shown there?

This shows a man looking out of the open door; he has an apron on; the shapely milk-delivery maid; and the legend, underneath, "Come back later sweet; my wife hasn't left for the factory yet."

Do you think that that cartoon, full page in color, contains any improper sexual connotation? A. No. I immediately thought of the fact that we are playing on the fact

4139 that women are in the factory now and the men are home cooking the meals; the reverse of the old iceman joke.—that the men are cooking the meals.

Q. The old iceman joke. You think that that was perfectly decent, for the wife to have sexual relations with the iceman in the absence of the husband? A. Well, I wouldn't approve of that; no.

Q. You would approve of a joke built in and around that fact; wouldn't you? A. Well, it necessarily would have to suggest that sort of thing.

I mean I would be against that sort of thing.

Q. What would this joke suggest? A. I think of the women working in the factory and the men doing the house-

4140 keeping and the women working in the factories; a reversal of the thing.

Q. How about the line, "Come back later sweet; my wife hasn't left for the factory yet"? A. Well, it is stressing the modern trend of men being at home and women in the factory.

Q. Doesn't this cartoon deal flippantly with the sanctity of marriage? A. Well, I didn't think that it did.

Q. You didn't? A. No.

Chairman Myers: We will take a recess for 10 minutes. 4141

(A short recess was taken.)

By Mr. Hassell:

Q. Will you refer to page 49 of the October issue of Esquire, the full-page color cartoon facing page 48? There we have a scene of a hefty young man in overalls seated on the couch; a woman, with rather oversized breasts, seated in his lap, with her arms around his neck; cocktail glasses and a cocktail shaker on the table in front; and what appears 4142
to be the irate husband, in street clothing, standing, glaring at them; under which appears, "Hello, dear; this is the gentleman who sells us our fuel oil."

Do you think there is any indecent sexual connotation to be derived from that joke? A. No.

Q. Do you think it is perfectly proper for a wife to be caught in that predicament, with a man of that sort, and just having had drinks, intoxicating drinks? Do you think there is nothing indecent at all about that? A. I don't like the taste of it but you have to keep it in its context.

When I think of the women in Athens now who almost bow before servant girls and the coal man in an effort to be 4143
nice to them; it is really the laborer-employer situation now in reverse that makes me think of it.

You pointed out the breasts; I never noticed the breasts; I was thinking of the situation in that whole town of Athens, where the women are playing servants to the servants.

Q. Then you don't think this deals flippantly with the sanctity of the marriage relation? A. No; not as I hold the

4144 sanctity of the marriage relationship; I don't think it does; I see it in its context as a modern industrial problem.

Q. You think modern industrial conditions condone acts implied by this cartoon? A. No; but it is an exaggerated way of showing that women are nicer now to laboring people than they were 10 years ago.

Q. You preach morals, do you, Reverend, in your congregation? A. Among other things.

Q. What are you being paid for coming here to testify, sir? A. Nothing.

Q. Did you come here in your capacity of a witness for
4145 Esquire in furtherance of any moral program you have on now? A. Nothing that I am stressing in particular; no.

Q. You came here simply out of love for the magazine and the type of matter that is carried in it? A. Not love for this magazine in particular but just freedom of the press in general.

Q. You are here as a crusader for freedom of the press, as you state, for carrying matter of this sort? A. Not as a crusader.

Q. In what capacity do you appear here? A. Not as a crusader; just as one person who has been asked.

4146 Q. You are taking up your time— How many days have you devoted to this? A. I came yesterday morning and am leaving as soon as I can today.

Q. And how many days did you devote to it before you came here? A. I knew nothing of the case until Saturday afternoon, late.

Q. How did you happen to be contacted? A. Mr. Gingrich called me.

Q. Did you know Mr. Gingrich? A. I had met him once.

Q. Where did you meet him? A. Chicago.

Q. In the Esquire place of business? A. No; in education. 4147

Q. In education? A. Yes.

Q. Where was that? A. At the Francis Parker School.

Q. Are you in any way connected with that school? A. No; my wife was, seven years ago.

Q. I see. So, through that connection Mr. Gingrich or counsel got in touch with you and asked you to come here and testify and try to save the second-class privilege for Esquire; is that right?

Mr. Bromley: I object to that statement. 4148

Chairman Myers: That is a characterization. Sustained.

By Mr. Hassell:

Q. You think this is the type of literature that Congress had in mind when it established a subsidy for second-class publications?

Mr. Bromley: I object to that as incompetent.

Chairman Myers: That is a question not in issue here; the objection is sustained. 4149

By Mr. Hassell:

Q. Do you think this magazine is originated and published for the dissemination of information of a public character relating to literature, the sciences, and the arts? A. Yes, sir; to me, as it is written.

Q. And do you think that this part that is involved in this case is of such a character? A. Will you please explain what you mean by "such a character"?

4150 Q. Is the matter that we have been discussing here, the matter that you were asked to examine by counsel, matter of the character I have just described; designed for the dissemination of information of a public character relating to sciences, literature, and the arts?

Mr. Bromley: The statute says "or" and not "and".

Mr. Hassell: All right; I accept the correction.

Mr. Bromley: There is nothing much else you can do but accept it.

By Mr. Hassell:

4151 Q. Do you think it is of such a character? A. Will you repeat those three again?

Mr. Hassell: Will you read the question?

(Question read.)

A. There is science, literature, and the arts; some, probably, wouldn't come under that.

By Mr. Hassell:

4152 Q. Do you think that this part of these issues of this magazine that are under examination here consists of matter originated and published for the dissemination of information of a public character or related to literature, the sciences, or the arts? A. I am afraid I just don't understand. Didn't I answer that in the first question? Just how is that different from the other question?

Q. I didn't hear you answer it; maybe you did. A. I believe it is for purposes of those three things you mentioned; that is part of it.

Q. Dissemination of information of a public character? A. Yes. 4153

Q. You think this type of joke, cartoon, and the Varga-girl pictures, and these articles referred to here are information of a public character? A. It could cover them specifically. Your term there is so broad that it could easily be in there. Public information—

Q. Would you put it under either of the others? A. I wouldn't put it under letters; it is not the highest kind of literature.

I would consider the Billy Phelps contributions as very good.

Q. You say that this particular matter that we are referring to here is literature? A. Well, it has articles in it; it depends on your definition of literature. 4154

Q. Do you think jokes such as we have referred to and cartoons such as we have referred to and the Varga-girl pictures which we have referred to are literature? A. No; I don't call that literature.

Q. Do you think that matter relates to the sciences? A. No.

Q. Or the arts? A. The pictures come under art.

Q. Did I hear you say that the Varga-girl pictures are art? A. It depends on your definition. I don't particularly care for them, but, to some people, yes. 4155

Q. The magazine doesn't carry them as art; does it? It has an art department but it doesn't list the Varga pictures under art. A. Well, I haven't examined the magazine with that in mind.

Q. Now if it had been indicated or— It is not claimed that the Varga girls are art: would that change your opinion? A. I don't know if— State that again, please.

Q. I say, if it has been stated here that it is not claimed

4156 that the Varga-girl pictures are art would that change your opinion? A. You mean we could find other things in the magazine which would be art, then?

Q. Yes; an art department, so denominated and listed; but the Varga-girl pictures do not come under that. You would still say they are art? A. Well, they could be. Not very good, not the best.

Q. You are not qualified as an art critic, though? A. No; I am not.

Mr. Hassell: That is all.

4157 *Redirect Examination by Mr. Bromley:*

Q. You have four young children; have you not, Reverend Luchs? A. Yes, sir.

Q. The boy you spoke about, who was sent home by the Army as delinquent: there are other magazines, magazines other than Esquire, which you would not want him to have access to, as well as Esquire? A. Very much so; you are right.

Q. The Seldes review of "Star and Garter Blues" in the January issue at page 83 is just a factual report of a Broadway show; is it not? A. Yes.

4158 Q. Do you rely upon your conclusion that the report, which is in the nature of a review, is of a debunking nature because of the sentences or clauses in the very paragraph Mr. Hassell referred to but which he did not read, to-wit: the first whole paragraph in the second column on page 83, such as:

"A stripper who does an orgiastic dance verges on the erotic; but the entertainment value isn't high, in fact, the burlesquers learned long ago that the strong emotions they

wish to arouse are quenched by the cold water of comedy"? A. I think the whole article is debunking. 4159

Q. Did you read Paul Gallico's piece on burlesque at page 32 of the May issue? A. Yes.

Q. What is your opinion about that piece? A. That was even stronger than Seldes' article; in fact, I think he refers to monkeys. I mean, after reading that article no one would want to go to it; anyone would feel cheap to even go to a thing like that.

Q. Your reference to monkeys is where Mr. Gallico called the chorus line of performers "poor, cold monkeys"? A. Yes.

Q. By the way, would you consider the piece of fiction which is among the complained-of material, entitled "Portrait Above the Fireplace", to be literature? A. I think it is one of the great stories I have read; in fact, to me, I think a great sermon could be taken from that story. 4160

Mr. Bromley: That is all.

Recross Examination by Mr. Hassell:

Q. Do you think it is entirely decent to trifle with the emotions of an individual who has built up his life on an ideal of a picture of a woman whom he has generally held in his mind as his mother, to trifle with that ideal by characterizing that woman as the madam of a bawdy house? Do you think there is anything indecent in that? A. I think it is possible, just as some of the Renaissance and Reformation artists would use women who are not of the highest type for their models. I mean, here was a man under the influence of liquor who admitted it; I mean, it is not a casual situation. The man had been drinking and he admitted it and that is the reason he told the truth, the whole story. 4161

4162 Q. Isn't that a shocking idea, though, to confront a man with, that here, this picture, which he idealized, was really the picture of a madam of a bawdy house? A. It is, but I think it is so true that we have those ideals and it has helped us.

Chairman Myers: Did you ever hear of the man who said, "Let him who is without sin among you cast the first stone"?

A. Yes, sir.

4163 Chairman Myers: About whom was he talking?

A. He was talking about such a woman.

By Mr. Hassell:

Q. What did that man say to the woman after he said that? A. "Neither do I condemn thee."

Q. Didn't he say, "Go forth and sin no more"? A. Yes.

Q. You didn't find that here: did you? A. That is past.

Q. What? A. That is past; we know nothing of her past; we know one time she was.

4164 Q. But this story you are referring to, "The Portrait Above the Fireplace", has as its climax this shocking revelation which is calculated to debunk the man who has built up this ideal? Isn't that what it means? A. What was that, again?

Q. I say, you have the climax of this story, this picture of this woman which has been used and around which this man has built his life;— A. Yes.

Q. —you have a debunking of his ideals by the revelation that this woman was the madam of a bawdy house;— A.

May I be allowed to see the last line or two of that story again? I think the last line makes it a truly great story. 4165

Q. What issue is that? A. October 1943, page 128.

Q. The last line does what? A. Look at the next-to-the-last paragraph:

"Tressant was shaken."

That is, he admits his mistake.

Then the last line in the story:

"Good night, Mother."

I mean that is why it is a great story, that he didn't go out and go back to carousing and drinking again but he kept his faith in an ideal. That is why it is a great story.

Q. Would you say that his friend, Tressant, who made the revelation, would display a sadistic bent of attitude? 4166 A. Without re-reading it, my impression is that he was drinking and he was just given to talking.

Q. Was he trying to tear down the ideal of his best friend? A. Yes, thinking, when he was drinking, that it was a good trick, probably.

Q. Do you think this story contributes to the exalted position that everyone holds motherhood to occupy? A. Here is a man who could believe in motherhood even when he knew the worst of her. It reminds me of that poem, "Mother of Mine".

Q. Now, refer to "The Savage Beast In Us", pages 32 and 33 of the May issue of Esquire. Do you note the illustrations 4167 in that article on those two pages? A. Yes.

Q. You think they are entirely decent, do you? A. I hadn't thought much, one way or the other. They are so caricatured in a way, so inaccurate, that I don't consider them very good art and I don't think they are stimulating.

Q. You think this article would have the effect of discouraging persons who ordinarily attend burlesque shows, from going to them further? A. I think so.

4168 Q. Do you have any idea why such an article should be included in such a magazine for men, as Esquire? A. I do not know the policy of the editor.

Q. And you don't have any thought on why such an article should be included in such a magazine? A. No. I was glad to see it for its emphasis.

Q. The magazine is a sophisticated magazine, I believe you said? A. Yes.

Q. And intended for sophisticated men and still you don't understand why such an article could be covered in such a magazine. A. To appeal to sophisticated men. I
4169 don't know what was in his mind, but thinking for my own mind, sophisticated men go to this sort of thing and he is showing them up and saying politely: "How foolish you are to go to these things."

Q. Now, reference was made to the Gilbert Seldes article on this burlesque show, known as "Star and Garter", and to the fact that that purports to be a factual report. Do you think the fact that matter may be factual— A. I didn't get one word there.

Q. Do you think that the fact that matter may be factual eliminates any indecency or obscenity that might otherwise be attached to it? A. It would be possible in a matter
4170 of fact article to put that in.

Q. I see. In other words, the truth of the matter doesn't necessarily determine whether it is decent or indecent, does it? A. A truthful article could have something in it that is indecent.

Q. That can be indecent? A. A truthful article can easily indulge in the indecent.

Mr. Hassell: I see. That is all.

Mr. Bromley: That is all. Thank you, sir.

(Witness excused.)

Abe Blinder—for Respondent—Direct.

ABE BLINDER, a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows: 4171

Direct Examination by Mr. Bromley:

Q. Your full name is what, sir? A. Abe Blinder.

Q. You live where, sir? A. Chicago, Illinois.

Q. You are employed by Esquire, Incorporated? A. Yes, I am.

Q. In what capacity? A. I am the circulation director of Esquire, Coronet and Apparel Arts.

Q. And have been such for how long? A. Twelve years. 4172

Q. Will you explain briefly your duties as circulation director? A. My job is to take the magazines after they are printed at the printers and distribute them to the newsstands and to the subscribers, and to handle all of the sales of the subscriptions and on the newsstands of the single copies.

Q. Will you explain to the Board generally how Esquire is circulated? A. Yes. It is circulated in two distinct ways, one on the newsstands. We have an arrangement with the Curtis Publishing Company who have an organization to distribute their own magazines, and they in turn distribute our magazines. 4173

The distribution is handled through wholesalers throughout the country. There are about one thousand of such wholesalers and these wholesalers handle most of the major magazines.

There are two distributing set-ups, the American News Company and the independent wholesale set-up, and the independent set-up handles 18 of the 25 largest magazines.

For example, they handle the Post, Ladies Home Journal.

4174 McFadden Publications, Reader's Digest and things like that.

These local wholesalers in turn distribute the magazine through drugstores, bookstores, department stores and other retail outlets like that. There are about 75,000 outlets throughout the entire country and Esquire is on 55,000 of those outlets. The 20,000 outlets we are not on are what is known in the trade as grocery-store outlets. These are small dealers who handle only one or two copies of magazines like Reader's Digest and the Post.

The other way we circulate our magazine is by subscription.
4175 We have three distinct ways of getting our subscriptions. The first way is by direct mail. We mail millions of pieces to various lists, listing subscribers. For example, we take a list like Poor's Directory, which is a directory of all of the directors of corporations in America. That is a list of about 90,000 of the leading directors in the country, and we make a mailing to that list soliciting their subscriptions.

I recall that in that particular list we secured 6,000 of those directors as subscribers.

Then, of course, we solicit our renewals by mail when the subscriptions expire.

4176 The next main category in how we get our subscriptions is through catalogue subscription agencies. There are seven such agencies and they represent all of the leading popular magazines like the Post, Time, Colliers, Newsweek, and, of course, our publications. They get their subscriptions through local agents which they have throughout the country who are comprised primarily of elderly people, invalids, housewives, and people who just want part time operations, and then a large part of their business is through retail outlets like department stores and bookstores and magazine stores.

Then a third main category from which we get our subscriptions is local agents. Those are agents that report 4177
directly to us, that send their subscriptions in direct to us. We have about 5,000 of such agents.

Included in those agents are the same kind as do business with the catalogue agencies.

In other words, about half of them are the local agent of the elderly person type, the invalid, the housewife type who wants part time work, and the other half are men's stores and department stores who send their business directly to us.

We have, for example, such fine stores as Wanamaker's 4178
in Philadelphia, Marshall Field and Carson, Pirie Scott in Chicago, Juster Brothers in Minneapolis, Ellis Ayres in Indianapolis, Straus and Block in Indianapolis, J. L. Hudson—stores like that that sell subscriptions to our publication and then send them in to us.

And, we did have one other way of getting subscriptions which we have dropped because we are getting more subscription business than we need, and that was through combination with newspapers. We had many leading newspapers in the country that sold subscriptions to our publication as they do with many other publications in combination with their own newspaper.

Q. I believe one of the members of the Board raised a 4179
question about the extent of the sale of Esquire and Varga calendars to the armed forces. Will you tell us precisely what that situation is? A. We have a subscription list of 300,000 and of this 300,000, 69,000 are subscriptions addressed to men in the service. We know what that count is exactly because we had to make a card list of all of our service subscriptions because we get so many changes of address on service subscriptions.

4180 Twenty-three per cent of our subscription list is addressed to men in the service.

Then, Esquire is sold at all of the post exchanges throughout the country. This is handled by Curtis Publishing Company and local wholesalers who have access to the post exchanges themselves. They handle all of the popular magazines and Esquire is on sale on all of them.

Then, in addition, we have an arrangement with the War Department, with their overseas post exchange division which is located in New York, through which we handle the sale of copies of Esquire to boys overseas by means of the
4181 post exchanges.

Now, we sell these copies to the War Department at a wholesale rate. That is the same wholesale rate that our distributors pay, and they in turn, we understand, resell it to the boys overseas at that same rate. In other words, they don't make any profit in the sale of the copies to the boys overseas.

Q. About how many a month go overseas at that wholesale rate? A. Well, this started in February, 1943, with about 5,000 copies and the latest reservation is for 30,000 copies.

Q. What about your special edition that was mentioned
4182 here? A. Well, that is a military edition that we have been working on with the Army Special Services Division. We have been negotiating with them all summer. They have an arrangement where they send a package of magazines and books to the boys overseas; they send a package weighing four pounds to a unit of 150 men. That is in combat overseas, and they particularly wanted to get Esquire included in that package because they told us that they conducted a survey overseas and found that the three magazines that the boys wanted most were Esquire, Reader's Digest, and Life Magazine.

We finally concluded negotiations with them to arrange for a military edition after they were able to secure additional paper for us, over and above the paper granted to us by the W. P. B., and I have made several trips to Washington here to contact Major Troutman in the Special Services Division, arranging for this entire set-up. 4183

At first we were going to get out a miniature edition like the one that Time and Newsweek and the New Yorker get out, but the Special Services Division suggested that we keep the full size because the boys wanted the pin-ups in the full size.

Now, we have arranged to give them Esquire in the full size without advertising; it would be just the editorial content of the magazine. 4184

We started with the November issue, and distributed 29,100 copies of the November issue and the same number on the December issue. Those copies have advertising because we were not able to arrange the military edition without advertising until the January issue, but on the January issue they will get copies without the advertising. They have asked for 73,500 copies of the January issue and succeeding issues and we have agreed to give them not only the 73,500 each issue, but up to a maximum of 100,000 copies an issue. They figure that that will enable them to cover a million to a million and a half of the boys in the overseas service. 4185

Q. Now, will you tell us about the distribution of the Varga drawing calendars? A. You mean how it started?

Q. Well, yes, when it started and what the volume is. A. Well, the Varga calendar, starting in the month of December, 1940. It came out in our January, 1941, issue. We ran an ad with a coupon in that issue offering a bound reprint of the calendar for 25 cents. I remember that episode

4186 very well, because it was my job to forecast how many reprints we should get up and have bound up, and I ordered 25,000 calendars.

Well, the orders just poured in and we had to have about eight or nine printings that year, and it came to a final sales total of 327,000.

For the next year, the 1942 calendar, the orders increased. Again all we did was to run two ads in the magazine with coupons for orders, what we call mailing coupons, and we got orders for 504,000 calendars.

Then, on our 1943 calendar we sold a total of a million

4187 and this year it appears that we will sell in the neighborhood of two and a half million of those calendars.

Q. Can you give us any idea as to the extent to which the Varga calendar has gone to service men? A. Yes. Of the 1943 calendars that we sold a million of, 300,000 were sold by mail. Of the 1943 calendar, we put a bunch of them on the newsstands; that was the first year we had them on the newsstands, so only 300,000 of the million came directly to us by mail. I made an analysis of the 300,000 and found there were 49 per cent addressed to men in the service. That is, they were either orders from men in the service or from civilians having them sent to men in the service.

4188 Q. Have any business firms used the Varga calendars for advertising purposes? A. Yes. That was something that started last year also. We got a lot of requests from companies who wanted to send the calendars out to their customers, so we started a calendar department offering that privilege.

I made a list of a few of the outstanding companies that we got orders from last year. Here are companies like the American Wire Company of Philadelphia, the Consolidated Company of Cleveland, Ohio, the Crown Mills, Inc., of

Marcellus, New York, the P. H. Denly Corporation of Chicago, the Thomas Edison Company of St. Louis, Missouri, the General Air Conditioning Corporation of Los Angeles, California, J. P. Smith Shoe Company, Chicago, Illinois. 4189

That is only a few of the companies that buy these calendars and on which their advertisement appears which they are sending out to their customers.

Q. In connection with the wave of pin-up demands by the armed forces, to which reference has been made, can you tell us anything about the extent to which Esquire has been supplying pin-ups to the services? A. Well, we get just unlimited requests from boys in the services for reprints of the pictures that appear in Esquire. That is one of my duties to handle those, and I get many letters every day requesting these reprints. I finally got the idea that it might be helpful if we sent some of these reprints out, so I sent a letter to Army camps and Navy bases in the country offering them a package of 50 reprints, just assorted, whatever we had left of the color pictures that have appeared in Esquire. That is the Hurrell, Varga, Waxman dog pictures, Leydenfrost, the cartoons, the Szyk caricatures; all the stuff we have run all along. 4190

That is a package, incidentally, which we had gotten up and offered to the general public for five dollars. We had had a lot of requests from the general public for material like that which they wanted to use in decorating their game rooms, rumpus rooms, waste-baskets, screens and that type of thing, so I thought it would be a nice gesture to send these sets to the Special Services Division at Army camps and Navy bases, so I sent a letter out offering these reprints with the compliments of Esquire. 4191

We received back 600 requests from the various camps. I think we mailed a total of 1,000 letters. The letters came

4192 in from majors, captains, lieutenants, colonels, sergeants: whoever happened to be the special service officer at each camp, asking that we send them a set of those reprints.

I remember one letter we got from the Navy commandant's office in New England. They asked for 25 sets which we sent to them because they wanted to cover all the bases in the New England area. They asked for 25 sets and we sent it to them. They wrote me another letter later on and asked for 25 more sets which we sent them.

I also remember one other letter that was particularly impressed upon me, it was a letter from a colonel at an

4193 embarkation camp. I believe it was around Virginia, in which he wanted this material particularly because he thought it would lift the morale of the boys who were going overseas, and he sent me a picture of a thing which he had gotten up at the time which he used expressly to use these pin-up pictures, and he said it was the last thing the boys saw before they went overseas. I have a copy of the picture here if you would like to see it.

Q. Is this the picture that shows a bulletin board "Best Wishes, Esquire"? A. It is.

Mr. Bromley: I offer it in evidence.

Mr. Hassell: I object.

4194 Chairman Myers: What is its competence?

Mr. Bromley: It shows the usage and general acceptance of the Varga girl.

Mr. Hassell: Mr. Chairman, I have been waiting until this witness finished. All of this witness' testimony up to this time is absolutely irrelevant and impertinent to the inquiry here and it is exactly and definitely on all fours with the decision of the Circuit Court of Appeals in the Second Circuit in the Levine

case which had to do with the sale of books, and the Court specifically held that the exclusion of lists of purchasers of books by the Court below was correct. 4195

So I move that this testimony all be stricken and that all similar testimony in the record be stricken, and that if I have been shown as asking any question respecting such matter that that be stricken also.

Mr. Bromley: May it please the Board, under 39 U. S. Code Annotated, Section 226, there are specified the four conditions which a publication shall fulfill.

The fourth condition is as follows: 4196

"The publication must be originated and published for the dissemination of information of a public character or devoted to literature, the sciences, arts, or some special industry, and have a legitimate list of subscribers."

Mr. Hassell has stated that Esquire should be barred from the mails on the ground that it does not comply with the provisions of the fourth condition for admission to second-class mailing privileges.

It is, therefore, our position that we should be allowed to show a cross-section of Esquire's subscription list in order to prove that Esquire complies with this provision of the fourth condition of second-class mailing. 4197

Moreover, in his Appendix A to the transcript of the proceedings relating to the application for second-class mailing privileges, Mr. Hassell, who prepared this document, citing the case of United States v. Rebhohm, et al., 109 Fed. 2nd, 512 (C. C. A. 2nd, 1940) states:

4198 "The Court then proceeded to point out that such abuse had been established as 'defendant had indiscriminately flooded the mails with advertisements, plainly designed to catch the prurient. The circulars were no more than appeals to the salaciously disposed.'"

Mr. Hassell further goes on in his Appendix A brief:

"Here we find that none other than the Circuit Court of Appeals for the Second Circuit is influenced in its interpretation of what is and what is not obscene by the method of distribution of the matter under consideration."

4199 Since Mr. Hassell takes the position (a) that Esquire does not comply with the fourth condition for second-class mailing and (b) that the method of distribution, i.e., whether the magazine is only distributed to those who are salaciously disposed, it is proper for us to show the nature of the character of the persons to whom Esquire is sent through the mails and the numerous reputable hospitals, institutions and so forth that receive this magazine.

The case of United States v. Levine, 82nd Fed., 2nd, 156 (C. C. A. 2nd, 1936), which has been referred to as authority for not allowing this evidence to be 4200 introduced is clearly distinguishable on the ground that it was decided under 18 U. S. C. A. 334 which makes it a crime to send obscene matter through the mails and has no relation to the conditions for second-class mailing.

Chairman Myers: That is the point I want to clear up in my mind. I had in mind the Levine case. I thought this other point was involved in the Levine case too.

Mr. Hassell: May I make a statement in answer to counsel's statement? 4201

Chairman Myers: Yes.

Mr. Hassell: As to the first point, that this testimony is pertinent under the last clause of the fourth condition of 39 U. S. Code 226, namely, "having a legitimate list of subscribers," I submit that from the outset I have made no contention that the publication does not have a legitimate list of subscribers. We freely admit that. That is not in controversy in any manner whatsoever.

As to counsel's reference to a document that I got up for use in another second-class case, not of this type, referring to the Rebhohm case, there the circular was in itself salacious and was involved in that very prosecution. 4202

We don't have that situation in this case at all. I submit that this is an obvious attempt to get in irrelevant and impertinent matter here that has no bearing on the issue involved in this case whatsoever.

Mr. Bromley: I am not willing to accept Mr. Hassell's proffered stipulation in view of the long history we have had here, trying to pin him down as to whether that is under the fourth condition or not. I want to prove where we are. 4203

Chairman Myers: Let me see the Levine case which is the case I had in mind which excluded this kind of evidence. I thought this matter of qualification is involved here.

Mr. Bromley: I don't think it is involved here at all. I think it is purely obscenity.

4204 **Mr. Hassell**: It specifically covered the exclusion of lists of purchasers and held that was a correct act on the part of the trial judge.

Chairman Myers: Apparently in this case only a conviction on obscenity was involved.

Mr. Bromley: That is the way I read it, sir. That is, only 334 was involved and not 226.

Mr. Hassell: That is correct.

Chairman Myers: I think that is right. Then, do you have any authority on the question of establishing matter that disseminates information of a public

4205 character or is devoted to literature, sciences, or the arts or special industry?

Mr. Bromley: We have not been able to find a single case which construes that language in any such shape or manner.

Chairman Myers: What do you say to this? In the last paragraph of the Levine case there is this language:

"The judge refused to allow in evidence a list of purchasers of the books, among whom were a number of well-known persons. He was right. Such a list

4206 taken alone told nothing of the standing of the works in the minds of the community; even respectable persons may have a taste for salacity. Obviously it would be impossible without hopelessly confusing the issues to undertake any analysis of such a list by finding out why each buyer bought. On the other hand, it is reasonable to allow in evidence published reviews of qualified critics—quite another thing, incidentally, from expert witnesses at the trial—for such evidence does not lead far afield and is ration-

ally helpful, though in the end it is the jury who must declare what the standing shall be. So far as that may be a menace to the free development of the arts, it is a risk which Congress has seen fit to impose, and which we cannot gainsay, even if we would." 4207

Mr. Bromley: I agree with that statement. If the list is offered merely to rebut the charge of obscenity by an attempt to show that reputable people buy the material, I think we will be concluded by that decision. But I am not offering it for that purpose. I am offering it because the Department has taken the position repeatedly that we do not comply with the provisions of the fourth condition, and also he has openly charged that it is a hush-hush magazine and, therefore, since the fourth condition says that we must have a legitimate list of subscribers, it seems to me I am entitled to prove— 4208

Chairman Myers: I don't believe Mr. Hassell ever questioned the fact that you have a legitimate list.

Mr. Bromley: He doesn't now, but I don't see why we should be required to take his belated concession. I want to prove we are complying with that requirement and how we do comply with it 4209

Mr. Hassell: Mr. Chairman, the charges initiating this proceeding don't make any such charge. The matter has not been in issue at all from the very first witness, Mr. Wentzel. It was admitted this publication had a list of some 300,000 subscribers and there was no question whether they were legitimate or not. That is conceded. That is not at issue.

Mr. Bromley: Will you stipulate we comply with the fourth condition of Section 226?

4210 Mr. Hassell: I certainly will not, but the last clause, "having a legitimate list of subscribers," I will stipulate you comply with.

Mr. Bromley: I am not willing to take that. I will take a stipulation that we comply with the whole thing and not a part of it.

Mr. Hassell: Absolutely not.

Chairman Myers: It is the view of the Board that the evidence shall be admitted for the sole purpose of touching on the fourth condition of Section 226. But it is our view that the question of having legitimate

4211 lists of subscribers is not involved at all and that it relates to the rest of the condition. But for that purpose and that purpose alone—it is not admitted with respect to the other provisions of the charge because I think that is out under the main case.

What was the question you had? It was on the question of this photograph?

Mr. Bromley: I will withdraw it.

Chairman Myers: I was going to say that I don't think it is proper.

Mr. Bromley: Can we get this concession on the record: that there is now no charge that our magazine

4212 is a hush-hush magazine and surreptitiously distributed?

Mr. Hassell: I have not charged it is a hush-hush magazine or surreptitiously distributed. I have charged that it is a sophisticated, racy magazine, that a good many people probably would not want in their homes and would not have in their homes where they have young and adolescent children.

Mr. Bromley: Will you concede it is openly and regularly distributed like any other reputable magazine?

Mr. Hassell: Certainly, and I will concede that it is distributed through the mails improperly at a subsidy of $500,000 a year. 1213

Mr. Bromley: That doesn't help me very much. I just don't like that.

Mr. Hassell: I can't let counsel put words in my mouth as to what I am going to agree to.

By Mr. Bromley:

Q. I have just one other thing I want to cover.

In connection with the surveys made by the Curtis Publishing Company and Mr. Crossley, could you tell the Board, based on an analysis of the subscription list, the distribution of the subscriptions population-wise? At least, can you tell us how many of the subscriptions go in cities of over 100,000 and how many of the subscriptions go in cities under 2,500, which was the down limit of the Crossley survey so far as urban results are concerned? A. Yes, we are required to make a population breakdown every six months for the Audit Bureau of Circulations. That is an organization of all of the major publications that carry advertising and it is maintained and supported by members, and this organization requires these statements on circulation-population breakdowns to be filed, and then they come in and audit these reports. 1214 1215

I have had a copy of our last report that we filed for the first six months of this year and we have a population breakdown on that particular report. It shows that 48 percent of our circulation goes into cities over 100,000 and that 8.38 goes into cities of less than 2,500.

The population breakdown is compiled by various population groups here.

Mr. Bromley: That is all.

4216 Mr. Hassell: I move that the balance of the testimony of this witness be stricken on the same ground as covered in the other, and the fact that reference to the Crossley survey or any other survey that might have been made in prior testimony, that is in this record over my objection, does not justify this matter going in.

Chairman Myers: Overruled on the same conditions set forth in the overruling of the last motion.

Mr. Hassell: May I have an exception to the Board's

4217 ruling on that?

Chairman Myers: Yes, and your exception may be noted.

Mr. Hassell: No questions.

(Witness excused.)

Mr. Bromley: I should like to advert to the situation of the three letters which each side put in yesterday, and to offer another letter in evidence, for the reason that I find that since the Government got in one ahead of the three, they now have four whereas we only have three, a fact which I overlooked.

4218 Chairman Myers: I don't recall the fourth.

Mr. Bromley: They got one in before and then we made the "three" arrangement.

Mr. Hassell: I don't recall that. What was the letter I got in before?

Mr. Harding: Cambridge Glass Company.

Mr. Bromley: I call that an unconscious gyp.

Mr. Hassell: Oh, that had reference to the distribution of these Varga calendars and desk pad and so forth.

Mr. Bromley: But you overlooked the fact that right in the middle it talked about the magazine. 4219

Mr. Hassell: I was not offering that as it related to Esquire magazine directly, but simply as it related to the business of selling the portion of the magazine that we contend here is salacious, that is, the Varga pictures on playing cards, desk cards, calendars, and so forth.

Mr. Bromley: But it had a very direct reference to the magazine as a whole and it was very uncomplimentary.

Chairman Myers: You had better let Mr. Hassell see the letter. 4220

Mr. Bromley: I am sure once he reads it he won't have any objection to it. (Letter handed to Mr. Hassell.)

Mr. Hassell: Mr. Chairman, I do have a very definite objection to this letter. This letter deals with the very question that we have been discussing here in connection with the Levine case. It purports to show that this particular library likes to have this magazine.

It is designed to lend standing to the magazine by reason of the fact that it is deposited in this library. 4221

Now, if we went into this question, possibly I might show that this library has shown in the past, or might have shown in the past, that it was interested in getting subversive material from Germany and maintaining that in the library, and other matter of an objectionable character.

I think this goes to the very point that we have been discussing here, and it involves the reputation and standing and the type of material in this library, but certainly this Board does not intend to go into that.

4222 It is far more than the testimonial of readers of the publication.

Chairman Myers: Would you be willing, Mr. Hassell, to withdraw one of your letters that you placed in the record?

Mr. Hassell: Absolutely. I would be willing to have the glass company man's letter disregarded insofar as it refers to Esquire, the magazine itself.

Chairman Myers: We can't do that. The whole business is in. We will have to take the whole letter out if you take it out.

4223 Mr. Hassell: Let it go out. I have forgotten how just how it came into the testimony.

Chairman Myers: Do you remember the number of that exhibit?

Mr. Bromley: 29.

Mr. Hassell: This letter from the Cambridge Glass War Service Committee specifically refers to the kit. He says he doesn't want the kit. Incidentally he mentions the magazine.

Mr. Harding: He mentions that he doesn't want the magazine either.

Mr. Hassell: I am willing to have it go out. I don't

4224 think that sort of matter is at all binding or should in any way influence the decision of this Board.

Chairman Myers: Well, let Post Office Department Exhibit 29 be withdrawn.

(Department Exhibit No. 29, heretofore introtroduced in evidence, was withdrawn.)

Chairman Myers: Any further witnesses?

Mr. Bromley: We have a matter of some four or

five stipulations here to clear with Mr. Hassell. We would like to meet with him over the noon recess or at least deliver the material to him so he can read it and possibly stipulate. 4225

Chairman Myers: How does that fix you as to time? Would 1:30 be too short a time for you?

Mr. Hassell: Well, not having seen the stipulations or having any information as to what they may cover or are designed to cover, I am not in a position to say.

Mr. Harding: The same matter I discussed with you before. A psychiatrist, an educator, and a pastor: three short stipulations. 4226

Mr. Hassell: A psychiatrist and an educator and who?

Mr. Harding: A clergyman.

Mr. Hassell: Well, it would probably take us at least half an hour.

Chairman Myers: Suppose we make it 2:00 o'clock.

Mr. Hassell: All right.

Chairman Myers: We will adjourn until 2:00 o'clock.

(Whereupon, at 12:06 o'clock p. m., the hearing was adjourned until 2:00 o'clock p. m.) 4227

AFTERNOON SESSION.

(The hearing was resumed, pursuant to the adjournment, at 2:00 o'clock p. m.)

Mr. Bromley: If the Board please, under the prior stipulation as to witnesses we now offer the same agree-

4228 ment and stipulation with respect to Dr. Richard H. Hoffman, who was born in 1887, graduated from Cornell University in 1908, was an interne at Mt. Sinai Hospital in 1911, is a Fellow of the American Medical Association specializing in psychiatry and neurology; chief of the neurological institute clinic of New York City for ten years, and for ten years chief of the clinic for mental defectives, Post-Graduate Hospital, and private professor of mental diseases, Post-Graduate Hospital 1920 to 1923, studied in Vienna, Munich and Berlin 1925 to 1927, wrote "The Struggle For Hell" in
4229 1929, and is now visiting neuro-psychiatrist at Beth-David Hospital, New York City.

He would testify that he finds nothing obscene, lewd, lascivious, indecent, or filthy in any of the material objected to and states it to be his opinion that nothing in the objected to material, taken either singly or collectively, would have any tendency whatsoever to stimulate impure thoughts or acts or corrupt the morals of any person, nor would said material have any tendency whatever to lower the standards of right or wrong in any class of population.

4230

JOSEPHINE MIXER GLEASON. Born 1892. Graduated from Vassar 1914 with A. B. degree; graduated from Cornell University 1917 with Ph. D. Was assistant professor of psychology at Vassar from 1914 to 1916. Was instructor at Cornell University 1916 to 1918, and has been associate professor of psychology at Vassar from 1918 to date.

Miss Gleason, having studied the objected to ma-

terial, states that based upon her experience with Vassar girls, as chairman of the committee on admissions since 1930, and as professor in the field of psychology, she would testify that in her opinion none of the material complained of is obscene, lewd, lascivious, indecent, or filthy, and that none of such material would have any harmful effect upon girls of college age. 4231

HEDLEY S. DIMOCK, Dean of George Williams College and professor in that school. Now on leave to conduct the recreation programs of the U. S. O. in their main office in New York. 4232

Was at one time director of personnel at Camp Ahmek, one of Canada's leading private camps for boys, and prior to his enlistment in the Canadian Army during World War I was associate secretary of the Y. M. C. A. in Saskatoon, Saskatchewan. Holds an A. B. degree from the University of Saskatchewan, M. A., B. D., and Ph. D. from University of Chicago.

Prior to joining the staff of George Williams College he was instructor in psychology and education at Carleton College, and has written many books in his field of education. 4233

He would testify the same as Professor Ernest Osborne, of Teachers College, Columbia University, insofar as said testimony relates to youth in camping activities.

We have a stipulation prepared for Reverend Ray Anderson Eusden, who is a clergyman, but I understand Mr. Hassell won't stipulate with respect to him just because he is a clergyman.

4234 Mr. Hassell: This statement that counsel refers to is an affidavit. I feel that it is necessary for the Government's case here, if we are going to consider this matter in arriving at this opinion, that we should have an opportunity to cross examine witnesses of this sort.

Mr. Bromley: I would like to recall Mr. Gingrich.

Mr. Hassell: May I inquire what the object of calling Mr. Gingrich is? Is this direct examination?

Mr. Bromley: Yes, just on the Petty girl plate.

Mr. Hassell: Is this matter that you inadvertently overlooked in your direct examination?

4235 Mr. Bromley: No. It is a matter which you questioned on cross examination which I now have to go into.

Mr. Hassell: Well, counsel had an opportunity, I submit, Mr. Chairman, to cover this in his redirect examination of this witness.

Chairman Myers: Are you taking it up as a matter of redirect examination?

Mr. Bromley: No. I would like to recall him for direct on this one point.

Chairman Myers: Well, better clear it up if you can.

4236 Mr. Hassell: Well, if we apply the same procedure to all the other witnesses we may be here another month.

Arnold Gingrich—for Respondent—Recalled—Direct.

ARNOLD GINGRICH a witness called by and on behalf of the Respondent, having been previously duly sworn, resumed the stand and testified further as follows: 4237

Direct Examination by Mr. Bromley:

Q. Mr. Gingrich, I show you these two plates and ask you whether they represent, first, the plate of the Petty girl as originally submitted to the Post Office Department, and, second, the plate of the Petty girl as modified and finally published? A. They do.

Q. Now, the second plate, that is a modified plate, was submitted to the Chicago postmaster, was it not? A. That is correct. 4238

Q. And it was on the basis of that modified plate that the issue was approved for mailing second class? A. Yes, with the understanding that this would be done and it was done.

Mr. Bromley: I offer both of these in evidence.

(The documents above referred to were marked, respectively, Respondent's Exhibits Nos. 125 and 126 for identification.)

Mr. Hassell: Will you distinguish between them, which is the original plate and which is the modified? In other words, how are they marked? 4239

The Witness: They are marked old and new, Mr. Hassell.

Mr. Hassell: Was 126 submitted to the Solicitor, Mr. Gingrich?

The Witness: I don't find any further correspondence beyond my letter in confirmation of the telephone call. Recalling the complete set of plates which we

had prepared as we always did upon the request of the
4240 Chicago post office, I thought that we had done it both in Chicago and here, but quite evidently there was no separate submission of this particular one.

Mr. Hassell: In other words, there was no submission to the Solicitor of the revised plate?

The Witness: No. There was simply an agreement that if I would make the changes that I promised to make that the issue could be accepted for mailing in Chicago. I, at the time of the letter concerned, stated that we would remove this one noticeable line, if you
4241 recall the testimony, to approximately the equivalent of the depression of the back bone, and that is the change that was made on the plate as this exhibit clearly shows.

By Mr. Bromley:

Q. 125 is the original plate and 126 is the modified one; is that correct? A. That is correct, yes.

Mr. Cargill: With whom was that agreement made, Mr. Gingrich?

The Witness: With Mr. Miles on the telephone.
4242 Realizing that the plate was completed and that there was no longer time to make a new engraving, I simply told him that we would reduce the objectionable strong line there by running through the engraving and he said that if I would do that then that would remove the objection. You will see that I undertook to make that posterior line approximately the equivalent of the line of the backbone, and the second plate shows how that was accomplished, by revision of the engraving plates.

Chairman Myers: The exhibits are received.

(The documents heretofore marked Respondent's Exhibits Nos. 125 and 126, respectively, were received in evidence.) 4243

(Witness excused.)

Mr. Bromley: That is all. The Respondent rests.

Mr. Hassell: At this point I would like to recall Mr. Wentzel to the stand.

NELSON B. WENTZEL was recalled as a witness for and on behalf of the Post Office Department and, having been previously duly sworn, resumed the stand and testified further as follows: 4244

Direct Examination by Mr. Hassell:

Q. Mr. Wentzel, you have already been sworn? A. Yes, sir.

Q. Have you examined your files at my request to ascertain whether or not the November, 1937, issue of Esquire and the July, 1937, issue of Esquire were held to be non-mailable? A. I have.

Q. In letters addressed to you by the Acting Solicitor of the Post Office Department? A. Yes. 1243

Q. You have those letters? A. I have.

Q. Do you have copies of those letters and can you testify what notification, if any, was made to the publisher of Esquire of these rulings? A. I have the letters and I can do that.

The first letter was dated July 3, 1937, addressed at Chicago. It stated:

4246 "The copies of the July, 1937, issue of Esquire submitted with your letter of the 17th ultimo in connection with the publisher's request for the acceptance of the second-class bound rate to publishers of copy of the monthly edition were submitted to the Solicitor of the Post Office Department with the request that he advise whether any of the matter embodied therein rendered the copies unmailable and he has advised as follows:

"'This issue of the publication is non-mailable under Section 598 P. L. & R. 1932'. Please inform the publishers that the law, Act of March 3, 1879, embodied in Section 520,
4247 P. L. & R., prescribes as one of the conditions to enjoy a publication to the second-class mailing privilege that it 'must regularly be issued at stated intervals'.

"The law contemplates that mailable issues meeting the requirements in all respects shall regularly be issued in accordance with the frequency under which the publication is entered as second-class matter and failure to comply with this requirement jeopardizes the second-class status of the publication.

"Copies of each edition of the next issue should be transmitted to this office. A copy of this letter is enclosed for the publisher."

4248 Q. Now, with respect to the other issue I mentioned, Mr. Wentzel? A. With respect to the November issue we wrote a letter dated November 3, 1937, to the postmaster at Chicago stating:

"The Solicitor for the Post Office Department has held that the November, 1937, issue of Esquire is non-mailable under the provisions of Section 598 P. L. & R.

"The July, 1937, issue of this publication was also held non-mailable by the Solicitor. Please again inform the

publisher that the law, Act of March 3, 1879, embodied in Section 529, P. L. & R. contemplates that mailable issues 4249
of a publication meeting all the requirements prescribed for mailable matter for second-class shall 'regularly be issued at stated intervals' and that if mailable issues of the publication are not regularly published in accordance with the frequency with which the publication is entered as second-class matter the publication shall not continue to retain its second-class privilege.

—"If the publishers of Esquire continue to indulge in the practice of publishing non-mailable issues it will be necessary to take action leading to the revocation of its second-class mailing privileges. See Section 602, P. L. & R. 4250

"Please also continue to send to this office copies of both editions of each issue of Esquire.

"A copy of this letter is enclosed for the publishers."

Q. I see. Now, does your file show whether or not an issue of 1940 was held to be unmailable by the Solicitor? A. Yes, the file does show it.

Q. Do you have that here? A. I just have a memorandum of it here. That ruling, by the way, was made directly to the Chief Inspector's office.

Q. But a copy was sent to your office, was it not? A. Much later.

Q. In due course of business? A. Much later, yes. 4251

We have here an index of the evidence in the case and it says that under date of November, 1940, ruling to Chief Inspector dated November 22, 1940, rules that this issue of the publication is non-mailable under Section 598, P. L. & R., 1942. Recent issues of Esquire have contained matter of a questionable character but this issue completely oversteps the line. Inasmuch as the publication has already been mailed, it is suggested that the matter be brought to the attention of the proper United States Attorney.

4252 **Mr. Cargill: That Section 598 that you referred to is the so-called "obscene statute"?**

The Witness: It is.

Mr. Hassell: That is all.

Cross Examination by Mr. Bromley:

Q. Never at any time subsequent to this last memorandum, Mr. Wentzel, and in 1941 and 1942, was any issue of Esquire which was actually mailed held to be non-mailable in whole or in part? A. I have a record here of the action taken with respect to each of the subsequent issues, and while

4253 **there were a number that were referred to as being questionable, full responsibility for any violation of the law being placed on the publisher, I don't find any until beginning with 1943.**

Q. Each one of those issues that I asked you about in my question was submitted to this office, wasn't it, as mailed? A. I believe it was, either as mailed or subsequent.

Q. After you received these issues, in no instance was any one of them or any part of any one of them declared non-mailable. Isn't that so? A. Not so far as our records show.

4254 **Mr. Bromley: That is all.**

Redirect Examination by Mr. Hassell:

Q. Up until 1943, January, 1943? A. I so stated, until January, 1943.

Mr. Hassell: That is all.

(Witness excused.)

Colloquy.

Mr. Hassell: Now, Mr. Chairman, we have been taken somewhat by surprise by reason of the fact 4255
that the Board heard a good deal of opinion testimony in this case and by reason of the fact that the Board is considering this type of testimony, and it has been necessary for us to prepare some rebuttal testimony.

Owing to the fact that all of my time was taken up with the daily hearings in this case, I have had no opportunity to get or examine witnesses to produce here in rebuttal, so with the permission of the Board I would like to have Mr. O'Brien take over the 4256
Government's rebuttal case, present the testimony, and examine the witnesses.

Chairman Myers: All right.

Mr. Hassell: I am not quite certain whether he will be ready to go on this afternoon.

Of course, as the Board understands—I don't know whether counsel does or not—the Government has no fund even to pay expenses of witnesses brought here in a proceeding of this sort, and naturally we have to accommodate our time to the convenience of the witnesses.

We could not have these witnesses sitting around 4257
all this time. We thought probably this case would conclude tomorrow morning, that is, the respondent's case, and we would have been prepared to go on then, I understand from Mr. O'Brien.

Chairman Myers: Call your next witness.

REBUTTAL BY POST OFFICE DEPARTMENT

4258 DR. BENJAMIN KARPMAN, a witness called by and on behalf of the Post Office Department in rebuttal, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien:

Q. State your full name. A. Dr. Benjamin Karpman.

Q. Where do you live? A. 4490 Forty-second Street, Northwest, Washington, D. C.

Q. What is your business, occupation, or profession? A.
4259 I am a physician.

Q. You are a doctor of medicine, are you? A. Yes, sir.

Q. And where do you practice that profession? A. St. Elizabeth's Hospital. I am a senior psychiatrist and psychotherapist.

Q. In Anacostia, D. C.? A. That is right.

Q. Doctor, will you outline your education in medicine and psychiatry for the information of the Board? A. I have a Master's degree in psychology, postgraduate; I have an M.D. and M.B. degree in medicine, University of Minnesota; I have a diploma, University of Vienna, in psychiatry, postgraduate course.

4260 Q. How long is it since you graduated in medicine, Doctor? A. 1919, 24 years.

Q. Since you graduated in medicine, will you give us some more specific account of your studies in psychiatry? A. I don't quite get the question.

Q. Where did you study psychiatry first? A. I came to St. Elizabeth's Hospital as a probational interne and I have advanced through several grades to the position of senior psychiatrist and psychotherapist, psychoanalyst.

Q. During the time you have been employed by St. Elizabeth's did you make any special studies in psychiatry or

in psycho-analysis? A. Yes. I have been to Europe twice, 4261
once for a general trip to see what was going on in psychiatry in 1923 and 1924, and the second trip I went to Vienna for a year.

Q. What studies did you pursue? A. I studied analysis with Steckel. I attended all the seminars and meetings of the Freud group. I knew Freud personally, I have been at his home.

I studied with Shidler and Ranke.

Q. Tell the Board who is Steckel. A. Steckel is one of the leading pupils of Freud, who has published about twelve volumes of studies dealing with a variety of psycho-neurosis 4262
and psychosis.

Q. Is Steckel a world-recognized authority on psycho-analysis? A. I think so, especially in the dream interpretation.

Q. Is Freud also a world-recognized authority? A. Oh, yes.

Q. Tell us something about your work at St. Elizabeth's, Doctor. A. I am practically the only psychotherapist they have at the hospital, on the hospital staff now. The number of patients I have is very small but they are given individual and personal attention, most of them every day, and some three or four times a week.

4263

I am doing psychotherapy with them, making psycho-analyses. Sometimes a year and sometimes two or three years is taken to pull them through, and I believe that I will not overstep my modesty when I say there are a number of cases on record who are cured and have stayed cured since they have been discharged from St. Elizabeth's.

Q. Has your work in St. Elizabeth's dealt with persons having sexual problems, sexual neurotic or psychopathic? A. I would say that 90 percent of the cases have many

4264 problems centered on some sexual difficulty. It may not appear so at first by the presentation of the symptom, that is, they may complain of some anxiety or depression or a headache. I had a case of goiter—or it may be diarrhea, gastric ulcer, mucus colitis, or something which on the surface appeared to be physical maladjustment but on analysis appeared to be sexual neurosis.

Q. Have you from time to time since 1917 up to 1942 written a number of articles and books dealing with psychiatric psycho-analytic problems? A. Yes.

Q. I hand you a list which begins in 1917—I think the
4265 first three items on there are not psycho-analytic in character, are they? A. That is correct.

Mr. O'Brien: I want to offer this list instead of reading it all out loud at this time. (Handing document to Mr. Bromley.)

Mr. Bromley: No objection.

Chairman Myers: It may go in.

(The document above referred to was marked Department's Exhibit No. 62 and received in evidence.)

4266 Mr. O'Brien: I wish to have this admitted into the record, please, and I also desire to read the names of the particular items or articles which relate to sex and so forth.

Chairman Myers: It has been admitted.

Mr. O'Brien: It has been admitted?

Chairman Myers: Yes.

Mr. O'Brien: Post Office Exhibit 62 shows that Dr. Karpman wrote the following articles, amongst those listed:

The Sexual Offender, from the Psychoanalytic Review, Volume 10, July, 1924; 4267

The Sexual Offender, II, from the Psychoanalytic Review, Volume 12, pages 67 to 87, 151 to 159, 1926;

The Biology of the Inter-sex, from the Journal of Nervous and Mental Diseases, March, 1927;

Psychoses in Criminals, II, from the Journal of Nervous and Mental Diseases, March to June, 1929;

Impotence in the Male, from the Archives of Neurology and Psychiatry, April;

Frigidity in Woman, from the Archives of Neurology and Psychiatry, December, 1930; 4268

Psychic Impotence, from the Psychoanalytic Review, Volume XX, No. 3, July, 1934;

The Obsessive Paraphilias (Perversions), from the Archives of Neurology and Psychiatry, September, Volume XXXII, pages 577 to 626, 1935;

The Kreutzer Sonata, a Problem in Latent Homosexuality and Castration, Psychoanalytic Review, January, 1939;

Perversions as Neuroses (the paraphiliac neuroses), from the Journal of Criminal Psychopathology, Volume III, No. 2;

Criminology as an Expression of Psycho-sexual Infantilism, from the Journal of Criminal Psychopathology, January, 1942. 4269

By Mr. O'Brien:

Q. Doctor, in dealing with your neurotic or psychoneurotic patients, do I understand that you have inquired to some considerable extent into the matters which affect their sex lives? A. Yes.

4270 Q. Which stimulate them to thoughts of sex, whether normal or abnormal; is that true? A. I don't do it directly. I mean, I don't ask directly the patients what stimulates them, but it comes out in the form of associations.

Q. It comes out in your analysis of the patient? A. Yes.

Q. It may be entirely voluntary? A. Oh, yes. I would say spontaneous rather than voluntary because it is all voluntary; otherwise they wouldn't come for treatment.

Q. Have you any information, Dr. Karpman, as to whether any of your patients or many of your patients have
4271 made any purchases of the magazine Esquire for the purpose of stimulation?

Mr. Bromley: I object to that on the ground that it is incompetent and of course hearsay.

Chairman Myers: No, he is asking him of his own knowledge.

Objection overruled.

The Witness: May I answer?

Chairman Myers: Yes.

The Witness: I wouldn't say that patients deliberately go out of their way to buy Esquire. They
4272 buy all sorts of things. They buy Film Fun, as one patient told me. They buy Laff; they buy Esquire. Some patients say that they buy Esquire because of the pictures that stimulate them, and some patients tell me that they buy Esquire because they like the short stories and the sports section, and so on. I don't think I could commit myself to the statement that they buy Esquire only for that purpose.

Mr. Bromley: Just a minute. I move to strike out the answer on the ground that it is hearsay.

Chairman Myers: I take it that that is what they told him. 4273

Objection overruled.

Mr. O'Brien: He questioned them about their basic reactions. This was what they told him all through these cases.

Chairman Myers: Objection overruled.

By Mr. O'Brien:

Q. Did you at my request examine the January through November issues of Esquire magazine for 1943, Dr. Karpman? A. I have. 4274

Q. Have you specifically examined various items marked and listed on the covers of such magazines? A. I have.

Q. Dr. Karpman, I show you an exhibit in this case marked Post Office Exhibit No. 1, being the January, 1943 issue of Esquire magazine, and ask you to examine it. A. Well, I have examined the—

Q. Just a moment. I want to ask you some questions. You have already examined this, have you not? A. I have.

Q. You have already examined a copy of the January, 1943 issue? A. Yes.

Q. I want you to turn to the so-called Varga calendar in there which begins on page— A. 97. 4275

Q. 97—and look at the twelve pictures in the calendar for the months of January through December. A. Yes.

Q. Doctor, will you state to the Board whether or not the ordinary normal person examining or looking at those pictures would obtain any sexual reaction therefrom or any stimulus of a sexual character? A. I would say that by and large they will.

4276 Q. All right. Turn to the February picture. Will you explain to the Board why you think, for example, that that February picture would arouse sex stimulus in the mind of the beholder? A. Because it accentuates what we call in psychoanalysis the erogenous zones. Erogenous zones are zones of the body that have a greater sexual stimulating value than other parts of the body.

Q. In this case, Doctor, you notice that the woman is shown with her back toward you. A. That is right.

Q. With her face not looking toward you. A. That is right, but the thing that attracted my attention, and I
4277 imagine that would attract the attention of almost any normal individual, is the prominent display of the buttocks. In fact, the poor woman seems to have nothing but buttocks.

Q. Well, let us turn to the March issue of the lady with a fan, with the ostrich plumes. A. Well, I would say that one of the best ways to produce sexual stimulation is to cover very lightly the part that is intended to make the appeal, by light feathering, and the breasts are just about covered. You can just see a little bit, and the buttocks are also covered but it attracts attention that way.

Q. Now, have you anything to say about the parts of
4278 the body that are visible? A. I beg your pardon?

Q. Have you any comment to make upon the parts of this picture which show these visible parts, the flesh of the body? A. It is physically stimulating.

Q. Let us turn to April, on the next page, and May. What can you say about those two pictures, if anything, Doctor? A. Here again you have those erogenous zones very nicely appealed to. You see the breast here, you see the buttocks, you can let your imagination run as to what is in between the legs, and then there is the leg.

Q. The May picture—

Mr. Bromley: May we have the answer read? We don't always hear the doctor. 4279

(Record read.)

By Mr. O'Brien:

Q. Don't you notice, Doctor, that those women have some clothes on? What effect does that have on the sexual appeal of the pictures? A. The main idea is this, the human eye is a very peculiar thing, it only notices that which it wants to notice. It doesn't notice clothes.

Q. Take the May girl. She has clothes on, doesn't she, 4280
Doctor? A. I don't see very much. The only part that would seem to have clothes would be in the upper thigh, through the buttocks, up to the navel; the chest and the back are bare, and the thighs from below down to the legs are bare.

Q. What can you say about the May picture which in your opinion would incite sexual thoughts in the normal mind? A. I will put it this way, that it would create an undercurrent of sexual tension in the reader, and I would like to examine the reader in whom it does not create such a sexual tension.

Q. Doctor, will you turn to the June picture in the 4281
same issue? A. It seems to me that they are all about the same thing. You got about four erogenous zones, that is, parts of the body that are particularly selected through cultural civilization to appeal sexually, and in one form or another they are displayed.

Here it is the breast, or it is the buttocks, or it is the navel, or it is the back, but by producing a variety of the combinations you practically have the same identical thing

in all the pictures; not only Esquire but Film Fun and
4282 everywhere else, but I am not concerned with everywhere else.

Q. I want you to look at each picture from July on through December and tell us if your testimony is the same with respect to all of them. A. Now, in the July picture the breasts aren't displayed, the legs aren't as shapely, but the buttocks are very prominent.

In the August you have almost all of them shown; the breasts are outlined.

Q. What have you to say about the pose of the body in the August and September pictures? A. Well, I would say
4283 that the pose is also physically stimulating. It is not a pose that is ordinarily assumed by a woman in daily life.

Q. How about the pose for the October picture, Doctor and the picture itself, as to whether it is stimulating or not sexually? A. I think it definitely does. It is probably the most lurid of all. The breasts and through the buttocks are marked in red, and red is known to be a symbol of passion.

Q. You think that this would arouse lascivious ideas or desires? A. I think it would. If it doesn't, then the artist failed in his purpose.

4284 Mr. Bromley: I move to strike it out on the ground that it is a conclusion.

Mr. O'Brien: I will agree.

Chairman Myers: Strike it out.

By Mr. O'Brien:

Q. Doctor, will you turn to page 6 of the January issue? A. Six?

Q. Page 6.

Q. Will you direct your attention to that item in there entitled "Shor Nuff" at the center of the page? A. Yes. 4285

Q. Have you read that, Doctor? A. Yes, I have read it.

Q. Will you state whether or not you think there is anything sexually stimulating or crude in that? A. I can't find very much in the editorial as a whole, but the first sentence which says: "Sandwiching good advice between its spicy cartoons," strikes me to give the impression that is just the opposite. It gives spicy cartoons sandwiched between good advice.

In other words, I get an impression that the spicy cartoons are probably the essential thing.

Q. What does this item down at the bottom, Doctor, mean to you, this item about juking? Is there any sexual implication there? A. You mean, "Comes it then breeding"? 4286

Q. At the bottom of the left-hand column and also item 7 in the right-hand column. A. I didn't see anything about that that is striking. I didn't see anything particularly bad about it, about the breeding part.

Q. All right. Turn to page 83, the "Star and Garter Blues." A. Page 83?

Q. Yes. A. Oh, yes.

Q. Doctor, have you ever made inquiry among your patients as to their interest in burlesque? A. I do not make inquiries. The statements come out spontaneously as a part— 4287

Q. What do they tell you about burlesque? A. I would say that there are certain patients who are habituees of burlesque. They have a yearly seat regularly.

I recall one fellow, a pyromaniac who set a number of furniture houses on fire some years ago. He used to have a seat at the Gayety every week. He was highly impotent

4288 and incompetent in sexual relations with women and with him, going to a burlesque was a vicarious escape by which he could satisfy himself that way and I might add—this is not nice—that going to these shows would lead later to masturbation activities.

Q. What is a voyeur? A. A voyeur is an individual who derives particular, almost specific sexual satisfaction from watching sexual activities of others.

I had a case in the hospital of a man who used to plant himself every night at a different apartment house on a fire escape with a magnifying glass and would watch what
4289 was going on in the apartment house on the opposite side. He did it for a considerable time, until he had exhausted all the apartment houses in Washington.

Whereupon, he took to exhibitionism. Exhibitionism and voyeurism go together.

Q. How is voyeurism related, if at all, to a desire to see leg shows or pictures relating to leg shows? A. Because the individual gets satisfaction in a vicarious way by merely observing the sexual part but without utilizing this sexual part to his personal satisfaction. In other words, he gets sensory stimulation which is almost enough to satisfy him. That bespeaks an abnormal character because a normal
4290 person is not satisfied by the sensory stimulation but must complete the biological act.

Q. Do you see any connection between these displays in the Varga calendar and voyeurism? A. I think so. I would look upon people who are particularly attracted to the Varga girls and similar things as essentially voyeurs.

One cannot be arrested for looking at a Varga girl, but one can be arrested for looking at apartment houses.

Q. Turn to page 123. A. Yes.

Q. Do you notice the letters there addressed to "Dear Doctor Diddle"? A. Yes, sir. 4291

Q. Will you state to the Board what you understand the meaning of that word to be, "Dear Doctor Diddle"? A. So far as I know, the word "diddle" is used to describe the preliminaries of sexual play, starting with loving, caressing, necking, petting, teasing, touching, until up to the point of reaching for the actual intercourse.

In other words, what we psychoanalysts call preliminary, or fore-pleasure activities.

Q. In the last column there, the right-hand column of page 123, is the item "Dear Doctor Diddle", and it reads: 4292

"I am a beautiful brunet but I have a serious problem—every time I take a bath I blush. What shall I do? * * * Twenty.

"Dear Twenty: Before you undress, put on a blindfold."

What connotation, if any, does that joke have for you, Doctor? A. I would say it is pretty hard to figure out what the man really means by that except that in some way or other it leaves indirectly the impression of some sexual stimulation.

Why should a woman who undresses herself blush? The average woman, you might say, is in love with her body. She glorifies her body. 4293

Perhaps this is one of the reasons why so many women buy a magazine like Esquire. It is supposed to be for men. They see in it what looks to them like a glorification of the female body.

Why a woman should blush looking at her body, I don't understand.

Q. What does it bring to the mind of the male reader, since this is a magazine for men? A. He is trying to

4294 imagine her taking a bath, imagine how she is in the nude, but I don't believe that he will blush. I mean, the man who imagines.

Q. Now, about the use of the word "Doctor Diddle" in connection with this word picture of a nude? Does that have any sexual significance there? A. I don't see it.

Q .You don't see it? A. I don't see it, but then I am only one man.

Q. Doctor, I hand you Post Office Department Exhibit No. 2, which is the February, 1943, issue of Esquire, and call your attention to the Varga girl picture in this issue. I think it is page 34.

4295 Would you tell the Board, Doctor, whether or not you consider this picture of the Varga girl, with the accompanying verse "Song for a Soldier", sexually stimulating? A. They are almost monotonously the same. You see again the outline of the breast, the navel, the buttocks, the legs, and again the breast, the navel, the buttocks, the legs. It is just the same, just a variation on one theme.

Q. Does this article of wearing apparel that is shown in the picture enter into any modification of the answer? A. What is that?

Q. This nightgown, or whatever it is she is wearing. A. I think the nightgown reveals more than it conceals.

4296 Q. You don't think it would prevent—or do you think it would prevent the picture from arousing a sexual stimulation? A. The human mind is so constituted it is usually not attracted by something concrete. If a little bit is left for suggestion it attracts more. Put some bit of drapery over the leg there through which you can see the outline of the leg and for some reason it produces more stimulation than if the leg were completely naked. Put a very thin piece of silk over the breast through which you can

see the outline and the human mind, for some perverted reason, will conceive it a better stimulation than if the breast were entirely naked. 4297

Q. Now, Doctor, turn to page 65 of the same magazine the cartoon with the Oriental or Turkish gentleman and the girl with the caption: "What am I bid for this 100 pounds of sugar."

What would you say, Doctor, as to what this— A. The woman here is a chattel that can be sold and be made usable by the owner in any way he wants. How to imagine what the owner would do with an attractive woman who is again showing the navel and the breast and so on— 4298

Q. Do you think it is a sexual connotation? A. I would say it would create an undercurrent of sexual tension. What the fellow will do with it, I don't know.

Q. In other words, that undercurrent might not lead to an overt act? A. It might not. I would not be surprised if it does not.

Q. He might forget all about it? A. He might take the next picture.

Q. Doctor, will you turn, please, to page 77? A. I saw that picture.

Q. This is an article, "Home Sweet Ruby Street", and the picture on page 77. A. Yes, I saw that article, I saw the picture. I put my eye-glasses on it so that it was magnified. I can't see very much in that. 4299

Q. Did you read the story, Doctor? A. I read some of it, not all of it.

Q. I call your attention specifically, Doctor, to page 77, the last paragraph at the bottom of the first column. A. The first or the middle column?

Q. The first column on page 77, the left-hand column, and about the seventh or eighth paragraph of the center column beginning:

"It was not the response Mrs. Finn had hoped for and
4300 left her at rather loose ends." A. I remember reading that. I don't see much in that.

Q. Do you notice that the picture depicts two young Negroes in the act of dressing or undressing, and the male in the front is winking at the woman seated on the chair? A. Yes.

Q. As he puts his clothes on? A. I don't see much in it. After all, Negroes have a right to dress and undress if they want to.

Q. The fact that this illiterate woman here shown seated in the picture could be embarrassed by what is going on
4301 in front of her, indicates this must be something of a lascivious, sexual occurrence, doesn't it? A. I don't know. Morality is not in itself dependent upon literacy. Many illiterate people may be very moral. The fact that she is illiterate and embarrassed doesn't suggest anything in particular to me.

Q. All right, Doctor, turn to page 95. Have you read this article on page 95 about "The Unsinkable Sailor"? A. Yes, I read some of it.

Q. And at the top of the right-hand column, the last column, page 95, there is an item— A. You mean beginning with "There is a new secretary in the union hall"?
4302 Q. Yes. A. Well, I would say it is mildly suggestive because it is very difficult to find any other interpretation for the word "boom" except a sexual connotation.

Q. Now, in this article also did you read about the incident of the urine jar being placed in the safe? A. That is in the third column, "What kind of safe have you?"

Q. Are there any neurotic manifestations which concentrate more or less upon excretions? A. Yes.

Q. What are the names? A. Coprophilia and urolagnia.

You sometimes find, even in the Post Office Department, you sometimes find people sending fecal matter through the mail. I remember there was a case like that some years ago. 4303

Q. Would you say that this item here has any what you might call direct relationship to these neuroses similar to what the Varga girls have as depicted in the magazine? A. I mean the suggestion is here that he is carrying some matter and I suppose it is left to the imagination of the reader to think what he wants to think. I don't think it is very dirty, but it is there, no doubt about it.

Q. Do you think it is filthy? A. I don't know. You take a bottle of urine to the doctor for examination. I wouldn't call it filthy, but if it gives a lurid description of it and makes a particular impression upon the reader's mind, then it becomes filthy. I am not sure just what impression it will make upon the reader's mind. Some, no doubt. Some will think of it in terms of filth and some will not, but the opportunity is there. 4304

Q. In other words, if the mind is susceptible to the interpretation of filth as in the words you gave— A. Coprophilia and urolagnia.

Q. (Continuing): Then this would be matter that would furnish sexual stimulation? A. That is right. That would be material that would stimulate. 4305

Q. That would furnish some material that would be suggestive? A. That is right.

Q. Now, coming back to the expression on page 95, "lower the boom on you, sister", you say that has a sexual connotation in your mind? A. I don't know whether it could be, just what would anybody say. What does lowering the boom mean? When a fellow almost jumps on the back of the woman and says "How's chances to lower the boom on you, sister?" what else does it mean?

Q. And then it goes on: "The girl jumped up in terror
4306 and ran screaming from the room". A. Yes, and what else could it mean? Perhaps somebody else would interpret it differently. I would be glad to hear it.

Q. You mean that lowering the boom on you, sister, you would interpret that as the sailor making an improper proposal of sexual connotation? A. Something of this kind. It is hard to say just what he meant, because I never came across a sentence like "lowering the boom" and I have a dictionary of pornography with all sorts of pornographic words.

Q. What does it mean when it says: "The girl jumped
4307 up in terror and ran screaming from the room"? A. Well, that is not necessarily to say that a man may jump on her or that she is terrified because he may want to attack her physically, not necessarily sexually. That alone I wouldn't interpret that way, but as I take the thing as a whole, the whole paragraph, I get the impression that some sexual connotation is meant. I wouldn't swear to it because there may be some other interpretation.

Mr. Bromley: Don't you see that it is explained right at the end of the paragraph there, right in front of you.

4308 The Witness: How is that explained?

Mr. O'Brien: Now, let us not get into cross examination at this time.

Mr. Bromley: I just want to help him.

Mr. O'Brien: I know that.

Chairman Myers: Suppose we take a recess for ten minutes.

(Whereupon, a brief recess was taken.)

By Mr. O'Brien:

4309

Q. Doctor, I hand you Post Office Department Exhibit No. 3, or a copy thereof, being the March, 1943, issue of Esquire, and call your attention to page 9, the Thorne Smith advertisement: "Thorne Smith's three wittiest, most ribald novels". Also the descriptive text under the caption: "America's one and only Rabelaisian humorist". A. Yes.

Q. And the pen and ink drawing in the lower left of this text? A. Yes.

Q. Showing a man and a woman in the nude apparently. Will you state, Doctor, what, if any, sexual appeal is obtained from this picture and text with respect to these Thorne Smith novels? A. I would say that if they hadn't put in the word "ribald", if they hadn't put in the sentence: "America's one and only Rabelaisian humorist", and they hadn't put the picture in, I don't think they would sell very many copies. 4310

The advertisement makes the appeal basically on the obscene part of it. The fact that he is Rabelaisian, the fact that he is ribald, the fact that the woman is nude.

Q. What is the effect of the picture showing the man with the woman in the nude and the man holding out what appears to be a bathing suit? A. Well, it looks as if he is very bashful. He tells her that "you had better dress up, you don't look so good nude". 4311

Q. Does this drawing which shows the woman apparently naked on a bathing beach have any sexual relationship or voyeurism or exhibitionism? A. I think so. These are the things that appeal to the voyeur type of individual, the nudity.

Q. The idea portrayed is that of sexual stimulation? The
4312 situation portrayed has a sexual stimulus? A. I think it arouses an undercurrent of some sexual tension.

Q. Now, Doctor, I just asked you questions about voyeurism or exhibitionism. A. Yes.

Q. Is it true, Doctor, or is it not true that there is a certain amount of both tendencies in most normal people? A. Yes, there is.

Q. So, in the picture and text in this advertisement for the average normal individual, so far as you think of it in ordinary life— A. Except that it is—

Q. (Continuing): —it has sexual stimulus? A. Except
4313 that it is considerably exaggerated. You don't have to create a voyeur appeal by putting up a nude woman. If you put up a pretty, dressed woman, it also has a voyeur appeal, but this is going to the extreme.

Q. The idea of the nude woman among the crowd might stimulate the idea that the beholder might not be one of the crowd by reading the book? A. I don't know whether it means that, but it is to create an impression in the reader's mind that this would be a good book to buy because if it has one picture like that perhaps it has many more pictures like this.

Q. Doctor, turn to page 36. A. 36?

4314 Q. Yes. A. Yes.

Q. The picture of the Varga girl again. A. Well, it is the same pattern.

Q. The same pattern? A. Yes.

Q. Will you state whether or not this picture on page 36 of the March issue has any sexual appeal or will stimulate— A. I think so.

Q. (Continuing): —neurotic ideas? A. I think so.

Q. In the normal mind? A. I don't know how long these

neurotic ideas would last. They would last in the imagination, or be in the imagination, but here is the breast and the navel and the buttock and the shapely leg. What else can it do to an individual? 4315

Q. Now, page 49, Doctor. A. 49?

Q. Yes. That is one of those cartoon pages. We have a number of them. Showing the two soldiers and the girl and the text: "I wonder how the Sultan knew this was my birthday". Have you found it? A. Yes.

Q. Does this picture, in your opinion, have any sexual connotation or stimulation to the normal mind? A. I think taken as a whole it has some slight connotation. The expression of glee on the face of the man in the middle. 4316

Q. You say that was glee? A. G-l-e-e.

Q. What, Doctor, do you relate the glee to? A. Anticipating the sexual pleasure with her.

Q. With the girl on the left? A. Yes.

Q. I hand you, Doctor, Post Office Department Exhibit No. 4, the April issue of Esquire. A. What page? You don't have to tell me the page, I see it.

Q. I direct your attention to the cover of this magazine. Do you have any comments to make with respect to that? A. On the cover?

Q. Yes. A. No. It is interesting that the two, what do you call them, Esky girls, they are very small, their breasts are very conspicuous, but I don't see very much there. 4317

Q. Doctor, is there any special sexual appeal in the malformed or large homely breasts? A. Well, breasts are supposed to be the zone of sexual attraction to men. Now, men differ a great deal; some men are very much attracted to a point where they will not choose a woman regardless of what other appeal she may have if she hasn't got nice breasts. I have known men to leave perfectly attractive

maids because they discovered that the woman didn't have
4318 much of a breast. Some men are particularly attracted to that.

Q. What is the general situation with respect to sex attraction of breasts? A. I think it makes a definite sexual appeal to many men.

Q. On page 38, Doctor, of the April issue? A. Yes.

Q. What comment have you to make about whether or not this Varga girl has a sexual stimulating appeal to the normal person? A. I think it has.

Q. Why, Doctor? A. The breasts are definitely outlined, the buttocks are prominent, I see one buttock, the slit be-
4319 tween the leg and the shape of the leg.

Q. Doctor, have you read the verse which accompanies the Varga girl in the April issue, "Peace, It's Wonderful!"? A. I think I have.

Q. Has that any sexual connotation, Doctor, in your opinion? A. Some, slight.

Q. What slight sexual connotation has it got? A. Well, it suggests that he might want to rest up, but in the presence of this girl he is likely to be very much alert and awake.

Q. Does it indicate whether or not he is going to be awake and about the house or in bed? A. The implication is in bed.

4320 Q. Doctor, turn to page 60, the article entitled "The Court of Lost Ladies." Have you read this article, Doctor? A. Some of it. I must confess I do not have much patience to read these articles.

Q. Well, what, if any, sexual stimulus do you find in this article? A. Just a usual thing. You see three women and six legs.

Q. What about the article itself? A. I didn't get much out of that. The title is very suggestive.

Q. Does the fact that this article deals with the court in which prostitutes are tried in New York. I believe it is, and the description of the proceedings and of the women who were brought in there, constitute, in your opinion, any effective show, shall we say, of mental prophylactic for the men who might be attracted to prostitutes? A. I think it just brings to mind what is a prostitute and what she does during the day and what she does at night and how she lives. 4321

Q. Would it cause the mind of the reader to dwell upon the fact that there is available, perhaps in the town where he is, women who are sexually commercial? A. It brings to the mind the fact that sexual outlets are immediately available to one who has the money to spend. 4322

Q. Now, Doctor, I hand you the next issue which is May, 1943, sir. A. Yes, sir.

Q. I call your attention to page 32, the article entitled "The Savage Beast In Us". A. I would say that these pictures are not so suggestive. They are just vulgar, just plain vulgar. I see no great advantage to presenting these pictures. They are displays in the commonest and roughest form, the breast, the navel, the slit, the legs—

Q. Doctor, as a matter of fact, would they or not attract certain types of minds—the scenes particularly of the can-can, or whatever this is on page 33, and the large fleshy woman on the right and the one on the left below her—do they have a special connotation, a sexual connotation, or not? A. I think it more vulgar. It is just plain vulgar with me. If a man were confronted in daily life with a woman of this type I don't think she would be sexually appealing to him. The whole thing is so vulgar, the display. 4323

Q. Do you think they are indecent as well as vulgar? A. I would say so.

4324 Q. Doctor, did you read the article by Paul Gallico, "The Savage Beast In Us"? A. Some of it.

Q. What have you to say with respect to what effect this article would have upon the mind of the reader as to sexual stimulus? A. My personal impression is that the thing is so vulgar that it will almost revolt him sexually because the average man, even the common man, still wants a little bit of refinement in the woman that he seeks, something that will give at least a facade of beauty to him.

Q. Now, Doctor, didn't you tell me that you considered this article sexually stimulating?

4325 Mr. Bromley: I don't think counsel ought either to lead him or to cross examine him.

Mr. O'Brien: I am not cross examining. I am trying to refresh his recollection.

Mr. Bromley: By suggesting the answers.

The Witness: I said it is not so much sexually stimulating as it is vulgar. It is more vulgar than sexually stimulating.

By Mr. O'Brien:

Q. Turn to page 38, Doctor, the Varga girl again. A. I
4326 think it would arouse, as I say, an undercurrent of sexual tension. Again, there are the breasts—

Q. Is an undercurrent of sexual tension accompanied by an undercurrent of libidinous ideas?

Mr. Bromley: I object again to the form of the question on the ground that it is leading.

Mr. O'Brien: If you can lead him you can have him.

The Witness: The average person does not realize 4327
that looking at this picture and getting the effect is undergoing several stages of development. First, you see the picture, the physical side, the breasts, the buttocks, the shapely leg. That stimulates the idea and through his experience Nature will let him picture situations in his mind. He may put himself in a situation where he would be alone with this kind of a girl. It creates sexual tension.

Now, what he is going to do about it, I don't know.

Q. It could possibly lead to an overt sexual act, could 4328
it, Doctor? A. It might.

Q. Doctor, turning to page 92 of the May issue of Esquire, showing the picture "Broadway for the Boys", or a picture from that show, together with the text under the caption: "The juke scene from The Eve of St. Mark", and I call your attention to the text: "These soldiers have just come from a discussion of a hygiene lecture in which it was estimated that in the Army 20 per cent don't, 20 per cent do, and 60 per cent might."

What meaning does that text have with respect to sex matters, if any, Doctor? A. I suppose you can say 20 per cent eat a certain cereal and 20 per cent don't.

Q. 20 per cent what? A. 20 per cent eat a certain cereal 4329
and 20 per cent don't, and 60 per cent might perhaps, but the obvious interpretation would be that 20 per cent would be led to some sort of sexual activity, 20 per cent would not and 60 per cent might.

Q. Did you say would have sexual activity? A. Might be led to sexual activity.

Q. What about the picture on page 92, on the left? A. It consists of two couples. The one on the left may belong

4330 to the 20 per cent that might—that do, rather, and the one on the right is apparently unconcerned.

Q. Are you testifying, Doctor, that the couple on the left, the girl sitting on the man's lap— A. Yes.

Q. Are indulging in some sort of sex play of some kind? Is that your impression? A. In a very cryptic way, I don't think you can put your finger on it.

Q. What about the girls' legs, Doctor, are they cryptic, too? A. They are displayed. The thing is so vague, you know, you can't put your finger on it. I have a feeling that the second man really would like to have the first girl on
4331 the lap and that the girl on the right is interested in the second man but he, unfortunately, is interested in the first girl. That is the impression of the picture.

Mr. Bromley: How do you work that out?

The Witness: You see, my mind works different from yours.

Mr. Bromley: I can see that.

By Mr. O'Brien:

Q. Well, Doctor, let's come to the summer issue of June, 1943, and turn to page 34, the Varga girl. You will notice,
4332 Doctor, the left-hand corner of this page where it is unfolded, a poem captioned "Something for the Boys".

Does this portrayal of this girl in this position, as clad here, in connection with the caption or without it, have any sexual stimulation? A. I have never seen much ballet, but I have never seen a ballerina in this particular position.

Q. What do you think of this particular position? A. The position is sexually significant to me. Again, you have the breast, the back, the navel, the slit, the legs all over again.

Q. Now, Doctor, the curve of this garment runs from the heel here over the thigh, does it not, down upon the mons? 4333
A. Down upon what?

Q. The mons veneris. A. No. The slit would lead to that.

Q. Are you looking at the same picture I am, Doctor? I am talking about the slit here. I am going to ask a question about this anatomy here. Does it completely cover that mons veneris region or the erogenous zone, as you call it? A. I would say from the picture it doesn't, although the implication is it—there is a little space here, but mons veneris is usually covered with hair if you will get a text-book on anatomy. I wouldn't look for anatomical accuracy in seeing 4334
the Varga pictures.

Q. I don't believe you have answered my question yet, Doctor, whether or not you consider this picture stimulating sexually to the mind of the average reader? A. I think it would be. I think the position that the woman takes and the display of the various curves, is of a type that would arouse an undercurrent of sexual tension.

Q. What have you to say, Doctor, about the fact that she is covered over here with a dark, well-fitted garment? A. But you see the outline just the same. The outlines are visible.

Q. Do you think the appearance of the garment on this 4335
body lessens the sexually stimulating effect of the picture?
A. No, it might even heighten it.

Q. Turn to the July issue, Doctor, 1943, page 76. Is there anything sexually stimulating about that picture? A. I wouldn't say about the other woman. I see the woman in the front apparently is Spanish and supposed to be a dancer. I would say that it would arouse an undercurrent of sexual tension which may be very fleeting or it may be more permanent.

4336 Q. Would that undercurrent of sexual tension—does that mean it might arouse a desire for some sex experience? A. It might. I don't know how far it will go. It may stop right there and then or it might go on further.

Q. Now, page 146, Doctor, referring to the man-sized Esky card ad, the girl lying on her face and the Varga girl playing cards, the two pictures just below the one I mentioned.

Is there any sex connotation or stimulus to be found in these pictures, Doctor? A. I don't find anything particularly in the upper one.

Q. In which one? A. In the upper one here (indicating) 4337 There isn't very much here. I think this is vulgar.

Q. The second one? A. Yes.

Q. The one showing the girl lying on her face? A. Yes, the one of the girl lying on her face with some sort of flower or something attached to her nates.

Q. That is a glass hat covering her. A. It is?

Q. Covering her mid-section. A. See how things can be misunderstood.

Mr. Bromley: She has got it in the wrong place, Doctor.

The Witness: That is right.

4338 *By Mr. O'Brien*:

Q. Now, what about that picture, Doctor? A. I think it is vulgar.

Q. Do you think it has any sex stimulus, Doctor? A. Nothing particularly. I think there is more—too much vulgarity but the two lower pictures here, I would say—

Q. The fact that the figure is nude does not have any sex implications? A. You mean the two lower ones?

Q. No, the middle one. A. I would say the vulgarity of it negatives the sexual aspect of it. 4339

Q. What are you going to say about the two other pictures, Doctor? A. The two other pictures are definitely suggestive.

Q. You say they are suggestive? A. Yes.

Q. In regard to what? A. They are sexually suggestive.

Q. Sexually suggestive? A. You see, again, you have here the breasts, the buttocks, the thighs, and the region of the navel.

Q. Referring now to the Varga playing card picture? A. Yes, the two.

Q. The two last pictures on the bottom of page 146? A. 4340
Yes.

Q. Doctor, I hand you the August issue, page 38, the Varga girl. A. I would say that it is—

Q. Is there anything stimulating to the libido in this picture? A. Oh, we are talking about libido. You are borrowing a term that is used by psychoanalysists in the particular sense. I wouldn't use the term libido in the proper sense. This is our private property.

It does arouse a definite undercurrent of sexual tension which stimulates the imagination, producing pictures which vary with the type of individual, his background, his position in life, his age, a number of things. The same picture will 4341
produce, will have one picture on a young boy, will have a different picture on a young married man, and will have a different effect again on a married man who has established himself in life.

Q. Well, about the average male, the average normal male? Would it have any sex stimulation for him? A. I find it difficult to talk about an average age. I would like to differ-

entiate by types, by position, by age, by attitudes. If you
4342 want to lump all of these together, I would say it has a definite sexual appeal, but the appeal will vary with the type of individual, with his position in society, his personal background, the type of bringing up that he has.

Q. The state of his health? A. I would say even that.

Q. For example, in the case of an average normal male individual who had passed the age of puberty, having a normal biological drive, what would you say the effect would be on him, assuming no outlet? A. Well, if you take a young adolescent, I don't think he will bother with that. He gets so many girls and doesn't have to—

4343 Q. You don't listen to my questions, Doctor.

Mr. Bromley: Wait a minute. Let us have the answer here; don't interrupt him in the middle of it.

Mr. O'Brien: I would like to have my questions answered.

Mr. Bromley: I object to interruptions of this sort.

Mr. O'Brien: I had assumed that he was beyond adolescence.

The Witness: Yes.

Mr. O'Brien: I want to have my question answered.

4344 The Witness: Well, that will depend, if he is a single man it will have one effect; if he is a married man it will have another effect. Some men like to run around a lot before they are married and then after they are married they will settle down. The very same man before marriage will look at this picture and it might appeal to him and the very same man ten years later having a family and children will look at it and say it is disgusting.

A middle-aged man who has probably been disappointed in many things in life, this will probably appeal to him. 4345

On the other hand, the man 45 years of age who has a daughter 15 years of age who is beginning to be aware of her sexual problems and sexual attitudes, he will say "My goodness, are they putting in these journals these things? That is going to corrupt my little girl".

It all depends on the situation in life and different things. I admit to some men, to a number of men, it will be definitely stimulating. 4346

By Mr. O'Brien:

Q. What about the type of men I asked you in the first place? The young healthy male without a sexual outlet? For instance, the soldier, the highly repressed man in barracks or camp who has to assume a life of continence? A. It will have a double effect to different types of people. There are some soldiers who will look at this picture and they get nothing sexually stimulating; another will work it out at night in the form of emissions, and that will produce the outlet for the lack of women and different things.

On the other hand, there is another type of soldier who would not be satisfied with that, he would not be satisfied with nocturnal emissions, and it might stimulate him to the point where he might become aggressive and even leave camp A. W. O. L. in order to seek sexual satisfaction. 4347

I don't think you can classify all soldiers in one group.

Q. Turn to page 73, Doctor, the picture entitled "Mood for Red Hair". A. Is that the one (indicating)?

Q. No, sir; page 73. A. Yes. I don't know what to make

of that picture. I looked at it before. I saw it cited. I did
4348 not feel that it would arouse particular sexual tension. It might in some people, I don't know, I don't see it; nothing particularly here unless you look for it with a magnifying glass.

Q. Page 89, Doctor. A. There is something. Is that the one (indicating)?

Q. No, page 89, this picture of a woman seated on a man's neck.

Mr. Hassell: The "paste-your-face-here".

The Witness: Yes.

4349

By Mr. O'Brien:

Q. Does this picture on page 89, Doctor— A. Yes, I would say it is suggestive.

Q. Suggestive of what? A. It is sexually suggestive.

Q. Sexually suggestive? A. Yes. In my particular work there is some very small—a very small number of men who are addicted to a particular type of perversions, and to them —and I say again it is a very small number, the presence of a male head in the pubic region of a woman would be particularly sexually suggestive, but it wouldn't apply to the
4350 majority of men.

Q. Is there any other type of individual that you think it would be sexually suggestive to? A. No.

Q. The general individual? A. Yes, a picture like that would appeal to what we call the baser emotions. Certainly, there is nothing very ennobling in that.

Q. Page 127, is there anything sexually stimulating about this picture on page 127 entitled "Hew to the line, Bertha, let the skirts fall where they may"? A. I would say it was suggestive anyway.

Q. Suggestive sexually do you mean? A. Yes.

Q. Why? A. The raising of the leg. I don't know how it could have any other connotation. 4351

Q. Page 105, Doctor. The same issue, at the bottom of the right-hand corner. A. Yes.

Q. The picture of a sailor approaching land and another sailor is clasping the tree and the caption is: "Thank God, help at last", and the background has a number of— A. Savage women.

Q. Would this picture have any sexual connotation? A. I think it has a sexual connotation. I venture to say that probably a large number of people would probably not get it at all, they wouldn't understand that these are savage women, but for those that made an effort to understand, I think that it has a sexual connotation. 4352

Q. What does the caption: "Thank God, help at last" mean, Doctor? A. Well, it suggests—I don't know whether they can prove it—it suggests as if the poor man had had a sort of life of being a sexual servant to all the savage women with unlimited capacity for passion and the poor man is exhausted and he sees another sailor coming along and he says: "Thank God, help at last".

Q. Now, Doctor, page 144, third column. A. The top of the third column?

Q. The bottom of the third column. A. Yes. 4353

Q. "Once he had slapped a prostitute in Bordeaux who had persisted in keeping his cap, but that didn't count. He was amazed to find himself slapping his second woman.

"Dorothy began to cry loudly and headed out of the room. Dizzy and with the taste of blood in his mouth, he noticed how large the uniform made her behind look".

Have you anything to say about the use of the word "behind" in this passage, Doctor? A. Well, that simply is an-

4354 other word for the nates or the buttocks, but the thing that attracted me is that this scene suggests sadism, or the sexual satisfaction that the man gets not from so-called normal relations but from inflicting pain on his partner, and this is really true to life in one sense because there are many men who go through life without realizing that they are sadists until one day they come in contact with a situation where they have to slap a woman and that seems to start a subterranean stimuli, and from there on they become sadists.

It says here: "Once he had slapped a prostitute in Bordeaux who had persisted in keeping his cap, but that didn't 4355 count. He was amazed to find himself slapping his second woman."

Once he happened to slap one woman he will slap two, three, and four women because that arouses his sadistic tendencies.

Q. Now, let us get this straight. Does sadism have any relation to sex? A. Oh, yes. There are two things about it. Unfortunately, there is so much about psychoanalysis that has become popularized that the term sadism is used popularly to denote brutality. As a matter of fact, sadists as a group are not brutal and brutal men are not sadists.

In a very restricted and narrow sense we use the word 4356 sadism to connote the type of man who is unable to get sexual satisfaction in a normal way, but is obliged to resort to violence with a partner who in turn cannot get sexual satisfaction unless violence is inflicted on him or her.

Q. Now, Doctor, leave sadism aside for the moment. What do you think of this passage here where after slapping the woman, he noticed "how large the uniform made her behind look". What connotation does that have? A. I don't find that sentence.

Q. The bottom sentence in the third column. A. Yes. Well, it simply connotes—it brings the attention to her buttocks. "Behind" is simply another term for buttocks, as I understand it. 4357

Q. Does that have any sexual interest or indicate any sexual interest to you, Doctor? A. In the sense that buttocks are sometimes what are called an erogenous zone, sexually stimulating zone, it does.

Q. The September issue is the one I hand you, Doctor, and I call your attention to page 38, the Varga girl again. Does this picture have any sexual stimulus? A. Yes, I think it does. It is again the same thing. You have here an accentuation of the breasts, accentuation of the region in the navel, accentuation of the buttocks, the slit, the leg, the whole pose. 4358

I would say it would arouse an undercurrent of sexual tension.

Q. Doctor, I call your attention also in this picture to the expression on the model's face and the diary in her hand and the verse entitled "Military Secret." It reads:

"Now, no one can peek
At this Book of the Weak—
In wartime I have to be cagey,
That boy in the Army
Would certainly bar me 4359
If he knew I date a J. G.,
That boy in the Navy
Whose hair is so wavy,

Would tear it right out at the roots
If he found that I
And a Leatherneck guy
Were now in romantic cahoots!"

What do you gather from the entire ensemble, Doctor, as
4360 to any sexual indecency? A. It means she is probably not true to her promise to the lieutenant (junior grade) and probably willing to drop him for the sake of a private in the Marines.

Q. Does it indicate anything else, Doctor, with respect to her promiscuity or otherwise? A. Not particularly. That depends a lot upon the imagination of the individual who looks at it. Some people have a very vivid imagination and some are awfully dull.

Q. Would you say this picture here has a greater or less sexual stimulus than the Varga girls you have looked at?
4361 A. They vary among themselves. I would give her 100 per cent.

Q. Page 65, Doctor, that is the cartoon showing the lady from "Dale's Milk" with the caption, "Come back later, sweet—my wife hasn't left for the factory yet."

What, if any, connotations do you obtain from this picture, Doctor? A. Well, I suppose they have a sort of clandestine affair which is kept away from the man's wife, and he tells her to go away for a while and come back later when the wife is gone, the implication being that when the wife has gone to work in the factory that they can—well, the sky is the limit.

4362 Q. They can commit adultery if they like. Is that it? A. Is that what you call it legally—they will do something anyway.

Q. Does this situation portrayed here, together with the idea implied by the caption, imply in your opinion any sexual stimulus? A. You mean this picture as it is?

Q. Yes. A. Oh, yes. It suggests they are going to indulge in something and, of course, it stimulates the imagination of the reader. That is, he might say to himself, "I wish I were in his boots."

Q. Or apron? A. Or he may say, "I wouldn't want to take one like that. I have something better than that." 4363

At any rate, it will set him thinking.

Q. Sexually? A. Oh, yes. It is also interesting that in popular language the milkman has become proverbial as the man who is likely to seduce the housewife. Here, on account of the war situation, women are taking the place of men in many respects, and here is a milkwoman who is performing the same function that the milkman performed before the war.

Q. Turn to page 102, Doctor. It shows a man emerging from a group of trees and a girl lying on the beach in shorts, with the caption, "Ain't it a damn shame? Plenty of water on this island, plenty of food, and now I get hallucinations!" 4364

Is there any sexual connotations or sexual idea stimulated by this picture? A. The only sexual connotation I see is that the man is virtually naked and the girl is almost so. What other implications there are, I don't see.

Q. Does the position of the girl and her attire and anatomy have any relation to the situation? A. She is lying in a very—I would say—sexually receptive position.

Q. Will you state, Doctor, whether or not this picture, in your opinion, would arouse any thoughts of sex in the minds of the average readers, males? A. It will bring to one's mind the picture of the sexual situation where everything is ready for the consummation of the act, but whether the act would be consummated or not, the picture doesn't imply. 4365

Q. Would your mind necessarily stop at that point or would it go on to an imaginary consummation? A. I don't know. You have two people here on an island, not a soul around there, it is a nice, bright day—almost anything can happen.

Q. Doctor, I hand you the October 1943 issue of Esquire.

4366 Turn to page 37, please, the cartoon in the lower right-hand corner. Do you notice the picture of the girl looking at the tattooed figure on the man's shoulder muscle?. A. Yes. I looked at that picture before. I think one has to strain his imagination really to get a sexual stimulation out of that. It is hard to portray in a picture shimmying, especially shimmying of a tattoo mark. I can't see much in it.

Q. What would you say was the purpose of the man making the figure shake for the girl? A. Well, he thought this might stimulate an otherwise resistant female.

Q. Resistant to what? A. I mean if she is resistant to
4367 his advances, this may produce an additional stimulation.

Q. And so eliminate the resistance. Is that your idea? A. I suppose so. But the poor man, if he can't get anything better than that—

Q. Page 43, "Torches at Midnight," the Varga girl. Does this picture have any sexual stimulus, in your opinion, Doctor? A. I don't know what else it has. Again, you have the breasts prominently displayed, the torso, the navel, the slit, the buttocks, the leg, the same thing all over again.

Mr. O'Brien: May I go off the record a moment?
Chairman Myers: Yes.

4368 (Discussion off the record.)

The Witness: I say that as a rule, not on this particular occasion; I qualified my statement by saying that it might stimulate one type of person but may not stimulate another type. It may stimulate the same person differently at different ages of his life.

By Mr. O'Brien:

4369

Q. And might not stimulate a homosexual at all? A. That is right.

Q. But for those who have a sexual ability would you say it is stimulating? A. Yes, definitely.

Q. Now, does the answer which you have given take into consideration the fact that this girl has some kind of garment displayed or indicated on her body? A. She hasn't got very much.

Q. Does it take into consideration the fact that she is lying on her back with her feet up in the air, partly? A. Part of the way. The slim covering that she has is more likely to 4370
arouse or create sexual stimulation than if you show her completely naked, because, as I said before on another occasion, the human mind somehow is attracted when he has to do a little bit of reflecting, when he has to think and visualize and imagine things. As he looks at the thin covering he pictures what is behind it.

Q. What importance has the pose, if any, in this picture? A. I suppose it has some. It didn't particularly attract my attention. I think the picture as a whole, not individual parts but taken as a whole, is definitely likely to arouse an undercurrent of sexual tension.

Q. Doctor, I call your attention to page 93 of the October 4371
issue of Esquire. In the first column there is a cartoon showing three men at a table and just below that is a joke or anecdote which reads:

"A Pullman porter who had started out on an all-night run had his trip canceled. Returning home unexpectedly, he took a look around the house, then took out his razor and stropped it vigorously.

" 'What you doin', Sam?" asked his wife.

"'If dem shoes stickin' out from under the bed ain't got
4372 no feet in 'em, Ah is gonna shave.'"

What, if any, sexual connotation does that have, Doctor? A. It implies that he probably thinks there is a man hiding himself under the bed and that his wife is unfaithful to him and that he is prepared to take his revenge.

Q. Would this joke be suggestive or not suggestive of illicit sex relations? A. It suggests infidelity on the part of the woman, and jealousy and revenge on the part of the man, and it suggests some sex, but I question very much whether the reader of this joke would go so far as to try to visualize the woman and the man under the bed in any form
4373 of sexual activity.

Q. Now, Doctor, turn to page 93, the last column, and the second joke reads:

"'What does f-e-e-t spell, Johnny?' asked the teacher. Johnny didn't know.

"'What,' persisted the teacher, 'is it that a cow has four of and I have only two?'

"Johnny's answer was as surprising as it was unexpected." A. Well, probably Johnny didn't catch the idea of the—

Q. Of what? A. Of the feet, and probably thought of the breasts. If Johnny was a little older he probably would have thought of something else.

4374 Q. Does this joke have any sex connotation? A. It doesn't strike me. Johnny is too young to know those things.

Q. What do you suppose was Johnny's answer? A. I don't know. I could tell you what I would have said in Johnny's place.

Q. Well, tell us what you would have said in Johnny's place, please? A. I probably, in my innocence, would have thought of the breasts. I would not have thought of anything else.

Q. I hand you the November 1943 issue of Esquire, Doctor, and call your attention to page 46. "Virtue Triumphs!" is the name of the verse and it is accompanied by an illustration of the girl by Varga. The verse reads: 4375

"The look of alarm
On this bundle of charm
May set up some foolish illusions.

Her state of attire
May also inspire
Some rather ignoble conclusions.

Perhaps you've surmised 4376
That the gal's been surprised
By a villainous sort of a louse—

But, brother, you're wrong,
You're been wrong right along—
It wasn't a wolf . . . but a mouse!"

What is your statement, Doctor, as to this picture and verse with respect to any sexual obscenity. A. I would say that the picture is much more suggestive by itself than with the verse. The verse almost spoils it.

Q. Doctor, would you kindly explain what is spoiled? 4377
A. As I understand the purpose or what you call the function of presenting the Varga girl, is to make some sort of a sexual appeal, and she has got all there is to be had. She is dressed very thinly, attired very thinly, the various parts of the body are rather prominent, but I don't get much out of the verse here, it doesn't suggest much to me.

Q. Now, Doctor, if I interpret this poem to mean, as I read down to the last line, that this girl's face expresses alarm, shall we say, because she has been spied on by a

4378 wolf, that is to say, a human wolf, a man having some desire for further relations with her, would that interpretation of the poem in conjunction with this picture have any sexual stimulating effect? A. Well, I might say that for once the Varga girl has a certain amount of modesty on her and doesn't want anybody to look at her. That is the first instance I have encountered.

Q. I wasn't thinking about that, Doctor, but the Peeping Tom implication of the poem. Does that have any relation to voyeurism? A. There is no voyeurism. The whole thing is very much implied. It might be implicit
4379 that she is afraid that she has been spied on by somebody and she wouldn't feel very comfortable about it, but I don't see that you can draw a direct conclusion that one could be sexually stimulated by that particular verse.

Mr. Hassell: Mr. Chairman, while there is a pause here, Dr. Karpman's secretary wants him to call a number before 5:00 o'clock and the secretary also wants him to call his wife.

Would you mind adjourning a little before 5:00?

Chairman Myers: All right, we will adjourn until 9:30 tomorrow.

The Witness: Thank you very much.

4380

(Whereupon, at 4:50 o'clock p. m., the hearing was adjourned until Wednesday, November 3, 1943, at 9:30 o'clock a. m.)

HEARING OF NOVEMBER 3, 1943.

4381

PROCEEDINGS RESUMED.

Chairman Myers: All right, Mr. O'Brien. Proceed.

BENJAMIN KARPMAN, a witness called by and on behalf of the Post Office Department, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination by Mr. O'Brien (Continued):

4382

Q. Referring this morning to the same copy of Esquire, Doctor, that you had yesterday when we recessed with the November, 1943, issue, the next item—

Mr. Cargill: May we ask that you speak loud enough for us to hear?

Mr. O'Brien: Am I speaking loudly enough?

Mr. Cargill: No. That is the reason for the difficulty in hearing, Mr. O'Brien.

Mr. O'Brien: All right, sir; I will speak louder.

By Mr. O'Brien:

4383

Q. Doctor, referring to the November issue, page 60, photographic illustration on page 60 and the descriptive matter in the boxed section in the lower left-hand corner, page 61, the Esquire canteen girls from the "Folies Bergere." What is your opinion, Doctor, as to whether or not this picture is sexually stimulating to the average person? A. I think it definitely is. The effect of it is that the geometric proportion of the women is increased by the arithmetic proportion

4384 of the clothes. It is very alluring, very suggestive, definitely stimulating sexually.

Q. Would you say, Doctor, that the amount of clothing exhibited on these girls has anything to do with your answer? A. Yes, it is. There isn't very much clothing to begin with and what little there is is put up in such a way as to suggest what is behind the clothing. For instance, the breasts, the buttocks, the thigh.

Q. Turn to page 66, Doctor, the cartoon with the caption "It's no use, Sarg, we are outnumbered. Yippppeeee!"

Will you state, Doctor, whether or not, in your opinion, this stimulates any sexual ideas? A. Well, the picture definitely suggests a perfect willingness on the part of the soldiers to be captured, to be enslaved and pressed into service by the presumably attractive young women. You can see the expression of glee on their faces, with the idea being forced into slavery under such circumstances.

Q. Well, has this picture, in your judgment and opinion, any sexual connotation? A. I think it does.

Q. What? A. Well, they like to be put in the service of these women and be forced into, as it were, against their will, into some sort of sexual activity. I don't think much against their will.

4386 Q. Page 77, Doctor—no, turn back to page 73, this picture of a woman on page 73, with the title on page 72 "Golden Mould", "Julie London, one of the nebulae of Hollywood."

Will you state whether or not in your opinion that picture is sexually stimulating? A. I don't see much in there—it may be a bit suggestive with her leg sticking out. Fortunately, every woman has a leg. I don't see much there.

Q. All right. Turn to page 77. That is the page bearing the caption: "First Nights and Passing Judgments". The

first column is a reference in the second paragraph to "An old-time St. Louis sporting house." A. Oh, yes.

Q. Are you familiar with that term, Doctor? In the first column, Doctor. A. The first column?

Q. That is right, the left-hand column, beginning with the word "By" and going down to the second paragraph. Half way in that paragraph is the expression. A. The term sporting house, of course, is another name for brothel or bawdy house, and I wouldn't doubt it brings to the reader's mind a picture of the type of house it is, what is likely to go on there, the type of women you consort with there, the purpose for which one comes there.

Q. Now, at the top of the third column, item No. 10, "young floozie characters wearing short skirts that tightly embrace their hinterparts and who interpret their roles by crossing their legs three inches above the knees and dangling red hand-bags big enough to hold the books of the Corn Exchange Bank." A. I think the description is rather suggestive and, of course, the individual reading that will try to picture in his mind the hinterparts, women crossing their legs three inches above their knees, and dangling their hand-bags, and so on. It brings up, I would say, a lascivious picture to the mind.

Q. At the top of the right-hand column on the same page, Doctor— A. 21?

Q. 21 is the number. Will you read that, please?

"Den don't gimme any a dat crap! What da hell did you tink I wus gonna do? Hang around dis dump waitin fer Santa Claus tuh take care a me, fer Chris sake. Looka you! What a yuh got? Six years yuh went tuh college and what da hell a yuh got? A lousy handout a thoity bucks a week! Not fer me! Yeah, I got mine, but I took it." A. I don't see much in there. Of course, the word "crap" can be

4390 interpreted in two ways. I think what the man really meant here was in the sense of baloney, nonsense. Don't hand me that stuff. Don't hand me that nonsense, don't hand me that baloney. I don't see anything there.

Q. You have read all of these articles, Doctor, have you? A. Yes.

Q. Have you any general statement, Doctor— A. Just as much as I could stand.

Q. What? A. Just as much as I could stand.

Mr. O'Brien: Strike the question.

4391 *By Mr. O'Brien:*

Q. Turn to page 89, please. That is a picture which bears a caption on page 88, lower right-hand corner of that page: "Stagedoor Esquire. Backstage at the Greatest Show on Earth". This is a picture showing what appears to be the interior of a tent or in a circus. A. I would say that—

Q. Showing two or three girls or at least two girls and a man. What is your opinion as to this picture, Doctor, with regard to it being sexually stimulating? A. I would say that there is—that they are very alluringly dressed.

4392 temptingly dressed.

Q. In what sense, Doctor? A. In the sexual sense.

Q. The sexual sense? A. Sexually stimulating, no doubt about it. You see the outline of the breasts, the buttocks, the thigh, the slit, the legs. Much more in the one on the right side than on the left, although the one on the left isn't missing much either.

Q. Isn't what, Doctor? A. Isn't missing much either.

Q. Will you state whether or not, in your opinion, this

picture would stimulate thoughts of erotic or sexual desire or of a sexual nature? A. I think so. I think that is essentially the purpose of it. 4393

Q. Page 94, Doctor, left-hand column of page 94, at the bottom of the column, is an anecdote. A. Yes, I read it.

Q. You have read that anecdote? A. Yes.

Q. Relating to the corporal going home on furlough and finding two blondes in his Pullman berth? A. Yes.

Q. Would you say whether or not, in your opinion, this anecdote arouses any sexual stimulus or erotic ideas? A. Of course, it creates in the mind of the reader, first of all, the idea of almost an impossible situation. Here is a man confronted with two women and the man can do less with two women than he can do with one, so he asks the other one to go out. Of course, if this were intended seriously, he would ask both of them to go out, but the fact that he asked one of them to be left there suggests that he is not entirely averse—that the man entirely is not averse to remaining with her in the berth, in the Pullman berth. 4394

Q. For sexual purposes? A. You can't have a cup of tea or a cup of coffee in a Pullman berth. I don't know what else it would be.

Q. The purpose, then, I judge from your answer, and I am not clear on the answer, Doctor, is that of having sexual relations with the remaining blonde; is that correct? A. I wouldn't say—I wouldn't say that is definitely sex relations. Some sort of sexual activity. It might be sex relations, then again it might not, but it is suggestive anyway. 4395

Q. Number 24, that is on page 95. A. Yes.

Q. In the second column on the left right under the picture there. A. Yes, I see it.

Q. The story "Home on furlough the soldier was surveying his sweetie"— A. Yes, I read it.

4396 Q. (Continuing): —"whom he hadn't seen in months.

"'Slimmer, aren't you', he asked.

"'Yes', she replied. 'I've lost so much weight that you can count my ribs.'

"'Where', asked the G. I., with a gleam in his eye, 'do I start?'" A. Well, you see, it is sexually suggestive because no matter where he starts from he is bound to come across a sexual part. If he starts from below he will come to the navel and then to the body and then to the breast. If he starts up he comes to the breast and then to the navel and then to her pubic region, so he is safe anyway.

4397 Q. At the bottom of the third column, Doctor, there is a story about "The beautiful Army hostess, newly arrived in camp, thought she would take a nude dip in the clear blue lake while the men were out on drill." A. Yes.

Q. "And no one was nearby. It so happens that a rookie K. P. was sent down to the lake for a bucket of water, and seeing her pink clothes on the bank, sat down to watch. The beautiful Army hostess remained submerged up to her neck until she could no longer stand the chilling water, whereupon she scampered up the bank and found an old dishpan half buried in the mud. Hurriedly digging the pan out she held it in front of her like a shield and came ashore.

4398 "'You wouldn't have such a smirk on your face if you knew what I'm thinking', she said.

"Oh, I know what you're thinking all right', said the K. P. 'You're thinking that pan's got a bottom in it.'"

Now, Doctor, what is your opinion with respect to this one as to its being sexually stimulating? A. Well, of course, the idea is that if the pan hasn't got a bottom in it, then her whole purpose, if so, of trying to protect her genital parts by the use of the pan, is defeated, therefore, he can see the whole region, and this is sexually stimulating.

Q. Now, that idea is sexually stimulating to the reader, Doctor? A. Yes, I would say so. What else could it be? 4399

Q. Now, in the third column from the left, right after the one I have read is the following: "Have a good time at the party, daughter dear, and be a good girl.

"Make up your mind, Mother".

Ha, that any sexual connotation, Doctor? A. I don't know that it has direct sexual connotation. It merely tells the opinion on the part of the girl, that you can't be a good girl and have a good time at the same time. That is to say, the type of a good time that she would have would virtually exclude being good. That is, being moral. To that extent it has a sexual connotation. 4400

Q. At the bottom of the same column is an anecdote reading: "Pardon me, miss", said the sentry, "but it's against regulations to swim in this lake." A. Yes, I read it.

Q. Just a minute, Doctor, I want to read it. A. Pardon me.

Q. (Continuing): "'Well, for Heaven's sake,' exclaimed the maiden, 'why didn't you tell me before I undressed?'

"'It ain't against regulations to undress, lady.'"

What is your opinion as to that, Doctor? A. Well, he took advantage of a technical point in order to do a little peeping. To see her exhibit herself. 4401

Q. Does that conjure up any sexual images in the mind of the reader, Doctor? A. Very mildly. I wouldn't say very strongly, but to some extent. I think the joke, part of it, the humor part of it, is probably greater than the obscene part because it is really clever.

Q. The last column, the right-hand column on page 95, has an illustration of a little cartoon, showing two girls in the water with another one disrobing, and several trees in the background with eye-holes in them, apparently camou-

4402 flaged men, and the caption reads: "You're sure there are no soldiers around here?"

What is your opinion as to that, Doctor, as to its being sexually stimulating? A. Of course, the picture shows that there are soldiers around, even in the trees, because you can see the eyes over there, and to that extent, of course, they are able to see the women in the nude and that, of course, would arouse lascivious thoughts in the mind.

Q. Now, below that picture, Doctor, is a story of:

"A beautiful young lady went for a swim in a secluded spot but forgot to take a towel. She had a swell swim, then
4403 came out on the bank and was allowing Nature's balmy breezes to dry her when she heard a rustling in some near-by bushes. 'Whose there?', she cried in alarm.

"'It's Willie,' answered a rather high-pitched voice.

"'How old are you, Willie?' asked the girl.

"The answer came quickly: '79, darn it.'"

What is your opinion as to this anecdote? A. I think it is suggestive.

Q. Of what? A. Of course, I don't believe a man of 79 can do any more than a boy of 11, but the fact that he says "Darn it," shows that there being such good opportunity, he would like to make more use of it but his age wouldn't
4404 permit him.

Q. Now, are you talking about some sexual reaction? A. I think so. I think the words "Darn it" suggest that he is not pleased because he is 79 and probably sexually incompetent to take advantage of the, to him, unusual situation.

Q. What do you think of a story picturing a woman standing around in the nude while the man hiding peers at her? What special connotation would that have? A. He's getting a certain amount of sex satisfaction just seeing a nude body.

Q. What about the reader? A. The reader will try to

realize it and his imagination would become a little bit more active. 4405

Q. In what way would his imagination become more active, in your opinion? A. It would create sexual thoughts in his mind, I would say, what I would like to call an undercurrent of sexual tension.

Q. Doctor, your attention has been called to some items in these pages 94 and 95. Assuming a reader were to read with interest all of the items to which I call your attention, would you state what, in your opinion, would be the cumulative effect, if any, from a sexual standpoint? A. If you pick out these particular items, I would say the cumulative effect of these particular items—that is, if the reader would read 4406 only these items and not the other items, it would be definitely sexually stimulating.

Q. Suppose he read all the items? A. Some of that might be lost because some of it is rather innocent.

Mr. O'Brien: Your witness.

Cross Examination by Mr. Bromley:

Q. Doctor, did you ever hear a joke told just for the purpose of getting a laugh and not for the purpose of suggesting some course of conduct? A. There are some. 4407

Q. There are some? A. I suppose so.

Q. But you think most jokes are written and told just to suggest a course of conduct and not to get a laugh? A. Not necessarily.

Q. What would it be? A. It might be both.

Q. Isn't it a fact, Doctor, that most jokes are told to get a laugh and not to suggest a course of conduct? A. I never made a statistical study of it.

4408 Q. Some of your confreres have written on the subject, haven't they? A. Some.

Q. Do you know what their opinion is? A. Probably the same as mine.

Q. Let's look and see. Did you ever hear of Ives Hendrick? A. I have.

Q. He wrote a book on "Facts and Theories of Psychoanalysis." A. Yes.

Q. Published by Knopf. A. Knopf.

Q. Would you say Dr. Ives Hendrick was a respectable authority? A. It all depends on the particular subject,
4409 on what particular statement he makes. I wouldn't blindly subscribe to everything he says.

Q. Is this a book of recognized authority in your field? A. It is a book, another book.

Q. Just another book? A. There are lots of them on the market.

Q. Does it rank with yours or below? A. I don't think that is a fair question.

Q. Can't you tell the Board if it is a recognized authority or not? A. It is a good book.

Q. In that book the author says:

"Many references may be acceptable in jokes which pro-
4410 duce an emotional release by laughter, though the same thought couched in dignified language would bring exclusion from polite society."

Mr. O'Brien: Don't answer that, Doctor, until I have voiced an objection.

I object on the ground that this is trying to introduce expert testimony under the guise of cross examination. The Doctor didn't cite this book or any other book as authority for his position. It is

a well-known fact that he cannot be examined on a scientific book unless he has relied on it for his opinion. He can only tell what this man in the book might say by bringing him in. 4411

Chairman Myers: The objection is overruled.

By Mr. Bromley:

Q. Do you remember the question? A. Do you want me to state whether I consider this book as an authority?

Q. No, you have already stated that. I want to know if you agree with this sentence which I have just read you. A. Some of it. 4412

Q. Do you agree that many references may be acceptable in jokes which produce an emotional release by laughter? A. That is right.

Q. Though the same thought couched in dignified language would bring exclusion from polite society? A. Yes.

Q. You agree with that? A. Yes.

Q. In fact, you have several times hinted that yourself? A. I have not done much hinting.

Q. You have stated several times that references which might otherwise be considered vulgar are made acceptable when they are told in connection with the humorous joke. Is that right? A. I said that some jokes depend largely on humor and less on vulgarity, and some jokes will emphasize the vulgarity point and the humorous part is secondary. 4413

Q. When you read the joke about the girl who came out of the swimming pool holding the dishpan in front of her and read what the soldier said about "I know what you're thinking, you're thinking the pan has a bottom," did you have immediately a picture of a woman standing in front of you with her genitals exposed? A. I did.

4414 Q. Do you think that would be the ordinary effect upon an ordinary human being of that joke? A. I would say so, because I think I am a normal man.

Q. You don't think you have been affected by your long association with abnormal people? A. No, we allow for these things.

Q. What is the correct name of the institution with which you are connected? A. St. Elizabeth's Hospital.

Q. Is this St. Elizabeth's Hospital for the insane, Doctor? A. That is right. No, it is not. It used to be Government Hospital for the Insane, and by an Act of Congress it was
4415 changed to St. Elizabeth's Hospital.

Q. The people there are insane people, aren't they? A. Insane is a social term. It is not a psychiatric term.

Q. The people there are insane, aren't they? A. Do you call psychoneurotics insane?

Q. I do. Don't you? A. Lots of psychoneurotics are in the world and doing good work.

Q. Are people there for treatment of abnormalities? A. Most of them are there for what we call psychosis.

Q. And about 7,000 of them? A. Over that.

Q. Isn't it fair to say that your experience has been primarily with what Mr. Hassell referred to as warped
4416 mentalities? A. My experience has been not only there. First, you must remember the treatment is largely confined not to the psychosis, but neurosis.

Psychoses as a group are not accessible to treatment, but neuroses, what we commonly call nervous break-downs, are accessible to treatment, and their problem is largely not mental but psychic. There is a difference.

One has hallucinations and delusions. When these hallucinations and delusions extend so deeply as to determine his conduct in a way that he becomes socially impossible

to deal with, and can only be confined in a hospital, these people are not easily accessible to treatment. They are warped mentalities. But the group that we call nervous break-downs, the problem is not mental at all. Mentally they are clear and alert, the judgment is good, but they are victims of emotional turmoils and it is the purpose to provide rest and relaxation and treatment to restore emotional balance. 4417

These are the people from whom I get most of my experience.

Then, for instance, I had an office down town, a private practice, and there I have come in contact with a large number—I would say, 90 per cent of the patients are neurotics with nervous break-downs. 4418

Furthermore, as a matter of policy with them, ever since I began to do this work, I have tried to balance up the judgments and experience and expression of opinion of the various patients I have, so I walk and talk to the brothers, sisters, mothers, fathers, uncles, aunts, as many people as I can possibly get hold of in order to get the reactions in correct relief.

Therefore, my contact has not been entirely with abnormal people. I have examined an immense number of perfectly normal people.

Q. You are the only psychotherapist at St. Elizabeth's? A. Virtually. There is another man, but he is doing more of administrative work and very little actual practice. Technically he is, but I am doing practically all the work there is, practically everything. 4419

Q. You were born in Shlutz, Russia, weren't you, Doctor? A. Shlutz, the same city that Maurice Hindus was born in.

Q. You took some of your postgraduate work at the University of Vienna? A. That is right.

Q. 1926 and 1927? A. That is right.

4420 Q. That is where you knew Freud? A. That is right.

Q. You studied in the so-called Freudian group in the University of Vienna? A. No. I was under Steckel, but in the desire to gain an all-around knowledge I did work with other people as well.

Q. Steckel was a Freudian, wasn't he? A. He was originally a Freudian and then seceded or dissented. He was considered in Vienna really the foremost Freudian although I personally do not subscribe to all of Freud. I consider myself an eclectic; that is, I studied with Alfred Adler, the late Alfred Adler, there.

4421 Q. Now, Freud's position has always been that sex should always be brought out in the open and frankly and freely discussed? A. That is not true.

Q. No? A. No. That is the layman's conception of it and that is the price that every scientist has to pay when science becomes popularized. Freud didn't put the emphasis on sex. He said that anything that is within a person and has no expression always causes havoc. You can't forget a thing or put away a thing by always pushing it down, and somehow or other it is going to express itself, and the only way to relieve the accumulated tension and the symptoms is to give full play and full expression to the

4422 emotions. That is what we call emotional catharsis; it is a psychological thing that has a psychological purgative effect.

When a person thinks of some woman all the time, the same thing over and over again, it just drives him—the common thing is called—nuts, but if he comes to somebody like a psychoanalyst he has an opportunity to share his confidence and he knows that there is someone there who is going to give him some help; that if he says something that

is sexually crude or dirty or filthy, that the person to whom he is speaking will not disapprove; that the man is not there as a moralist or a Puritan but as a physician, and is willing to help him, and that gives him a great deal of relief. 4423

As a matter of fact, the first case that Freud analyzed and that gave him a clew to the whole thing was the case of a hysterical woman who led Freud on and on and when she disgorged herself of her painful emotions she got well.

Q. Wasn't it a part of Freud's whole theory that sex was the most controlling factor in life? A. No, there again you have the most popular conception of the psychoanalysts who do not think of sex as the laymen do. We don't think of it in terms of genitals or organs or male and female performing a particular function. We think of it in a larger biological sense, as having to do with the procreation of the species and the perpetuation of the race. 4424

Q. Do you know Dr. Kenneth Tillotson, the psychoanalyst connected with various hospitals in Boston? A. I met him once.

Q. Did you know that he is the head of the Hygiene Department in Cambridge? A. I didn't know that.

Q. Would you say that he is a man of excellent reputation in your field? A. I would say he is a good man.

Q. Did you know Dr. Clements C. Fry of Yale University? A. Yes, I have heard of him and I know of him. You see, the only way I know most people is by their publications, and these two people haven't published very much. 4425

Q. Well, you are familiar with Dr. Clements C. Fry's book, "Mental Health in College," written by him last year? A. No, I am not.

Q. You never heard of it? A. I think I came across a review of it.

4426 Q. Would you say that Dr. Fry was a man of considerable reputation in your field, particularly so far as case studies of youth are concerned? A. I really couldn't tell you because I don't know much about him. I only know people who publish a good deal, and he is just what you would call a recent arrival.

Q. Now, in your direct testimony, Doctor, you have referred frequently to the undercurrent of sex tension. A. Sexual tension.

Q. Of sexual tension? A. Yes.

4427 Q. Isn't that what Freud refers to as the libido of tension? A. No, not necessarily. The first conception of libido is more universally known. My own is more specific. I would say the undercurrent of sexual tension is a part of the libidinal behavior, but remember we don't use the term "libido" as you people do. There again it is a clash between the scientific approach and the layman's approach.

Q. Isn't it a fact that this undercurrent of sexual tension to which you refer is a force which is always at work in human beings? A. It is at work but it is often latent or dormant and may be aroused by appropriate stimuli.

4428 Q. Those appropriate stimuli are very great in number, aren't they? A. Oh, yes. It doesn't take much to arouse a young man.

Q. The undercurrent of sexual tension can be aroused by almost anything? A. Well, now, that is a rather broad statement.

Q. I was only repeating your words. A. I wouldn't say by almost anything. I would say that globe (indicating), that electric globe, I don't think that will arouse any sexual tension. I don't think the hat on the rack will arouse any sexual tension.

Q. Silk stockings might, though? A. Yes, especially on a pretty leg. 4429

Q. Hair might? A. What kind of hair?

Q. Well, you tell me what kind of hair. A. Women's hair, done up in a pretty way, it might, and then again it might not, depending upon the person, depending upon the setting, depending upon the receptivity of the individual.

Q. Then it is fair to say, isn't it, Doctor, that this undercurrent of sexual tension is a perfectly normal and natural thing? A. It is to the extent of the receptivity in which it appears in a human being. I mean, a human being from the age of puberty to senility, and sometimes even senility. 4430

Q. You wouldn't be in favor, would you, of abolishing everything that might stimulate or affect that current? A. Oh, no, that would be a tragic situation. I wouldn't want to abolish dances, I wouldn't want to abolish any of the gatherings where young people might meet, because that is what keeps life going.

Q. Now, you refer to the buttocks as being an erogenous zone. A. That is right.

Q. As a matter of fact, the erogenous zone is not the buttocks at all but it is the anus, isn't it? A. No, it may be the buttocks. They sometimes speak—there are certain perverts who speak of the buttocks as the cheeks and they often kiss it in the same way as a normal man would kiss the cheek of a maid. 4431

Almost anything might become the erotic zone but with many normal people it is primarily the genital region and the others as a sort of subsidiary feeling. There are men who would concentrate their attention primarily on the breasts, some like caressing and petting of the back, some

4432 like the pinching of the buttocks, some like the caressing of the thighs.

Men differ a lot in that respect.

Q. What are the four erogenous zones that you mentioned yesterday, Doctor? A. I don't know whether there are four. There are many.

Q. I think you said four. A. There are many more. We will say the breast is one, the genital region itself is two, the buttocks three, and the thighs are four.

Q. What about the lips? A. Of course a very nice erogenous zone.

4433 Q. Now, have you forgotten any others? A. Oh, I said specifically there are many.

Q. Many? A. I merely mentioned—anything that can become an erogenous zone. I would say there was a time about eight or ten years ago when the women had dresses with the shoulders exposed and due to the fact that the rest of the part was covered and only the shoulder was exposed, that became an erogenous zone because it aroused the interest of the male as to what is behind it.

Q. So a woman with a low-cut back in an evening gown, that would be an erogenous zone, the bare back? A. Well, it all depends how she is dressed; I would say yes. The pur-

4434 pose of the evening gown is to produce some sort of a sexual stimulation within proper limits. We don't see very much of the breast exposed in an evening gown, there is just a tiny bit, maybe a suggestion, even though the skirt may be arranged so as to expose the hips a little more prominently; it is not prominently displayed.

Q. So that a slit skirt would make the area exposed by the slit an erogenous zone, isn't that true? A. It would be sexually stimulating although it is supposed to be within the limits of socially accepted behavior.

Q. By the way, Doctor, would you say that the ordinary pair of pants that a member of the United States Navy wears accentuate the errogeous zone in the male, to wit, the buttocks? A. I don't think so. I don't think the normal male—there are men whom we call homosexualists or commonly known as "queers" to whom that may appeal, but I don't think it would appeal to the normal man any more than the erogenous zone in the woman would appeal to the average woman, although she may appreciate the beauty of it. 4435

Q. Would the accentuated sailor's buttocks appeal to the female? A. To the female? 4436

Q. Yes. A. Some, perhaps, some females.

Q. Will you look at the Varga girl picture in the July issue, which you did not mention in your direct examination, and tell me whether or not that drawing shows the erogenous zone of a man and a woman in action? A. Just the lips, juxtaposition of the lips, or almost the juxtaposition. It is just a picture that you find commonly, where they are ready to kiss each other.

Q. Now, would you say that the beholder would be sexually stimulated by that picture? A. It would just create a picture—he would probably want to be in his place, that is about all. 4437

Q. Now, will you tell us what you think that the beholder of that picture would be sexually stimulated about, if the beholder of that picture would be sexually stimulated? A. He might, depending on who he is, his age, his position in life, his previous experiences.

Q. You would say, wouldn't you, that that picture would create an undercurrent of sexual tension? A. I doubt it very much. It is almost too innocent, too acceptable. There is nothing else here, you don't see anything else that would support it.

4438 Q. Well, you see a man and a woman together in the act of kissing, don't you? A. Yes. That is all. You see it in the movies and you see it anywhere.

Q. Wouldn't that stimulate sexually an undercurrent of passion in the young man? A. It is so common and so acceptable as to cease to be a stimulus in that respect. If they were standing up and you see bust and her body and a great deal of passion displayed in the behavior, it might.

Q. The lips are one of the commonest erogenous zones, aren't they? A. Yes, so common we almost don't pay any attention to them.

4439 Q. Yet you think, if anyone is telling a milkman joke, that that would have a greater sexual stimulus on the listener, do you? A. Yes, because it is illicit.

Q. Because it is illicit? A. Yes, this is illicit.

Q. So that in your view anybody telling a story of a milkman coming to the back door would create in the mind of the average person a greater sexual stimulus than to look at this picture of a beautiful girl and a good-looking man kissing each other?

Mr. O'Brien: I object to the characterization of the picture; they are not kissing.

The Witness: No, they are not.

4440 Mr. Bromley: I will amend it to say "about to".

The Witness: It all depends on what kind of a milkman joke. The kind I heard are not conducive to moral purity.

By Mr. Bromley:

Q. Well, take the one that is pictured in the magazine, the one of the milk girl. That is just the reverse of the milk-

man joke, isn't it? A. Yes. I think it is definitely sexually suggestive. 4441

Q. You think it is greater than this picture? A. I would say yes, especially that picture, if I remember it, the pose: the bust is sticking out and the back is sticking out backward, and the bust is forward, giving a complete impression of sexuality.

Q. Do you ordinarily think of sexual intercourse when you think of that cartoon, Doctor? A. No, I don't think of intercourse as so, but I think that something might happen. I mean I don't see the purpose of that picture except why? That here the woman of the house goes away and the man and the milkwoman are going to entertain each other, and the picture doesn't say how they are going to entertain each other, so I reach the one inevitable conclusion. 4442

Q. And the one inevitable conclusion is sexual intercourse, Doctor? A. I would say so, yes, or at least some sort of sexual intimacy.

Q. So you think every joke has a purpose of suggesting action, do you? A. Some. I recall somewhere in the book by Hendrick, there you will find a reference to Freud, to Freud's book on "Wit and the Unconscious." Hendrick is a good psychoanalyist; he belongs to the orthodox Freud group and he does accept the statement of Freud where Freud indicates that many of the so-called witty jokes have a definite sexual meaning behind them. 4443

For instance, a lady—I am quoting this and I may not quote very accurately—a lady asks a man what is a eunuch, and the man was very much embarrassed and then caught himself and then says, "He is a bald man."

"Oh," she says, "you are a eunuch," because the man happened to be bald.

4444 "No," he said, "it is a two balled man."

Now, you figure it out your own way.

"I am a two-balled man." You find it in Freud's "Wit and the Unconscious" translated by Brill.

Q. Now, Hendrick says, agreeing with Freud, that such things as art and religion stimulate the sex impulse. A. I don't think he says that. I think he says that the origin of art lies oftenwise in the sexual instinct, but if you look at a picture of Leonardo da Vinci you need not be stimulated.

4445 If Mr. O'Brien will let me show the picture of Joan Leslie that I brought here, that demonstrates very clearly the difference between art and vulgarity.

In my own mind, just to be fair with you people, I went ahead and tried to look up in Life a number of pictures, and this I picked out. It is a year ago, Joan Leslie.

There you see a young woman, she has grace, she has charm, she has loveliness.

I know perfectly well that she has breasts; you don't see it. I know she has buttocks, thighs and legs and slit, but you don't see it.

4446 I would say this is a picture more or less artistic because it is true to life. You see grace without voluptuousness. You see charm without passion. You see loveliness without lust. But the effect of this is not temptation but admiration.

Temptation is essentially aggressive and possessive. The man who looks at the Varga girls feels within himself that he would like to have one like her.

Admiration is not possessive. You don't want to possess Joan Leslie. You just admire it. There is a difference.

It is not here to create a picture of temptation or lasciviousness. You see a nice lovely woman, lovely womanhood in the best sense of the word, whereas in every Varga girl that you got is the more common, the more vulgar.

Here you see womanhood, here you see femaleness, accentuation of the physical. If one were to go to Esquire and judge American women by that alone, he would think that American women are doing nothing else but trying to sexually mislead men. 4447

I don't think American women are that bad.

I was impressed by these pictures, not by the accentuation of the erogenous zones, but by the absence of modesty and innocence. You can't find a girl here who looks modest and innocent. There is too much vulgarity.

I don't believe there is a single virgin among the Varga girls. 4448

Q. You think that the Varga girl compared to Joan Leslie is in very poor taste? A. It emphasizes the femaleness. I think there are a lot more things to a woman than sex. A woman has a personality, a culture. She has a background, charm, a loveliness.

Lots of things about women are not necessarily sexual, but all the impression I get from reading all that is sexual, sexual, sexual.

Mr. O'Brien: Mr. Bromley, the cartoon you were discussing a few minutes ago is in the September issue, page 65, the milk-maid picture. May I put that in the record for identification of the date of the magazine which the Doctor brought. It is October 26, 1942. I would like to offer it in evidence. 4449

Chairman Myers: Wait for your time.

By Mr. Bromley:

Q. I am reading to you from the Speaker's Library Magazine. Do you find anything sexually stimulating in this story:

"A little girl and boy were in their baby carriages outside
4450 a store.

"Baby girl: 'Are you a boy?'

"Baby boy: 'Yes!'

"Baby girl: 'How do you know? Are you sure?'

"Baby boy (looking underneath the covers): 'Yes, I'm positive of it.'

"Baby girl: 'How can you tell?'

"Baby boy: (smiling, lifting one foot): 'Blue booties!'"

A. I must confess I am awfully dumb on these things. When this was first read to me I didn't catch it. It would look
4451 as if it were sexual, but I don't think it is sexual. That is my first impression.

Mr. Bromley: Will you mark this Speaker's Library Magazine for October, 1943, for identification?

(The document above referred to was marked Respondent's Exhibit No. 127 for identification.)

Mr. Bromley: I offer it in evidence.

Chairman Myers: Any objection?

Mr. O'Brien: Yes, I have an objection. It is not
4452 a magazine at all like Esquire and anything that might appear in that would have an entirely different connotation. It doesn't seem to me to be relevant in the case.

Chairman Myers: The objection is overruled; it is received.

(The document heretofore marked Respondent's Exhibit No. 127 for identification was received in evidence.)

By Mr. Bromley:

4453

Q. Now, is it your opinion that a joke about members of one sex peeking out of camouflaged trees at partially clothed members of the opposite sex, is sexually stimulating? A. I think so.

Q. Would you say that any comic strip that carried such pictures as that would be sexually stimulating? A. You will have to show me a comic strip that has exactly that kind of picture. I couldn't pass judgment on a theoretical, imaginary comic strip.

4454

Mr. Ellis: I wonder if the witness could talk to the Board. We are not hearing you, Doctor.

The Witness: All right.

You are not likely to accuse this woman of that age of having any sexual thought, would you, nor would you say these people might be influenced sexually by this type of woman?

Mr. O'Brien: If the Board please, counsel is cross examining this witness upon matter which we have not had an opportunity to look at. It isn't even mentioned except as a comic strip.

Chairman Myers: Have it marked for identification and let Mr. O'Brien see it.

4455

Mr. Bromley: Will you mark this for identification as Respondent's Exhibit 128?

(The document above referred to was marked Respondent's Exhibit No. 128 for identification.)

4456 *By Mr. Bromley:*

Q. You see only that in Respondent's Exhibit 128 for identification there are females camouflaged as trees looking at Mutt and Jeff who are naked, in swimming, and who have come out and hid in the bushes, don't you? A. Aren't they going in this direction, away from the scene? They are going this way (indicating). Their eyes are facing that way. Unless they see backwards I don't see what they could see.

Q. So you would say that is not sexually stimulating and the girls are not looking through the knotholes? A. Peeping
4457 is far more common among men and not among women. Girls are not likely to peep anyway.

Q. So you would say there is nothing sexually stimulating in that cartoon? A. I don't see anything particularly. There might be some suggestion, very light, to some people under some circumstances.

Q. You see that in the left-hand box in the third column. Mutt and Jeff are right up against the girls who are camouflaged as trees? A. Yes.

Mr. Bromley: I offer it in evidence.

Chairman Myers: Have you seen it, Mr. O'Brien?

4458 Mr. O'Brien: This is certainly going far outside the scope of direct examination to bring in the comic strips. It relates to nothing in Esquire.

Chairman Myers: This is cross examination.

Mr. O'Brien: I know that, but I presume there is some limit to cross examination as well as direct. I think this thing in the funny paper has a very different connotation than from Esquire, and would be read, I think, by people with very different kinds

of minds, who had not been educated to Varga girls and dirty jokes, so I think it has no relevancy in this case. I object to it. 4459

Chairman Myers: It is received.

(The document heretofore marked Respondent's Exhibit No. 128 for identification was received in evidence.)

By Mr. Bromley:

Q. The cartoon at page 137 in the January issue, Doctor. I can't see anything very bad about that, can you? A. Did I say it was? 4460

Q. Sir? A. Did I say it was?

Q. I was trying to get you now to say. A. It is one of the things I didn't think very much of.

Q. Won't you talk so the Board can hear you just once? It is one of the things that you didn't think very much of, you said? A. Yes, that is right.

Q. And that is why you didn't mention it? A. That is right. I mean, I was not asked.

Q. That is why you were not asked. A. As to that, I don't know. I cannot tell you what's in the lawyer's mind, why he asked one thing and wouldn't ask another. I merely tried to answer to the best of my ability the questions asked. 4461

Q. This cartoon in May at page 48, the airplane spotters, you didn't find anything bad about that, either, did you? A. I passed it off too. I didn't think much of it. Of course, there is a real suggestion that while they may talk about a certain type of airplane they are actually talking about some women, because they are looking down. But I passed it off. I didn't think there was much to it.

4462 Q. Did you tell Mr. O'Brien that you passed it up? A. He didn't ask me about it.

Q. I mean in conference with him, not in the court room. A. I did my own. I did very little advising or consultation with anybody. I took this and sat down in the office and went through it and figured what had any connotation and what I didn't think was.

Q. And you didn't tell him that you thought these cartoons were all right? A. I don't remember telling him anything about it. I don't think he asked about it.

Q. Did you read this poem "Benedicts, Awake!"? A. Yes.

4463 I did.

Q. You didn't find anything bad about that, did you? A. I think it was suggestive. "Men, sleeping beside your wives." It creates a picture of a man sleeping beside his wife. He is just sleeping.

Q. You think that a reference to a man sleeping beside his wife is what? A. It may be sexually suggestive—not to everybody, not at all times.

Q. Well, we are talking about this poem. What about this poem? A. I imagine it might create some tension in some people. I wouldn't say in all, but in some people it would. They would try to picture what it is the man is

4464 doing in bed with his wife besides sleeping.

Q. Do you think it is something that ought to be prohibited? A. That is a legal matter—

Mr. O'Brien: I object.

The Witness: —which I am not competent to pass on.

If the other side will permit me to say, I will give my opinion, but I think this is a legal matter and I am incompetent to pass judgment on legal matters.

You understand, I am not on the witness stand against you people. 4465

By Mr. Bromley:

Q. Oh, you are for us? A. No, I am testifying according to my conscience, what I think I feel. I think there are a lot of good things in Esquire.

Q. What I want to get you to do, if you will, is to express your opinion as to whether the effect of that poem is so bad that people ought not to be allowed to read it. A. It depends upon what people. On some people it would not have any influence at all. On some people it might 4466
create a mild flurry, one might call it, and on some people it will have a mild sexual effect. I like to qualify my remarks.

Q. Yes. Will you give me the benefit of your opinion one step further? Because this poem may affect some people more than others, would you say its effect was so dangerous it ought not to be published at all?

Mr. O'Brien: I object to that question. We have not qualified the Doctor upon danger.

Chairman Myers: You have qualified him as an expert. 4467

Mr. O'Brien: Upon the effect of this or other printed matter of a sexual nature upon the mind, but not upon the danger to the public.

Chairman Myers: The objection is overruled.

The Witness: I have not committed myself as to whether Esquire should be published or should not be published, or prohibited or not prohibited from the mail.

4468 *By Mr. Bromley:*

Q. I am not asking you whether it should be prohibited from the mails. I am trying to find out whether, in your opinion as an expert, you consider this poem as so suggestive to some class of people that it constitutes a danger and, therefore, should not be left at large in the world. A. I wouldn't say "danger". There is nothing dangerous.

Q. Nothing dangerous at all? A. It would create an undercurrent of sexual tension which with some people will pass off and nothing is left. With some people it will leave
4469 a mental picture that might last for hours, and it might even lead some people to some action.

It is hard to say what people will do. But, as I say, the poem does create an undercurrent of sexual tension.

Q. But you don't think that would corrupt anybody's morals, do you? A. The man who would be influenced by this kind of picture is beyond corrupting.

Q. He is so bad he is beyond corrupting? A. I wouldn't say he is so bad, but he probably looks for this type of picture. He goes after it.

There are people who read not only this but, the chances are, the people who read this also read many other journals that have similar appeal. They may even ignore the rest of
4470 the material that is good, legitimate stuff, and just go after that.

And I imagine there are people who read the Esquire only for the good stuff and let this pass by.

Q. The first class of people you spoke of would find this sexual stimulation in a whole lot of things? A. They don't need much to be stimulated. There is material here that is suggestive and stimulating. It may not stimulate you, and it may not stimulate me, but it will stimulate John Smith.

Q. But if it stimulated John Smith he would get a stimulation from lots of things? A. Many things. 4471

Q. All sorts of things? A. You will have to qualify it. A number of things.

Q. A number of things? A. That is right.

Q. And, of course, it would be a hopeless task to try to take out of the world all those other things, wouldn't it? A. That you will have to tell Mr. Hassell, not me.

Q. You don't know?

Chairman Myers: We will take a recess for ten minutes. 4472

(Whereupon, a brief recess was taken.)

Chairman Myers: Proceed, gentlemen.

By Mr. Bromley:

Q. I call your attention, Doctor, to page 90 of the August issue. You don't find anything objectionable in the cartoon of the lady at the lathe, do you? A. At first glance I don't, and I probably wouldn't find it at second glance either, but I imagine some would.

Q. Do you find any charge against that cartoon as stretching things beyond all reason,—do you? A. I wouldn't say all reason, but beyond ordinary reason. 4473

Q. In the March issue, at page 68, is that one of the articles you couldn't read through, "The Fall of the Flattering Word"?

Mr. O'Brien: I object to the question. There is no testimony that he couldn't read through any article at all.

4474 Chairman Myers: Yes, there was. He said so himself.

The Witness: I am sorry I wasn't interested to read all these articles through.

By Mr. Bromley:

Q. I know, Doctor. This is one you were not interested to read through? A. Yes, but I noticed a few things.

Q. You noticed a few things without reading? A. I read some of it, but I didn't read the whole thing.

4475 Q. What parts did you select to read? A. I haven't in mind—I don't think I marked it here. I don't remember how this—without reference to your marking here—

Q. Oh, I know, yes.

Mr. O'Brien: We will find the copy he examined if you would like to look at it.

The Witness: I would like to have a copy so you won't think I am influenced by your marks.

Yes, I read that (indicating).

By Mr. Bromley:

4476 Q. On page 68 where are the marks you talked about? A. Here, these (indicating). This is what he called my attention to.

Q. Who called your attention to? A. This here. This hand, the printed finger (indicating).

Q. The red hand that is stamped in the article? A. That is right.

Q. That was in there when you got the magazine, Doctor? A. Yes.

Q. Wasn't it? A. That is right.

Q. Now, can you tell us after you now look at that copy whether you read that article or not? A. I didn't read all of it, I just read part that my attention was called to. 4477

Q. I take it you did not find anything objectionable in whatever it was that you read. A. I wouldn't say that. There are some suggestive things. I wouldn't say as a whole; I personally would let it go.

Q. You would let it go? A. Yes, although I can see that some of the things are suggestive, the V-neck and so on.

Q. Well, is one of the things you think suggestive, the use of the term "fly-front" in the third column? A. Yes.

Q. You find that suggestive? A. I find that suggestive; isn't it? 4478

Q. You know I saw it in an advertisement in a Washington paper yesterday, spelled right out, f-l-y. I did not think it was suggestive.

Would you have that impression if you saw it in a full-page advertisement in a Washington newspaper? A. I would think that probably it was some mistake.

Q. Some mistake? A. Yes. The Washington Post is not infallible.

Q. You know, don't you, that the advertising copy in the Washington Post is not written by the Post but written by the advertiser? A. I know, but I think the Washington Post will not allow a very misleading advertisement there, and somebody read it and looked it over and apparently it passed their own censorship in some way, but I don't see what else you can get from the term "fly-front". 4479

Q. What did you say? A. I don't see what else you can imply by the term "fly-front."

Q. What do you imply by the term "fly-front"? A. Well, the part of the trousers which covers the genital region which can be unbuttoned for purposes of passing water or what not. Is that what you call the fly?

4480 Q. Did you ever hear of a fly-front overcoat, Doctor? A. No, I haven't.

Q. You never heard of it? A. Fly-front?

Q. Yes, a man's overcoat called a fly-front overcoat? A. No, I never heard of it.

Q. You never have? A. No.

Q. Did you ever hear of a fly-front pair of slacks that women wear? A. I think I came across it once or twice but I took it because it is clothes or built on the same style of men's it meant the fly of the pants.

4481 Q. Did you ever hear of a woman's coat, a single-breasted woman's coat which is referred to publicly and in advertisements as a fly-front coat? A. No, I haven't.

Q. Don't you know that any arrangement of buttons and button holes in which the button holes are concealed by a fold over the top like on your pants is referred to as fly-front, whether it be a pants, men's, women's or a pair of slacks that women wear? Do you know that? A. No, I don't know that.

Q. You don't know it? A. No.

Q. Now, if it is commonly used practically to describe that style of buttonhole and button arrangement, you wouldn't think that there was anything nasty about putting it in an article in Esquire, would you? A. Probably not.

4482 Q. I show you the Washington Star for Monday, November 1, an advertisement of Kann's and ask you if you don't see there an advertisement for striped color print classic dress with an illustration and the price of it is $10.98? A. Well, now, you see, when we usually think of the fly—the fly of the pants in terms of men's clothes. When you refer to that in women's clothes you get a different connotation altogether.

Q. Well now, just tell me one question at a time. You see that advertisement? A. Yes.

Q. In the Washington Star. A. Yes. I don't get the same picture, the same idea of the fly here in a woman's dress as I would get in a man's clothes. In the man's clothes I would refer to it specifically to an opening in the trousers. 4483

Q. Suppose instead of being a pair of trousers or a woman's dress there had been in the advertisement a pair of pants pictured and underneath it said: "Striped color print classic pants", with the price of $10.00. "Would you think that was anything that would corrupt morals or be indecent, Doctor? A. I never came across that term before.

Q. Now, I am asking you something else. I am not asking you whether you came across that term before. Suppose it was there in reference to pants, would you say it was indecent? A. In terms of my previous understanding I would say there was probably something wrong in the printing. I never heard a public use of the word fly that way because it was always referred to as the fly of the pants. 4484

Q. In your understanding, anybody who uses the word fly front is guilty of an indecency, is that correct? A. No, I wouldn't say that. You are trying to impute something to me.

Q. No, sir; I am trying to get you clear, Doctor, then you have no criticism with Mr. Seldes' use of the word fly-front of that article of that March issue? A. Not particularly. I said at the time I read it it impressed me as referring to trousers, and I think I was a little bit off. 4485

Q. Now, the July issue at page 148 has the cartoon of the perfume counter. I cannot see anything objectionable to that, can you?

Mr. O'Brien: Now, I object to that question on the ground that he is testifying and not asking the witness questions.

The Witness: I just passed it off.

By Mr. Bromley:

4486 Q. You just passed it off, did you? A. Yes.

Q. Likewise I take it that you passed off as not objectionable the poem "Dog's Worst Friend" on page 141? A. Oh, that is bad.

Q. That is bad? A. Yes.

Q. Now, that is bad because it refers to what dogs do on the street? A. That is right, it is vulgar rather than obscene.

Q. I don't think the Board can hear you. You think it is vulgar rather than obscene? A. Yes. I make the distinc-
4487 tion, I understand, from the standpoint of law, that there is no law against vulgarity but there is a law against obscenity and obscenity is that which stimulates sexual thoughts and this is merely vulgar and there is an idea here of revenge, that he would like to bury them in the cemetery lot and let other dogs do to them what they did to them. I think it was very vulgar. I don't think it was particularly obscene.

Q. Now, in the August issue at page 30, did you have time or were you able to read the article: "Many Wives Too Many"? A. I read some of it, yes.

4488 Q. Well, I take it since you did not mention it you had no objection to it, Doctor? A. Not particularly, just there is too much material to run over.

Mr. Cargill: The Board can't hear you, Doctor.

Mr. Bromley: I think he is talking to himself, Mr. Cargill. I can't hear him either.

The Witness: Maybe you are better off. I don't see anything there. There is the word "polygamy", which very remotely might be suggestive, but I wouldn't say it would be very suggestive to me.

By Mr. Bromley:

4489

Q. Where do you find that, Doctor? A. Here (indicating).

Q. You refer to page 31 in the third column? A. Top.

Q. Top, this sentence: "With all the talk there is about a twenty-five thousand dollar annual income ceiling, it doesn't seem that Joad has picked the best of all times to propose polygamy."

Now, do you say you have objection to that sentence? A. No.

Q. No? A. No.

Q. In the same issue on page 110, this low-blood pressure nurse. I take it you have no objection to that? A. Well, it is a little suggestive because it suggests that if a person has low blood pressure this nurse can stimulate him so his blood pressure will go up.

4490

Q. Is that true as a medical fact? A. I think it does, and you probably heard the song of the last war?

Q. No, sir. A. "I am in love with a beautiful nurse and every time she takes my temperature my pulse goes up." You never heard it?

Q. No. A. You missed it.

Q. In that joke of the last war there was nothing even vulgar, was there? A. No.

4491

Q. Just a joke? A. Very thinly suggestive, but Good God, there are a lot of things that are suggestive.

Q. You would make the same comment to this Miss Blimpton cartoon, would you say? A. I would say so.

Q. In the next issue for September, at page 66, would you give me the benefit of your opinion with respect to this cartoon about the boy and girl courting in the presence of their mother and the cook. Nothing wrong about that, is there? A. Well, it is an old joke, but there is such a close

and intimate embrace that they have even forgotten modesty;
4492 a close embrace in the presence of other people and they probably don't notice them. It is suggestive.

Q. But, when you went over this material you found nothing suggestive about it, did you, Doctor? A. No. I think it is one that is thinly suggestive. They have almost lost themselves in the embrace and don't notice those people and then they try to justify it.

Q. Well, the people who try to justify the embrace number among them the mother, don't you see that? Don't you see the presence of the mother there and her laughing at this, about the fact that both of the young people work nights in
4493 a war plant and that completely removes any vulgarity? A. The only point is I don't think the couple notice the mother.

Q. But the mother notices the couple. A. Yes, but this couple in the close embrace didn't notice the mother. It is the couple in the close embrace and not the mother.

Q. But if the mother had any objection to it, she wouldn't be laughing, would she? A. Yes, but I would say the reference is not to the mother. Nobody suggests that the mother is in any way indecent or lascivious. It is this part of the picture (indicating).

Q. Don't you think it is important to notice that the
4494 mother doesn't think there is anything suggestive in the close embrace? A. Well, there are mothers and mothers, of course.

Q. Now, by the same token, you don't find any objection to the same kind of cartoon that appears on page 84, do you? A. Well, it is along the same line. Every night he tells her he is sailing tomorrow and I suppose she has got something that keeps him, that makes him stay.

Q. Now, what is that something? A. It.

Q. Eat? A. It, i-t.

Q. It? A. It recalls that she has got the "it". 4495

Q. The itch? A. No, not itch, the i-t.

Q. You see again the parents are there in that cartoon, don't you? A. Yes.

Q. Now, when you went over it you didn't find anything suggestive in it? A. Not particularly. It is a close suggestive embrace, very thinly suggestive, is about all I would say.

Q. It is quite common in reputable magazines, isn't it, Doctor?

Mr. O'Brien: I object to that question. We haven't qualified the Doctor as to what is in other magazines. 4496

The Witness: Yes. I read The Nation and the New Republic. I never found a picture like that there.

By Mr. Bromley:

Q. Have you ever read Colliers? A. No.

Q. I show you Colliers for July 3, 1943, and ask you what comment you have to make about the picture at the bottom of that page? A. That is even more suggestive than this.

Mr. Bromley: Will you mark this for identification? 4497

(The document above referred to was marked Respondent's Exhibit No. 129 for identification.)

Mr. Bromley: I offer it in evidence.

Chairman Myers: Did you show it to Mr. O'Brien?

Mr. Bromley: Yes (handing Respondent's Exhibit 129 for identification to Mr. O'Brien.)

4498 Mr. O'Brien: Well, I think, if the Board please, that this should not be admitted into the record nor the question and answer concerning it should not be, because certainly there was no reference to it on direct and the witness didn't say whether he read Colliers, so it doesn't seem to me to be material as part of cross examination. There isn't any purpose to it and I don't see what effect it would have on the issue here.

Mr. Bromley: It certainly is material on our present day standards.

4499 Chairman Myers: Objection overruled. It may be admitted.

(The document heretofore marked Respondent's Exhibit No. 129 for identification was received in evidence.)

By Mr. Bromley:

Q. I call your attention to the September issue, Doctor, page 87 and to the third column of that page, the joke at the bottom of the page, to which you did not make any comment on in direct:

4500 "She: 'Would you like to see where I was operated on for appendicitis?'

"He: 'No, I hate hospitals.'"

Your failure to mention it, Doctor, meant that you had no objection to that, isn't that right? A. I don't see much of a point to it.

Q. Well, do you see anything vulgar about it? A. Not particularly.

Q. Now, isn't it a fact, Doctor, that this whole double-

page spread of "Goldbricking with Esquire", republishing as it does jokes from Army camp papers really, in your opinion, has no significant effect on stimulating sexual desires at all? A. No. It all depends on how you look at it. If you take it all in, probably the few off-color jokes might be lost but there are men who just look for just this kind of a joke. They ignore the others. I think it will have an effect. You understand, of course, I believe that a good deal of it is perfectly all right. 4501

Q. Yes. A. Perfectly decent and I would have no objection, but there are a few now and then that are off-color and perhaps a few more off-color, and there are men, I wouldn't commit myself how many men, there are men who look just for this kind of stuff. 4502

Q. Those men are abnormal men, aren't they, Doctor? A. Oh, my goodness, if you call them abnormal you wouldn't have enough hospitals to build for them. They are common people. Lots of them; you meet them in daily life; they are right among your friends.

Q. Aren't they the exception rather than the rule? A. I wouldn't say they are the exception.

Q. You think a majority of our citizens go through a two-page spread of jokes like this and only pick out the ones that are off-color? A. No, I wouldn't say they only pick out, but they do particularly pick out this kind of joke; they will read this kind of joke; what will stimulate them is this kind of joke; the others are interesting and they get a little laugh, but that is all to it, but when you get a little risque joke, a little off-color, they like it. The chances are they will not repeat to any of their friends this kind of joke because there isn't much to it, but they are likely to repeat this kind of joke. 4503

Q. When you say this kind of joke, you point out the two
4504 blondes in the berth joke; is that it? A. Yes.

Q. You say most people would be likely to repeat that kind of joke? A. Yes. These are the kind of jokes they pass around. You probably have heard of the dirty jokes, the jokes that go around and around. You tell it and five minutes later someone else tells it. It takes about five years for that kind of joke to come back to you. These are the jokes that pass from one person to another.

Q. Do you think that the fact the off-color joke is so widely told in this country has a corrupting influence on
4505 any part of our population, Doctor? A. I wouldn't say it has a corrupting influence. I would say it is indicative of the trend of times and perhaps of our cultural setting. There has been a great deal of loosening of sexual repression since the last war; more has transpired to loosen sexual repression in the last twenty years than the previous hundred years.

The young girls 18 years of age know more than my grandmother did at the age of 85.

Q. In the October issue at page 38, were you able to read the article on "Wise Men Pick Pyknic Girls"? A. Here is another one, what I call the scientific tragedies. A scientific concept becomes popularized and then it becomes degraded
4506 and people vulgarize it and misuse it.

There are Pyknic types. Of course, in the time of Kretschmer who developed the Pyknic type and asthenic type—I think if Kretschmer would see that he would be mortified. He would not recognize himself.

Q. You object, do you, Doctor, to the popularization of serious scientific theories? A. There is a way of popularizing like the Scientific Monthly does or even some of the articles published in Science News Service where it is presented with a certain dignity and correctness, but when it gets to magazines—first of all, popular magazines—it becomes degraded.

Q. Yes. A. Now, if you were to show these women separately, not in an amorous embrace, it might not be so bad. 4507
She may belong to the Pyknic type. But is it necessary to put her in close embrace, close sexual embrace, in order to show she is a Pyknic type? It is wholly unnecessary and impertinent and irrelevant.

Here again, it is an opportunity to show a couple of buttocks, a couple of thighs, and a couple of breasts.

Q. Did you have any reference to any part of the text, Doctor? A. I would not have written that way because it gives a false conception of the Pyknic and asthenic types. We speak of the leptosome and so on— 4508

Q. Let's put it this way. Is this your only objection to it? A. To what?

Q. To this article, that it vulgarizes a scientific theory? A. I don't remember if I noticed anything else. I was particularly attracted to this.

Understand me, this is not incorrect entirely and it is fairly scientific, but to say the Pyknic type is of a soft, jolly, yielding, loving, peaceful, sunny, good-natured temperament—it is a hodge-podge.

You mix up so many different personalities.

Many of these don't go together even. Probably they are lots of times not jolly and you put the word soft and 4509
peaceful and loving, and you mix all the personalities of human beings. What is left of the specific type?

As a matter of fact, Kretschmer never described that. What we mean by Pyknic type is the type who develops the manic depressive type of psychosis.

But I wouldn't say everyone who has a sunny disposition belongs to the Pyknic type. It gives the impression of universality, which is not true.

4510 I say when it becomes popular it becomes degraded.

Q. Is that the objection you have to this article? A. Yes. that is my main objection, and I say again that all these pictures to demonstrate that are wholly unnecessary.

Q. Yes. Did you read the story: "Portrait Above the Fire Place" at page 56? A. Well, it is again the same old story. You can call it above the fire place or below the fire place or at the side of the fire place. It is another opportunity to display a couple of thighs, a couple of legs, slit, and everything else.

Q. You are off the track, Doctor. The picture hasn't any
4511 relation to the story and I wasn't asking about the picture. The Post Office Department does not complain about the picture. Do you complain about it? A. I pointed out several pictures I thought were obscene and they didn't think so. Our minds don't run the same. Isn't it fortunate?

Q. Yes. Let's get away from the photograph and you tell me if you read the story "Portrait Above the Fire Place". A. I don't think so.

Q. Well, let's take another one. Page 104— A. I might have read in the original if it was pointed out to me with that red mark, the hand, I might have read it, but I don't recall it.

4512 Q. Did you read this: "The Sporting Scene" on page 104? A. I don't remember that.

Q. You don't remember that? A. No.

Q. Finally, in the November issue this cartoon about the soldiers at the U. S. O. you found to be unobjectionable, did you not? A. Well, it is very mildly suggestive because it implies that they want something more tangible than cigarettes.

Q. Wouldn't you think that the large water pipes were more tangible than cigarettes? A. It all depends on how

you look upon it. It might. I don't see any great objection to that because here again you have that peculiar posture that seems to accentuate certain sexual parts, but it is not so very much. 4513

Q. Now, I show you what purports to be a photograph of a nude figure with her back towards you. Do you see that? A. Yes.

Q. Would you say that that nude was in a recumbent position? A. I think she is lying down on the grass or the beach or somewheres.

Q. Do you think that that would be sexually stimulating? A. A very, very little bit, some perhaps. You see here the buttocks—but they are not particularly accentuated. I wouldn't say that they are particularly obscene. I wouldn't say so. 4514

Q. You wouldn't say this is particularly obscene? A. Although I do think that showing what we call the sink of the buttocks, I mean the slit between the two cheeks, is somewhat suggestive.

Q. Would you think that would stimulate an undercurrent of sexual tension in the beholder? A. I doubt it. I think it is more on the vulgar side than on the obscene side.

Mr. Bromley: Will you mark for identification PM Weekly for November 16, 1941? 4515

(The document above referred to was marked Respondent's Exhibit No. 130 for identification.)

Chairman Myers: Will you let Mr. O'Brien see it?

Mr. O'Brien: The same objection as to the last week's Colliers.

Chairman Myers: It is admitted.

4516

(The document heretofore marked Respondent's Exhibit No. 130 for identification was received in evidence.)

By Mr. Bromley:

Q. Doctor, I show you a photograph of a girl in a thin costume. Would you say that photograph was sexually stimulating to the beholder? A. I would say so, because you do not find in normal life, in daily relations, a young woman in

4517 this position.

You have here again the suggestion of the breasts, the waist, the buttocks, the thigh, and the slit. They are all monotonously the same.

Q. Would you be able to recognize that, Doctor, as a photograph of a Varga girl from the motion picture "Du Barry Was A Lady"? A. I don't remember that.

Q. Did you know that the picture of that girl was shown from the screens of thousands and thousands of theaters of this country? A. So what? Does that lessen my statement? It still remains a sexually suggestive picture. If it is shown in the White House, it still remains a suggestive picture.

4518

Mr. Bromley: Will you mark it for identification, please?

(The document above referred to was marked Respondent's Exhibit No. 131 for identification.)

Chairman Myers: I had a recollection those were put in evidence in your defense.

Mr. Bromley: No, sir. I had them out here, but I never was able to get them in. There is a Life spread of them, but it doesn't contain the picture of this girl. 4519

Chairman Myers: That is what I had in mind. I know the pictures in Life were admitted.

Mr. O'Brien: I object to this. In the first place, there is no identification of the picture except that counsel is on the witness stand and makes a statement in testimony as to what it is.

Second, there is no showing that it is a Varga girl and it certainly doesn't look like any we have seen or that she appeared in the motion picture "Du Barry Was A Lady" in that particular costume. I saw that picture and never saw the costume. I have as good a recollection as counsel has. 4520

Chairman Myers: What about the identification?

Mr. Bromley: I offer it for identification merely because he has testified about it, and it goes to his standards. I admit I have not proved it as a part of the picture and I don't think I have to.

The Witness: But your statement that it is has made an impression upon me and might have prompted me to make an answer which I would not have made otherwise.

Chairman Myers: Let me admit it for what it is worth. There seems to be some doubt about identification. 4521

(The document heretofore marked Respondent's Exhibit No. 131 for identification was received in evidence.)

4522 *By Mr. Bromley:*

Q. Let me show you Life for March 9, 1942, at page 45. A. Is Life on trial too?

Chairman Myers: Is that one of the exhibits, Mr. Bromley?

Mr. Harding: That is not, no.

The Witness: Is Life on trial too?

Mr. Bromley: Would you mind waiting until I get through with my question and then I will answer yours?

4523 The Witness: All right, but I cannot be on ten trials at the same time.

By Mr. Bromley:

Q. You can't be? A. No.

Q. Does it confuse you? A. I have not prepared for that.

Q. Take a good look at it and tell me whether you think those pictures have a tendency to corrupt morals, will you? A. I think this is obscene and vulgar as well.

Q. When you say "this", do you mean the whole page? A. This picture here (indicating).

4524 Q. You point to the top left-hand one, do you? A. Yes.

Q. Look at the next one to the right. A. Also the same thing.

Q. And the two at the bottom? A. It is about the same. They are all the same, vulgar as well as obscene, to my mind.

Mr. Bromley: I offer in evidence this issue of Life for March 9, 1942, calling particular attention to page 45, the paintings about which the witness has testified.

Mr. O'Brien: The same objection as to the others.

Chairman Myers: Same ruling.

4525

(The document above referred to was marked Respondent's Exhibit No. 132 and was received in evidence.)

By Mr. Bromley:

Q. Doctor, in analyzing the material in Esquire, do you make any distinction between the act itself and a description of the act? A. Usually the description tries to explain the act if the act is not self-evident.

For instance, take the picture of the two soldiers where the man says: "No use, Sarge, we are overpowered". 4526

Q. "No use arguing". A. Now, without the description there, without the use of that sentence, the picture loses half its value, a good deal of its value,

The description supports the picture.

There are, of course, pictures that are self-evident, you don't need a description, it is implicit in the picture itself, but take a picture like that without a descriptive note and it almost loses its meaning.

The majority of people probably wouldn't understand it. They know something is there, but what it is they don't know.

So the description, to my mind, often supports the picture. 4527

Q. Well, I was directing your attention to this situation. Do you draw a distinction between what a prostitute does in her profession and the use of the word "prostitute" in an article or a story or a joke? A. Well, you see, the use of language implies an awful lot of imagination. Every word that we use is a condensation of a large number of words. Therefore, when we use a word there is in our mind a picture of what the word connotes.

4528 We really speak in images. The words are merely the external expression of it. When a man reads the word "prostitute", there comes before his mind a particular type of woman in a particular specific setting. And, of course, if his imagination works along that line, he will picture what a prostitute does.

Some will not go that far. Some will go farther. With some it will linger a little longer and probably they will try to create some pictures connected with prostitution.

Q. So, from that I conclude that you think that the use of the word "prostitute" may be just as bad as the act which she does? A. I don't know that it is just as bad.

4529 Q. Well, almost as bad. A. It creates a picture in the person's mind.

Q. Of what she does? A. Of what she does, and what he will do about it, I don't know. It all depends upon the man. It is not conducive to noble thoughts—not very much.

Q. And, therefore, you believe that the use of the word "prostitute" is something again which stimulates the undercurrent of sexual tension? A. Not all the time. For instance, if you get a description of the war situation in Europe and we say "Hitler has abolished prostitution in camps." I don't think it will bring anything to the person's mind. He probably won't stop to think about it. It depends on the

4530 setting and how it is used.

Used in a certain sense it is one thing; use it in conjunction with other words and other settings and it is another thing.

If you describe the life of some people in the—what we call behind-the-tracks—the lower class of people, the common people, and perhaps describe the sex life of these people and if you use the word "prostitution" there it has one connotation. If you use the word and nothing immoral is described.

it has a different connotation. It depends upon the setting, the text and the man. 4531

Q. I want to get you to draw that line for me. You said if somebody read that Hitler had abolished prostitution in Army camps— A. It would have created a picture in his mind of what had been before and he would go to the next paragraph and forget about it.

Q. Then it would stimulate some mild sexual thoughts? A. Every time we use a word we try to get an image of the word. We read in images and every time we read the word "prostitution" it is bound to create in our mind the picture of what prostitution is.

How long it will linger and what effect it will have on the individual, depends on the individual and the contact and setting and the use. 4532

Q. In the connection you have just given us, in connection with the sentence about Hitler, you say the sex stimulation would be mild, do you? A. I don't know there would be a sex stimulation. There would be a picturization of what prostitution is and that is all there is to it.

Q. What do you say about the reference in the story "Offensive on the Home Front", where it says: "Once the husband had slapped a prostitute in Bordeaux." A. That is suggesting sexual activity. Some men are not interested in normal intercourse and get their entire satisfaction by slapping women. 4533

Q. Don't you know the story shows that the reason the husband slapped the prostitute was because the prostitute had stolen his cap and wouldn't give it back? A. That may be true, but still the connotation would be created in the mind of certain readers which connotes what we call sadistic tendencies.

Q. And you think that material would be objectionable

4534 because it appeals to people— A. A certain type of perversion.

Q. A certain type of perversion? A. Yes.

Chairman Myers: Is your comparison based on a speculation as to what may appeal in the different minds of different people?

The Witness: Yes. For instance, there are patients that I have whose entire sex life is centered on slapping buttocks, we will say. To other people it would not appeal at all. It would make no impression on them.

4535 The second type people reading that would pay no attention to that. They would probably see only what this gentleman says there about the cap, but the first type of man will get a hold of it and it brings his mind to something that is familiar to him, slapping on the buttocks.

There aren't very many men like that, but there are some who will pick out that particular sentence and try to squeeze out what stimulation they may.

Q. Then, you would find objection to a story describing a father as spanking his daughter? A. That is different. The

4536 purpose is not sexual. The purpose is punitive.

Q. Do you think because a story says the man slapped the prostitute because she stole his cap, that makes it sexually stimulating? A. I say some people will pick out that part as a sexual stimulation to them. I do not say all people; I do not say the majority of people.

Q. Doctor, I assume you are in favor of a full and frank discussion of venereal diseases in the press and elsewhere, aren't you? A. That is a tender topic with me.

Q. It is? A. I don't think it is handled properly. I don't think you can take an 18 year old boy and off-hand begin to talk to him about venereal disease. Preceding that there should be a complete sex education. He should know the complete physiology, the complete whole human body. 4537

When an adolescent is taught the function of the human body and the sexual life included, then it is time to begin to talk in an entirely scientific and objective manner about venereal disease, but in the majority of cases we use venereal disease as a bugaboo to frighten people away from sex, not to teach them about sex in a normal way.

It is like the old-fashioned preacher used to tell the boys that if they masturbate they will become crazy, your bones will break and your body will fall apart, which did not have any truth in it. 4538

It was done for the purpose of frightening people.

I don't believe the discussion of venereal disease should be used to frighten people. There is nothing frightening about sex if presented in the proper manner.

Q. Are you opposed to the current tendency to write frankly about venereal disease? A. I would say a great deal of it is not presented properly.

Q. Do you think it is harmful to readers generally? A. I don't think a popular magazine is the place for a discussion of venereal disease. That should be discussed in a popular magazine like Hygeia, which is published by the medical association. 4539

Q. Are you a reader of Life magazine? A. Not very much, occasionally.

Q. Did you read and are you familiar with the spread it published in 1938 showing by text and illustration "The Birth of a Baby"? A. I think I remember that, something of that kind. Was that by Dr. Goodmaher or is it taken from—

4540 Q. No, it was taken from a motion picture film showing the birth of a baby. Do you remember that? A. I have a vague recollection.

Q. Do you recall that those pictures were attacked as having a tendency to corrupt morals? A. I do not recall, but I would not be in favor of publishing them in Life. It may be perfectly all right if properly presented, but I do not think Life is the place to publish about the birth of a baby. That should be done in school.

Mr. O'Brien: I don't remember anything in Esquire that is comparable to the spread, if there was
4541 one—

Chairman Myers: I think this happened when you were out of the room and it was introduced. That is one of the exhibits, isn't it?

Mr. Hassell: No, it was not. It has not been adverted to.

Mr. O'Brien: It seems to me nothing in here is analagous to any of the pictures or criticisms made of Esquire. It doesn't seem to me to have any bearing.

Mr. Bromley: I offer it as material on the question of what the expert's standards are in judging the material in Esquire.

4542 Mr. O'Brien: I think he has been very definite without going into child birth practice.

Chairman Myers: Of course, counsel has a right to question him on any point that arises in his mind.

By Mr. Bromley:

Q. Will you look at these pictures in Life and tell me whether you think they have any tendency to corrupt morals? A. I don't think so, because the whole intent and purpose of the picture is educational.

You do not sense any attempt on the part of the people who present the picture to even suggest the morality. It is educational. 4543

This is the anatomy of the female pelvis and I really don't think it has a place in here because anatomy is a very complicated thing and the average layman will not understand it.

I often am in the position where a patient wants to know or has to know for purposes of treatment the anatomy of the male or female pelvis, and I have a textbook on anatomy and it takes me hours to explain that. If it is put here, you are not going to learn a thing from that. You just see something and don't know what it is. 4544

By Mr. Bromley:

Q. What is your position, Doctor? Do you object to it or don't you? Now you have said it both ways. A. I don't object to it as a subject of obscenity because I don't think it is obscene, but I don't believe that Life is a place for it; I think it ought to be taught in schools and in special journals.

Q. And that is the same position you take on articles about venereal diseases? A. Yes, sir.

Q. Doctor, I want to read you an Army joke of the kind we have been talking about, and ask you whether you find anything sexually stimulating or objectionable in this: 4545

"One strip had Caniff's famed shapely Burma entertainting Yanks at a dinner at which food was hauled in by slave girls apparently unclad from the waist up. As bulge-eyed soldiers stared entranced, Burma asked, 'Why don't you guys eat? Is something too spicy?'

"In another, soldiers staged a camp show, using canteloupe to give feminine allure to their flat chests. In the last

4546 panel a tough Yank spotting well-built Burma yells, 'Hey, you, hurry it up. I gotta get all them melons back to the 'mess hall.' ".

What is your opinion of that description, Doctor? A. I don't see much point to it; I don't think it is clever; I don't think it is particularly dirty. It is a little suggestive; it is the type of joke which I would call an artificial joke. It is a joke which has been created for the purpose of producing, squeezing out some sexual suggestion, and it doesn't strike me as particularly clever.

Q. You don't think it is damaging, though? A. I wouldn't
4547 say so.

Q. That, however, is typical of Army humor, isn't it, Doctor? A. Yes, possibly so. I wouldn't say typical; I don't make a study of what is typical.

Mr. O'Brien: Just a minute. I move to strike out the question and answer. The doctor has not been qualified as an Army humor expert.

Chairman Myers: He only asked him if he knows.

By Mr. Bromley:

Q. Doctor, it is quite customary, isn't it, for magazines
4548 of the general circulation type to report night club shows in pictures as well as in text?

Mr. O'Brien: I object to that question as to what the general policy and practice is.

Chairman Myers: Of course, it is only referring to the doctor's general knowledge, isn't it?

Mr. Bromley: That is right.

The Witness: Many do.

By Mr. Bromley:

4549

Q. Have you ever been to the Folies Bergere night club in New York City? A. I was in Paris.

Q. You were in Paris? A. Yes.

Q. But not in New York? A. No.

Mr. O'Brien: I can't hear you, Doctor.

The Witness: I saw it in Paris. As a matter of fact, when the picture was shown here I immediately identified it as one that I saw in Paris.

By Mr. Bromley:

4550

Q. You mean to say you saw the same kind of costumes or the same kind of show? A. The same kind of costumes; the general distribution about it was the same. I think at that time there was no Folies Bergere in New York.

Q. I believe that is right.

Chairman Myers: Did you stop at Pere Oberg's and get some roast chicken?

The Witness: I have a diary at home. If you want, I will bring it over. Moulin Rouge is a good place to go to.

4551

By Mr. Bromley:

Q. I show you a picture from Life, page 63, Respondent's Exhibit 18, and ask you what is your opinion of that photograph from this same night club show. A. I think it is very suggestive.

Q. Very suggestive? A. Yes.

Mr. Cargill: I can't hear the witness.

4552 Mr. O'Brien: Keep your voice up, Doctor.

The Witness: I think it is very suggestive.

By Mr. Bromley:

Q. Do you think it would stimulate the undercurrent of sexual tension? A. I think so.

Q. Do you find in that what you have described as an emphasis upon the breasts, the buttocks, the leg? A. Yes.

Q. And so forth? A. Yes. In fact, I think it is a mistake that it got into Life; it should have been in Esquire.

4553 Q. What about the picture in this exhibit on the next page, what do you say about that? A. Nothing much.

Q. Do you see that the breasts are exposed? A. Yes.

Q. And the navel is exposed? A. Yes, I know, but it doesn't give the impression—

Mr. O'Brien: I can't hear you, Doctor.

The Witness: It doesn't give the impression of obscenity.

By Mr. Bromley:

4554 Q. Does the first picture give the impression of obscenity, on page 63, to you? A. This one (indicating)?

Q. Yes. A. Yes, it does.

Q. But not on page 64? A. No, because here the legs aren't exposed, you don't see the thighs, you don't see the buttocks.

Q. Is this picture on page 68 obscene in your opinion, Doctor? A. No, it is nothing unusual that you find in pictures.

Q. Well, is it obscene, Doctor? A. I wouldn't say so.

Q. You would call it suggestive, though, wouldn't you? A. That is right, that is suggestive. It would arouse a mild undercurrent of sexual tension. 4555

Q. The picture on page 66 of Lee Sherman, is that obscene or suggestive? A. The same as the other one.

Q. Well, which, obscene or suggestive? A. Suggestive.

Q. You have heard the nursery rhyme, "Hi, diddle, diddle," haven't you? A. No, I didn't, because when I was an infant I was in Russia and they had different songs over there.

Q. So you aren't familiar with it? A. No, I am not familiar with it.

Q. Did you tell the Board that you couldn't find the word "diddle" in your dictionary of pornography which you consulted? A. I never consulted it. 4556

Q. Didn't you tell the Board that? A. I knew that the word "diddle" had a sexual connotation, and I asked several people in the hospital to verify it, and they just confirmed it.

Q. I believe you said yesterday that you looked it up in your pornographic dictionary and you couldn't find the word "diddle." A. I don't have a pornographic dictionary. Did I say pornographic dictionary? A dictionary that I have?

Q. Yes, you did. A. I have—oh, I have a private, in my mind, a private dictionary of my own. I don't have a dictionary. I should have said quotation marks but you can't put quotation marks when you talk. 4557

Q. What you meant is— A. I have a private dictionary of my own which I get from patients. I have a dictionary, for instance, on homosexuality.

Q. At page 1436, you said, "It is hard to say just what he meant because I never came across a sentence like 'lowering

4558 the boom.' I have a dictionary of pornography with all sorts of pornographic words." A. I mean a mental dictionary. I don't mean an objective book with words alphabetically arranged.

Q. Well, did you say that or didn't you? A. No, I didn't.

Q. Well, now, do you say that having consulted your mental dictionary you don't find that "diddle" has any dirty meaning? A. I don't say that. I say that "diddle" meant to me engaged in preliminary sexual activity, which in the scientific language is called "before pleasure activities," and to make sure I asked several people in the hospital and

4559 they confirmed that.

Q. Will you look at this dictionary, being the standard Universal Dictionary, under the word "diddle," and tell me what meaning you find there? A. Yes, I see it is marked here, "To cheat," also "To borrow."

Q. You see that it also says in the line below that it has some other meanings? A. To toddle, to jog, to dawdle. Yes, I suppose it has several meanings. I didn't know the other meanings; I am very frank to tell you that. The only meaning I knew was with the sexual connotation.

Q. Have you had occasion, Doctor, to be on public swimming beaches very much in the last few years? A. I have been to some.

4560 Q. Are you reasonably familiar with the type of women's bathing suits now being worn on those beaches? A. Well, they change so quickly it is hard to keep up with them.

Q. Well, would you say you have some reasonable familiarity with them? A. Well, I would say that they don't cover very much.

Q. Look at the October calendar picture in the January issue. Wouldn't you say that that girl had on a red bathing suit? A. It might be.

Q. Don't you think that she is lying back down on a spring-board with her head hanging over the end, Doctor? 4561
A. Yes.

Q. Now, do you think that that bathing suit is any more extreme than those you see in the summertime on many, many beaches? A. So far as I can see, it accentuates rather prominently several parts of her anatomy.

Q. But do you think it is any more revealing than the normal ordinary type of women's bathing suits worn today? A. I wouldn't think so. Some of the bathing suits are anything but bathing suits.

Q. And the bathing suits to which you have just referred would stimulate an undercurrent of sexual tension in 4562
normal people, would they not? A. Well, of course, you have to look at a picture as one thing, and to go on a beach and watch women over there, that is a little different thing. You are almost prepared for stimulation over there.

Q. Would you say that to look at a live woman on the beach would in the normal person be more stimulating than to look at a picture, Doctor? A. It might. It depends on the circumstances. I say here you don't see anything else but sex. Over there you have a large setting, a beach where you may have a party and you go out with people and you may not pay attention to that.

Q. Suppose you are sitting right next to one? A. I think 4563
it would be stimulating. Wouldn't it to you?

Q. Very much, Doctor. I show you this advertisement of Cole's bathing suit. Don't you find that the bathing suit as represented on that Exhibit 24 of the Respondent is considerably more revealing than the October Varga girl picture? A. I don't know whether it is more revealing; it is a different picture; it represents something different.

Q. Well, doesn't the bathing suit reveal more of the body

4564 in the Cole advertisement than does the bathing suit in the October Varga girl calendar in the January issue? A. I don't think so. It all depends—I am judging it by the effect it has on the individual.

Q. Well, I want you to first answer this question: Doesn't the Cole bathing suit reveal much more of the human body than the red bathing suit does in the October Varga calendar? A. I think it will have about the same effect, without reference to what is revealed and what is concealed. I am talking about the effect.

Q. I am talking about the bathing suit. Wouldn't you
4565 say that the Cole bathing suit bares the midriff completely, whereas the red bathing suit in the October Varga girl calendar covers up the midriff? A. Again I am coming back to this, I am talking about the whole effect.

Q. You say they are the same? A. I don't say that they are the same.

Mr. O'Brien: Mr. Chairman, if counsel will let the witness answer the question, we will get it into the record.

The Chairman: Yes, let him answer.

Mr. O'Brien: He is cutting him off in the middle and asking him another question.

4566 The Witness: I say that the total effect of the whole is about the same. There may be a difference here and there, of course there are, otherwise they would be very much alike.

By Mr. Bromley:

Q. Now, forgetting about the total effect, there is a vast difference in the bathing suits, isn't there, because the

Cole bathing suit is in two pieces and the red one is in one piece? A. Well, sometimes two pieces will have a less effect than a one-piece, depending on the individual, the time, and the setting. 4567

Mr. Bromley: I just want the Board to see what I am trying to get out of him (exhibiting the above-mentioned pictures).

Chairman Myers: Is this a convenient point at which we can adjourn for lunch?

Mr. Bromley: Yes.

Chairman Myers: We will adjourn until 1:30 this afternoon. 4568

(Whereupon, at 12:00 o'clock noon, the hearing was adjourned until 1:30 o'clock p. m.)

AFTERNOON SESSION.

(The hearing was resumed, pursuant to the adjournment, at 1:30 o'clock p. m.)

Chairman Myers: Proceed, gentlemen. 4569

Mr. Bromley: May it please the Board, I have been assuming, perhaps foolishly, that the Government has been observing the Board's ruling and excluding their own expert witnesses. I hope that is so.

Mr. O'Brien: Have you seen anyone present during the doctor's testimony whom you consider one of my expert witnesses? If I had one present I would let you know.

4570 Mr. Bromley: If you have one present, keep him out, will you?

Mr. O'Brien: Perhaps you think the gentleman in the front row is one of my expert witnesses. Perhaps the Board can tell you to the contrary.

Chairman Myers: I can tell you that he is an expert but not on the subject here at hand.

Mr. O'Brien: He is an expert on figures but not of this type of thing.

BENJAMIN KARPMAN, resumed the stand and testified further as follows:

4571

Cross Examination by Mr. Bromley (Resumed):

Q. I show you three photographs of girls in bathing suits. Doctor, and ask you if you would say that those photographs are typical of bathing suits seen today? A. I have not made enough investigation of bathing suit models. It is a little bit out of my field to tell you whether that is called the modern style. I don't know.

Q. Well, look at the one you hold in your hand. Would you say that stimulated an undercurrent of sexual tension in the beholder? A. I think so.

4572

Mr. Bromley: Will you mark the photograph of the lady against the palm tree, for identification?

(The photograph referred to was marked Respondent's Exhibit No. 133 for identification.)

By Mr. Bromley:

4573

Q. This lady is sitting with her straps dropped from her shoulders. Would your answer be the same with respect to that picture, that it did stimulate an undercurrent of sexual tension? A. It produces a physical impression that is very likely to lead to creation of physical tension.

Mr. Bromley: Will you mark this for identification?

(The photograph referred to was marked Respondent's Exhibit No. 134 for identification.) 4574

By Mr. Bromley:

Q. And finally the photograph showing the eight girls in a row. Would you say that to look at that picture would stimulate an undercurrent of sexual tension? A. I think so.

Mr. Bromley: Will you mark this as an exhibit for identification?

(The photograph referred to was marked Respondent's Exhibit No. 135 for identification.) 4575

By Mr. Bromley:

Q. Doctor, having in mind these three exhibits for identification which you have looked at, can you tell us whether or not, looking at the girls themselves wouldn't produce the same undercurrent of sexual tension as looking at the photographs? A. What do you mean? If they were alive, on the stage, we will say—

4576 Q. No, right on the beach, and you were standing beside the camera man who took the picture. Wouldn't the beholder have created in his mind the same undercurrent of sexual tension produced by the photograph? A. It might well.

Q. Indeed, wouldn't that be greater, perhaps, than the photograph? A. It all depends on the individual, the type of background he has, and the personality, and so on.

Q. But for the persons who would be affected by the photographs in the way of sexual stimulation, so far as the undercurrent of sexual tension is concerned, they would
4577 be more affected by looking at them alive, wouldn't they? A. Not necessarily. Peculiarly enough, there are some individuals who are more affected by pictures than the living examples.

Q. I know that is true sometimes, but I am trying to get you to say what is the general rule. A. I don't know if I can commit myself to say that anybody who would be affected by the pictures would also be affected by the living persons; he may and may not; often he may, but there are individuals, I have had patients, who will take a picture like this and hold it to their breasts and kiss it and hug it, whereas they were entirely too shy and timid to even
4578 dare to look at or touch a live person.

Q. Then this undercurrent of sexual tension varies tremendously from individual to individual, doesn't it, Doctor? A. Not only that, but there are these individual differences that I mentioned which come up from time to time.

Mr. Bromley: I offer in evidence Exhibits 133, 134, and 135.

Chairman Myers: The exhibits have no eviden-

tiary value themselves. As I understand it, you are just introducing them as a standard of comparison to the witness and that is the only purpose? 4579

Mr. Bromley: That is right, sir.

Chairman Myers: The Board of course will not look upon them as having evidentiary value themselves.

Admitted.

(Respondent's Exhibits Nos. 133, 134 and 135 were received in evidence.)

By Mr. Bromley: 4580

Q. Would you agree, Doctor, that the trend in modern-day advertising has been toward greater use of the undraped female figure? A. I haven't made a particular study but I would say that that would be my impression, with the few advertisements I happened to scan. I haven't paid much attention to advertisements as a rule.

Q. Have you found anything corrupting about this increased use of the undraped female figure in advertising? A. I haven't made a study of the effect of advertising on the human being.

Q. Well, this type of advertising is pretty widespread, 4581
isn't it, Doctor? You see it in hosiery advertisements, clothing advertisements, tobacco advertisements, and so on. A. I haven't made a study of it and I couldn't tell you. I have the impression that it probably is but I couldn't commit myself in any definitive way.

Q. Well, take a look at this exhibit, Respondent's Exhibit 20, which is the advertisement of the Marelle Bath Foam. Would you say that a picture such as that would

4582 stimulate the undercurrent of sexual tension in the beholder? A. Not particularly. You see, the picture as such is an advertisement and the ostensible purpose is really to show how wonderful this particular soap or bath powder is. Produced in a setting of this kind, the individual doesn't look particularly for sexual stimulation in this advertisement. I imagine if this picture were taken out of this setting, all this removed (indicating) and just put in like that, it might have a greater suggestive value than in a setting like this.

4583 Q. Wouldn't this man or type of man you spoke about be apt to hug and kiss that figure as well as the other one you looked at? A. He may and may not.

Q. Well, then, so far as you are concerned you wouldn't have any objection to Esquire publishing advertisements of that kind, would you? You wouldn't find anything in there that would have any tendency to sexually stimulate the reader? A. Not particularly, not as an advertisement, but take the whole advertising out and put it in some setting and put the proper environment around and accentuate the body—

Mr. Cargill: I can't hear you, Doctor.

4584 The Witness: I say, take this away, take this picture out of this setting, narrow the advertisement, put in a little different context, perhaps a little drapery, perhaps polish it up, and it would create an entirely different impression. A person doesn't look for sexual stimulation in advertisements as such. There may be advertising that may have a stimulus value, but not as such, but if you take this picture out of its setting and put it in another setting that will accentuate it, then you have an entirely different setting.

By Mr. Bromley:

4585

Q. Well, if any one of those pictures of the Varga girl appeared in an advertisement of Marelle Bath Foam you would find that they had no tendency to corrupt the morals or stimulate the undercurrent of sexual tension? A. I don't think so. I can't see it.

Q. Aren't you able to visualize, looking at this ad now, a Varga girl in place of this naked woman in the bathtub? A. No. I would say some of the Varga girls, the way they are displayed, I think this type would be so prominent, it would obscure the entire advertisement.

4586

Q. Now, what you have referred to is a Hurrell photograph and not a Varga girl on page 88 of the January issue. A. That is right.

Q. You think if that Hurrell photograph were published as an advertisement it would have a sexually stimulating effect, do you? A. I think so, yes.

Q. Is your opinion of this advertisement, being Exhibit 23 in evidence, of Shaleen hosiery, the same as of the bath foam, Exhibit 20? A. I think this is sexually more suggestive and probably more stimulating. You see, you can see the accentuation of the back, the buttocks, the thighs, the slit, the legs.

4587

Q. And, Doctor, what is your opinion of this Linit advertisement, Respondent's Exhibit 41? A. That isn't bad, that isn't bad. But that is, I would say, suggestive (indicating).

Q. I am calling your attention to the Linit advertisement which has been marked Exhibit 41. A. I think that is suggestive.

Q. Very much so? A. Very much so, that is right.

Q. And you say that because the woman is portrayed as

4588 having large busts and large hips and legs exposed? A. That is right.

Q. That you would classify as very suggestive, would you? A. Very suggestive.

Q. That means it would have a strong tendency to stimulate the undercurrent— A. It would have a stronger tendency to stimulate an undercurrent of sexual tension. I don't know how strong it would be, but it would be stronger than the other one.

Q. Are you familiar with the current use of motion pictures featuring pin-up girls and Petty girls? A. No.

4589 Q. Do you know what a pin-up girl is? A. No.

Q. Did you know that a Varga girl was put in this double-page spread for pin-up use? A. You mean to hang on the wall?

Q. Yes. A. I know some people do. I wouldn't have it on my wall; it would be very embarrassing. I know some people cut out Varga girls and hang them on the wall.

Q. I wasn't asking you what you do. I am asking if you are familiar with the present-day custom on the part of many people to pin these pictures up and they are called pin-up girls when they are pinned up. A. I don't know it is a custom. Some people do that. A custom means that

4590 a large part of the public does it, and I haven't made a study of how large a part of the public does it.

Q. Do you know many college girls and boys do it? A. I wouldn't say many—some.

Q. Do you know that many soldiers do it? A. Probably.

Q. I call your attention to three pages in Life magazine for August 9, 1943, pages 8, 9 and 11, and ask you if you recognize those three pages as examples of typical pin-up girls. A. I couldn't say that because I have not investi-

gated what type of pictures boys or girls hang up on the walls. I don't know. I have not made a study of that. 4591

It would be necessary for me to visit some college dormitories and some fraternity houses, rooms where they live and board, and then sum up my impressions, but I haven't done that, so I couldn't tell you.

Q. I see. Would you think that the picture of this pin-up girl, being Betty Grable, had a strong or a weak tendency to stimulate the undercurrent of sexual tension? A. I think definitely to stimulate sexually. I couldn't tell you how strong but it would be very definite.

You compare this girl and this girl and this girl (indicating) and these do not have any special sexual—but this one positively does. Look at the legs and the display of the buttocks and even the expression of the face, and the breast sticking out. 4592

Q. What do you say about this Ann Gwynne pin-up picture? Does that stimulate sex? A. Not very much. There is a little in the breast and perhaps the buttocks. This isn't an unusual type of picture. It is much more toned down than this one.

Q. What about the bottom one on page 10? A. I say the position in which she sits or lies down is suggestive.

Q. Definitely suggestive? A. It is quite suggestive. 4593

Q. Quite suggestive? A. Yes.

Mr. Bromley: Will you mark for identification this issue of Life for August 9, 1943?

(The issue of Life referred to was marked Respondent's Exhibit No. 136 for identification.)

Mr. Bromley: I offer Exhibit 136 in evidence.

Chairman Myers: This is on this same basis of

4594 just being to illustrate the doctor's standards of comparison?

Mr. Bromley: That is all, sir.

Chairman Myers: Admitted.

(Respondent's Exhibit No. 136 was received in evidence.)

By Mr. Bromley:

Q. Now, turning to Exhibit 51, being a double-page spread of pin-up girls already in evidence, will you tell me which
4595 of those, in your opinion, definitely stimulates the undercurrent of sexual tension? A. It is easier to pick out those that don't than those that do, because most of them do.

Q. Pick me out the ones that do—that's what I am interested in, even if that is greater in number. A. This one does (indicating).

Q. The top left-hand one on page 88? A. This one does (indicating).

Q. On the bottom right-hand on page 88. A. This one positively does (indicating).

Q. Bottom left-hand one on page 89. A. This one un-
4596 equivocally does.

Q. The right-hand one at the bottom of page 89. A. Quite suggestive (indicating).

Q. The top center one on 89.

Mr. O'Brien: Does the Board mind if I watch these pictures rather than having them passed back and forth?

Chairman Myers: I think that is the way to do it.

By Mr. Bromley:

4597

Q. What about these two at the top right-hand? A. This is quite suggestive (indicating). This is somewhat suggestive (indicating). I wouldn't consider this (indicating) at all, except this is vulgar rather than obscene.

Mr. Bromley: These are the double-page spread of the ones we had in evidence, typical British ones.

Chairman Myers: Is that the exhibit right there? You might designate the exhibit number so counsel will be able to find it.

Mr. O'Brien: It is Exhibit 51. 4598

Mr. Bromley: The ones that he said are suggestive are this one and this one and these three and this one and this one (indicating to Board).

By Mr. Bromley:

Q. Now, in Exhibit 89, which ones of these pin-up girls do you find possess sex stimulation for the beholder? A. I would say any picture that is attractively taken of an attractive woman would sexually stimulate. None of these are particularly offensive.

Q. What do you think about the exposure of the chest in 4599
the upper right-hand, the Rita Hayworth picture? A. Some, not particularly, not very much—nothing unusual about it.

Q. Over the page. A. I would say this one is definitely sexually alluring.

Q. Dorothy Lamour in the lower left-hand corner. Is that right? A. Is that her?

Q. That's her. A. The rest are not particularly offensive.

4600 Mr. Bromley: The one he points out is the Dorothy Lamour picture here.

Mr. O'Brien: It is the right-hand corner?

The Witness: No, it is the left-hand corner.

By Mr. Bromley:

Q. Now, finally, what can you say about this Ingrid, 1942 pin-up girl? A. I think this would be sexually stimulating. I don't see anything in that (indicating) at all.

Q. I am not asking about the right-hand panel, just the left-hand panel. A. I think it is sexually stimulating.

4601

Mr. Bromley: This I ask to have marked for identification, another pin-up girl from PM for September 22, 1943.

(The picture referred to was marked Respondent's Exhibit No. 137 for identification.)

Mr. Bromley: I offer in evidence—

Mr. O'Brien: If the Board please, I object to these if offered in evidence. I object to these or the cross examining of the witness on these and similar

4602 publications which show no resemblance in character or content generally to Esquire. It seems to me there is no point in the comparison if there is any comparison to be made.

Chairman Myers: It is only admitted for the standard of comparison and not as having any evidential value itself. It is admitted on that ground.

(Respondent's Exhibit No. 137 was received in evidence.)

By Mr. Bromley:

4603

Q. Have you gone on record, Doctor, at any time, publicly, as condemning the use of pin-up girls or present-day bathing suits or present-day advertising illustrations? A. No, except what I might have said today.

Q. Would you say that our current standards sanction the frequent use of girls' pictures which freely display the curves of the body and the outlines of the breasts and the bare legs and the thighs? A. I would say that in some situations it does. I wouldn't say all the way through. You are not likely to find it in society columns of women.

4604

Q. Of newspapers, you mean? A. Newspapers, for instance. I doubt if a society woman who considered her reputation would allow her picture to be taken in a bathing suit or show such a free use of her body as some of the Varga girls do.

So you have to qualify. In some places they don't. Some women do and some women don't.

Q. Well, hasn't there been a great change in the last twenty years, Doctor? A. Yes, I said so. It is a well-known fact.

Q. I call your attention, Doctor, to a series of pictures of Carole Landis appearing in Life for June 30, 1941, at pages 59 to 61, being Respondent's Exhibit 56, and ask you your opinion of those pictures, as to whether you think they create this sexual stimulus of which you have so frequently spoken? A. I think these do. (Indicating.)

4605

Q. Referring to the ones on page 59.

Turn to the next page, please, pages 60 and 61. Is your answer the same? A. I would say it is about the same, the position is rather almost vulgar and the same thing here (indicating).

Q. And on the next page? A. I don't see anything here,
4606 a little daring; a little bare leg, not much.

Q. In the pictures on the first page, 59, would you say those pictures display an over-emphasis of breast? A. No. It shows the breasts are covered, but the covering suggests the position, but I would say there is no over-emphasis.

Q. What about the rest? A. Here (indicating).

Q. In the top picture you say the top picture of Carole Landis illustrates what you call an over-emphasis of the breasts; is that right? A. Some over-emphasis. There are different degrees of over-emphasis.

Q. But this is the same emphasis? A. That is right. I
4607 don't see anything here (indicating).

Mr. Bromley: I want to show that top picture to the Board. That is what he meant by over-emphasis.

By Mr. Bromley:

Q. On the next page you have what you call again an over-emphasis of the buttocks? A. Yes.

Q. In many of these pictures you have that, haven't you? A. Here is one (indicating).

Q. You refer to the top picture on page 60? A. Yes.

4608 Q. And the others? A. This is not a particular modest way of lying down.

Q. You refer to the second picture on page 60? A. Yes. The poses are suggestive, that is all I can say.

Q. In the bottom picture? A. Yes, suggestive.

Mr. Bromley: He refers to the buttocks in that picture and in the bottom picture (indicating).

By Mr. Bromley:

4609

Q. In Respondent's Exhibit 58 we have heretofore made reference to a cover being a photograph of Rita Hayworth in a bathing suit. A. Yes.

Q. In your opinion, does that picture stimulate an undercurrent of sexual tension? A. Oh, yes. There is the breast and the nates here.

Mr. O'Brien: A little louder.

The Witness: There is the breast.

By Mr. Bromley:

4610

Q. And the thigh? A. What is that?

Q. The thigh. A. No. The buttocks, the thigh.

Q. And the navel? A. The navel.

Q. So, you say that there is definite sexual stimulation to be found in that picture, do you? A. I think so.

Q. Now, will you look at this two-page spread of Carmen D'Antonio dancing and tell me whether, in your opinion, that series of pictures would strongly stimulate, in your judgment, the undercurrent of sexual tension? A. I think it would by and large. The display of the legs, the display of the breasts, the suggestive position. This particularly 4611
shown by the bending, showing the buttocks and the thigh.

Chairman Myers: What is that exhibt?

Mr. Bromley: That is not yet in.

Will you mark this issue of Life for September 16, 1940, for identification?

(The document above referred to was marked Respondent's Exhibit No. 138 for identification.)

By Mr. Bromley:

4612 Q. Now, you realize, don't you, that that is a report on the performance of a night club dancer? A. That is right.

Q. You refer particularly to again the thighs, the legs, the buttocks, the navel and the breast, do you? A. That is what they emphasize in all night clubs, don't they?

Q. Yes. A. What do you go to night clubs for?

Q. I go to eat. What do you go for? A. Oh, there are lots of restaurants.

Q. Now, which pictures do you say are particularly objectionable in this one? A. I would say this particular
4613 one (indicating).

Q. The left hand one at the top? A. Yes.

Q. And the right hand one, page number 59? A. Yes, and this one (indicating).

Q. And the one right underneath it on page 59? A. That is right.

Q. As a matter of fact, Doctor, I take it from what you just said to me, that you would find most musical comedies and most night club floor shows to be sexually stimulating to most people? A. To the—

Mr. O'Brien: Now, just a minute. I don't know
4614 whether the Doctor has seen most night clubs or most musical comedies or whether he is acquainted with the contents of them.

Chairman Myers: Well, he would say so if he hadn't.

Mr. O'Brien: Well, the way counsel is asking the question I don't think he gives the witness a chance to say what he wants to say.

The Witness: Will you read the question?

Chairman Myers: Read the question to him, Mr. Reporter. See if he understands it. 4615

(Question read.)

The Witness: I think most people that go over there go for the purpose of stimulation.

By Mr. Bromley:

Q. And, therefore, in your judgment they are sexually stimulated? A. I would say most of them suggestive anyway.

4616

Mr. Bromley: I want to show the Board these pictures.

Chairman Myers: Are you offering them in evidence?

Mr. Bromley: Yes.

Mr. O'Brien: The same objection.

Chairman Myers: The same ruling. They are admitted.

(The document heretofore marked Respondent's Exhibit No. 138 for identification was received in evidence.)

4617

Mr. Bromley: Will you mark for identification an issue of Life for January 6, 1941?

(The document above referred to was marked Respondent's Exhibit No. 139 for identification.)

By Mr. Bromley:

4618 Q. In Exhibit 139 for identification at page 19, what is your opinion of the picture therein displayed? A. I think it is sexually suggestive.

Mr. Bromley: I offer it in evidence.

Mr. O'Brien: Same objection.

Chairman Myers: Same ruling. It is admitted.

(The document heretofore marked Respondent's Exhibit No. 139 for identification was received

4619 in evidence.)

Mr. O'Brien: I think too, Mr. Chairman, that this whole line of cross examination has been pursued with sufficient length to establish what counsel had in mind.

Chairman Myers: We will let him proceed.

By Mr. Bromley:

Q. Now Doctor, pictures such as these I have shown you are found generally in magazines of current circulation, 4620 are they not? A. I wouldn't agree with your statement. You say are found generally in magazines of current circulation. You haven't shown me all the pictures that are found in all the journals. I don't know whether this represents 25 per cent of the pictures or five-tenths of one per cent. You have been very selective in your treatment of these people; you have picked out pictures that particularly suited your purpose in your cross examination. I haven't seen the hundreds and thousands of pictures that are in all the magazines.

Q. Yes, there are a great many other pictures, Doctor, in the magazines. I wanted to find out whether, in your judgment, these pictures such as I have shown you were not uncommonly being published. A. I don't know whether they are uncommon or not. 4621

Q. You don't? A. If you will make a statistical study of all the pictures that are found in Life for the last six or seven years of its publication and then pick out the so-called sexually stimulating pictures and make a comparative study and show me whether it shows 90 per cent or 9 per cent or 10 per cent, then I could answer you.

Q. Are you familiar with magazines such as Life? A. Yes. 4622

Q. And Colliers and Time? A. More or less.

Q. More or less? A. Yes.

Q. Then you know that the pictures which I have shown you from Life are fairly representative of lots of pictures, don't you? A. I don't think so. It is not my impression; you have been very selective in your choice here.

Q. Don't you know that every issue of Life has a theatrical review or a night club spread? A. I don't think so; they are not all selective of the type of picture you have shown me.

Q. Well, I will show you Life for July 5, 1943. Respondent's Exhibit 9, and ask you your opinion of the page beginning at 86 and running over to 90 in connection with the article entitled "Bare Legs". 4623

What about the picture on page 86? Does that stimulate the undercurrent of sexual tension? A. I think it will attract physical attention.

Q. Well, does it have sexual stimulation about it? A. It has a sexual connotation, I would say.

Q. What about the picture of the girls with their legs up in the air on page 89? A. I think it is bad.

Q. Bad? A. Yes.

4624 Q. You think that stimulates sexual thoughts? A. Not only that, but it is both sexually stimulating as well as vulgar, I would say.

Q. What about the picture on page 90? A. You mean this (indicating)?

Q. Yes, the top. A. It is a rather suggestive pose, but I wouldn't go any further than that.

Q. In Respondent's Exhibit 113, I show you a series of 12 Varga girl pictures and ask you if you find anything in any one of them which would stimulate this undercurrent

4625 of sexual tension? A. I don't think this would. There is nothing there.

Mr. O'Brien: Now, Mr. Bromley, he is saying "I don't think this would". They are marked by months.

By Mr. Bromley:

Q. Well, will you look at that, Doctor? A. Yes.

Q. And tell me whether you have the same opinion with respect to these 1942 Varga calendar drawings as you testified with respect to the January, 1943, Varga calendar drawings? A. I would ignore the January picture. I think the

4626 first reaction that anyone would have to that would be "Oh, boy", I think it is definitely sexually stimulating.

Q. That is February, is it? A. Yes.

Q. What about March? A. That is suggestive.

Q. What about April? A. It is more suggestive.

Q. And May? A. Very suggestive.

Q. And June? A. I would say suggestive.

Q. And July? A. Bad.

Q. By the way, you find that the picture of a girl with

this white bathing suit on is much worse than the girl with nothing on at all, do you? A. Yes. People as a rule are attracted to something that is a little bit concealed so their imagination plays around that: if they see something naked, it doesn't make the same impression on them. 4627

Q. I don't understand you, Doctor. You mean the more clothes the more suggestion? A. No. If there is just a little bit of clothes, just enough to cover but you can see through the clothes, the outlines of certain parts of the anatomy, it creates, it acts more of a stimulus than one entirely naked.

Q. You can't see through this white bathing suit, can you? A. I can see the outline of the breasts. 4628

Q. Well, you could see the outline of the breasts in any article of clothing, couldn't you, that fitted with a reasonable degree of snugness? A. Not necessarily.

Q. What about a sweater? A. You don't see much of the outline there.

Q. You don't see much of an outline of the breast in a sweater? A. Not necessarily. You may. Some girls draw it very tight and some girls wear it loose.

Q. What do you say about the August? A. I would say very suggestive.

Q. September? A. Also very suggestive.

Q. October? A. I can't find a word for it; it is bad, anyway. 4629

Q. November? A. That's suggestive. I would say it is suggestive.

Q. Your finger lingered over the crotch and the chest. Is that it? A. That is right.

Q. You mean to point them out? A. Yes.

Q. That woman has a full white evening gown on, hasn't she? A. I would offer this—is this a part of an evening gown, here (indicating)?

4630 Q. What do you think it is? A. I think it shows something of the pubic region to me, doesn't it?

Q. It shows something of the pubic region? A. Yes.

Q. What about December? A. I think it is suggestive.

Q. December is nothing but a typical ordinary ballet costume such as any dancer in any ballet in any theater in the world would appear in, isn't it? A. That may be.

Mr. O'Brien: Just a minute. Has the witness been told that or is he asked to agree with that?

Chairman Myers: I think it is just a statement.

4631 The Witness: It is just my opinion.

By Mr. Bromley:

Q. Yes? A. What?

Q. You said "Yes"? A. Yes.

Q. Look at this Sultan cartoon for March, 1941. Do you find anything sexually stimulating in that Sultan cartoon?

Mr. O'Brien: What exhibit number is that?

Mr. Bromley: Exhibit 103.

The Witness: I don't see very much. It suggests that it is not an easy thing to get these girls through

4632 a British blockade, but I wouldn't say it is particularly suggestive as a whole.

By Mr. Bromley:

Q. You would say it is not an easy thing to get the girls through the British blockade? A. Yes.

Q. Is that your opinion with respect to the cartoon from the April, 1941, issue, Exhibit 104? A. It suggests a woman

for sale and to that extent it is suggestive, but I wouldn't go beyond that. 4633

Q. Would you say that any textual reference to the custom of selling women was likewise mildly suggestive? A. I think so, because even in our society some women are for sale, as it were, I mean the sex part is for sale, and it brings up a suggestion which is likely to linger.

Q. That is, you think it is bad taste? A. That is right, bad taste.

Q. Now, in July, 1941, at page 62, Exhibit 107, there is nothing to object to in that Sultan cartoon, is there? A. I don't see nothing there. 4634

Q. And in the Sultan cartoon for October, 1941, Exhibit 110, again there is nothing to object to; is there? A. Nothing particularly.

Q. And in the Sultan cartoon for December, 1941, page 63, Exhibit 112, there is nothing to object to, is there? A. Yes, there is some suggestion there. First of all, the picture itself is suggestive. I mean the female body, the outline of the breast, the waist, the navel, the slit, the position of the legs, and then the appended sentence here: "I have a friend who can get one for me wholesale," suggesting again the buying of a woman, which is not in very good taste.

Q. And this one from June, 1942, "Have you got that one in a size larger?", Exhibit 118? A. I would say this is bad. I mean, the titling is bad. It looks as if not only sex is for sale, but they are even speaking of sizes and quantities, as if it was a piece of chattel to be thrown about here and there. 4635

Q. Here again you think it is bad because it refers to the custom of selling women, is that right? A. That is right, which is all right in Oriental countries, but we have not adopted it here.

Q. And, therefore, we shouldn't speak of it or write of
4636 it? A. I don't think it would be acceptable in this country.

Q. Is it acceptable to write about it, Doctor? A. I wouldn't.

Mr. O'Brien: I object to that question. In what way? I ask that the method of writing be described. You can write about a thing in a thousand ways, statistically and otherwise.

The Witness: I wouldn't write. I wouldn't undertake for anything to write about it because I have a certain respect for womanhood and I don't want to
4637 degrade myself by degrading them and speaking of them in terms of chattels being sold, just like a dog is being sold, a certain breed. I think it is bad taste, very bad.

By Mr. Bromley:

Q. What is your opinion, Doctor, as to the sexual stimulation or lack of it complained of in this picture which I show you?

Chairman Myers: What exhibit is that?

4638 Mr. Harding: 85.

The Witness: It outlines rather suggestively the body, the body form, but outside of that I don't see very much.

By Mr. Bromley:

Q. Do you think it is suggestive? A. Very mildly, very mildly.

Q. Will you read the text which appears at the side of it?

Read it out loud. A. (Reading): "Now, in front of the looking glass she tardily untied the ribbon of her nightgown and let it slip to the floor." 4639

Q. Now, what does—what is your opinion of the page? A. It still doesn't suggest much to me.

Mr. O'Brien: I still don't hear you.

The Witness: It still doesn't suggest much to me. With this explanation it becomes more suggestive because a person looking at the picture without the description will probably not get half of it, but with the description it becomes a little more obvious. I would say it is mildly suggestive. 4640

By Mr. Bromley:

Q. You would say that is mildly suggestive? A. I would say that is mildly suggestive.

Q. You would say that is mildly suggestive? A. Yes.

Q. And now, Doctor, I show you a picture on page 77 of this magazine and ask you whether that is suggestive, in your opinion?

Chairman Myers: What exhibit is that?

Mr. Bromley: That isn't in yet. 4641

Mr. O'Brien: What magazine, please?

Mr. Bromley: That is the Reporter magazine.

The Witness: I think it is suggestive. There is the breast covered and it brings to mind the breast, the navel, the slit here, the thigh. I think it is suggestive, definitely so.

Mr. Bromley: Will you mark this issue of Reporter for July, 1943, for identification, please?

4642 (The document above referred to was marked Respondent's Exhibit No. 140 for identification.)

Mr. Bromley: I offer in evidence this exhibit.

Chairman Myers: How many more do you have?

Mr. Bromley: This is the last one.

Chairman Myers: All right. It will be received on the same basis. The same objection and the receipt is on the same basis.

4643 (The document heretofore marked Respondent's Exhibit No. 140 for identification was received in evidence.)

By Mr. Bromley:

Q. Now, Doctor, you have not studied these eleven issues except the part on the complained of material which you have indicated, have you? A. No, I have gone through a lot of it that was not complained of.

Mr. O'Brien: What is the answer?

The Witness: I have gone through a lot of it that was never mentioned in these citations.

4644

By Mr. Bromley:

Q. Have you read the whole magazines? A. No, I just glanced through.

Q. And I take it, therefore, that you could not pass an opinion as a fair minded man upon any one of these issues as a whole without having read them? A. I would say so. As a whole—you are not talking about the parts?

Q. No. A. If you ask about the particular pictures I can give an opinion as to that particular picture. 4645

Chairman Myers: A little louder, Doctor.

The Witness: If you ask about the particular pictures, I can give an opinion as to that particular picture. But I would not commit myself as to the issues as a whole.

It may be that 99 per cent is perfect. Again, 50 per cent may be good and 50 per cent bad, and then the position might be reversed. I only commented on that, in the main, which was cited. 4646

Mr. Bromley: That is all.

Chairman Myers: Have you any questions?

Mr. O'Brien: Just a couple.

Chairman Myers: And you have an exhibit you want to put in.

Redirect Examination by Mr. O'Brien:

Q. Doctor Karpman, would the fact that the discussion of the sale of women for sex purposes or a cartoon and text indicating that was the subject being treated, was the subject of the cartoon and text, would the fact that that appeared in Esquire rather than in a serious sociological or other news magazine, have anything to do with the interpretation which the reader might place upon such matter in Esquire? A. I don't know that I can say about other readers. My reaction for the most part would be all the same no matter where it appeared. 4647

I mean, taking it by itself. If I were to see that in a journal like the New Republic I would be very much puzzled as to what purpose the New Republic had in putting it there, but seeing it in Esquire, it seems to be in its proper place.

4648 Q. Why? A. Because that is the type of picture they often put in.

Q. What type? A. I mean the type that would appeal to the gross or physical, or physical aspects of sex.

Q. Now, Doctor, you have been shown a number of magazines and other publications and a number of pictures of women on cross examination by Mr. Bromley, and he has asked you numerous questions about them. Has your cross examination changed your mind in any respect as to the opinion you expressed on direct examination concerning the various Varga girls in the January to November 1943 issues of the magazine which I showed you? A. No, it has
4649 not changed.

Q. When you speak of sexual stimulation, Doctor, afforded by the Varga girls in the pictures which I showed you, did you or did you not mean that that sexual stimulation included the obscene and the indecent thought? A. Yes, it did.

Mr. O'Brien: That is all.

Recross Examination by Mr. Bromley:

Q. You consider, do you, Doctor, any sex stimulation
4650 obscene, then? A. No. It all depends on the situation, the setting, and so on. For instance, if you see a dance going on with many couples dancing and women in evening gowns, some of them pretty well exposed, you are just an observer, I would say that this would be sexually stimulating, but it wouldn't be something that would be offensive because it is in a setting that is accepted and it is proper and not much fuss made about it; on the other hand, if you go to a night club and you see a large number of women going on the

stage and displaying their shapely ankles, their buttocks, and their breasts, making a special appeal in that respect, then that is a different proposition. 4651

Q. Well, is it obscene? A. I would say, in my mind.

Mr. Bromley: That is all.

(Witness excused.)

Chairman Myers: The next witness.

Mr. O'Brien: Well, I forgot to offer this exhibit showing the picture of Joan Leslie that I referred to.

Mr. Bromley: No objection. 4652

(The picture referred to, marked Department's Exhibit 63, was received in evidence.)

Mr. O'Brien: Mr. Myers and gentlemen of the Board, we had expected a witness on here this afternoon before this time but he is tied up with some official duties and I haven't been able to secure another one to take his place. In fact, I can't get anyone before tomorrow. We can start tomorrow if that meets with the wishes of the Board.

Chairman Myers: Well, that means we will have to resume tomorrow morning. 4653

Mr. O'Brien: I am sorry, but that is the only thing I can do. As I stated before, it has been difficult for us to get our witnesses on time.

May we meet at 10:00 o'clock tomorrow morning so the witness can get a chance to get down from his office?

4654 **Chairman Myers:** Couldn't you make that 9:30?

Mr. O'Brien: I am afraid I couldn't. I don't want to make this promise and then keep you all here.

Chairman Myers: I want to get this case out this week.

Mr. O'Brien: I want to make our presentation as brief as possible.

Chairman Myers: Suppose we adjourn until 10:00 o'clock tomorrow morning.

Mr. O'Brien: Thank you.

4655 (Whereupon, at 2:30 o'clock p. m., the hearing was adjourned until Thursday, November 4, 1943, at 10:00 o'clock a. m.)

4656

HEARING OF NOVEMBER 4, 1943.

4657

PROCEEDINGS RESUMED.

Chairman Myers: Are you ready to go ahead?

Mr. O'Brien: Yes, sir.

Chairman Myers: All right. Go ahead.

Mr. O'Brien: Doctor Cartwright, will you take the stand, please?

JOHN KEATING CARTWRIGHT a witness called by and on behalf of the Post Office Department, being first duly sworn, 4658
was examined and testified as follows:

Direct Examination by Mr. O'Brien:

Q. Will you state your full name for the record, please? A. John Keating Cartwright.

Q. Where do you live, Doctor? A. At the Rectory of the Church of the Immaculate Conception, 1315—8th Street, Northwest.

Q. You are pastor of that church, are you? A. I am.

Q. Will you state to the Board, please, what education you have had, Doctor? A. Well, I have had the usual profes- 4659
sional education for the Catholic priesthood. Four years of college and four years seminary course in Rome at the American College.

Q. What degrees do you hold? A. Ph. D. and S. T. D.

Q. You are a Doctor of Philosophy, and what is S. T. D.? A. Doctor of Theology; Doctor of Sacred Theology.

Q. In the course of your theological education have you studied subjects relating to psychology or metaphysics as part of your course? A. Well, we have a course in all of our

seminaries; we have a course in philosophy which embraces
4660 different sections and one, of course, is in psychology.

Q. Now, since your ordination, would you tell us when that took place, Doctor? A. 1916.

Q. Have you been actively engaged in dealing with the pastoral problems of the congregations? A. Yes. All during that time I have been in actual pastoral work, That is, first as an assistant, of course, and in the last ten years as pastor in the church.

Q. Does that bring you in contact with average normal people living in various— A. Oh, yes; hundreds of them all the time.

4661 Q. And do they bring you, in the course of your duties as a clergyman or pastor, their various problems arising from their lives, including, of course, problems relating to sex and morals? A. Oh, yes, we have frequent occasion to know about those problems.

Q. Yes. Now, at the present time, Doctor Cartwright, will you tell us what activities outside of your pastorate you are engaged in in Washington? A. Well, I am assistant professor of pastoral theology at the Catholic University. I have taken an active interest in literature, particularly insofar as it concerns religion and morals in the directorship of what is known as the Critics Forum.

4662 We had a meeting of that Forum at the Mayflower Hotel last night with 700 people present, and we discussed the books of current interest from the point of view of religion and morals in those Forum meetings.

Q. You usually make those reviews? A. Not always. I made it last night. I am director of the Forum and have to choose the books and know a great deal about them before they are reviewed.

Q. Do you have any connection with George Washington University? A. Not a direct connection. I am a director of the Catholic Students Club, called the Newman Club, and have been for twenty years. 4663

Q. Now, Father Cartwright, have you at my request examined certain issues of the publication called Esquire from January to November, 1943, inclusive? A. I did.

Q. And have I pointed out to you various items in these several publications which were under consideration before the Board of the Post Office Department, and requested you to express an opinion on them? A. You did.

Q. Yes, Father. Will you tell this Board whether in your opinion the publication as a whole is decent or indecent? A. I consider the general tendency of the publication to be indecent. 4664

Q. What effect do you think the reading of the publication, particularly with reference to the items mentioned, would have upon the average susceptible mind with respect to morals? A. I think it has a tendency to discourage low views and low ideas of women.

Mr. O'Brien: May the answer be read back? I think he said "discourage".

The Witness: To encourage low ideas of women. 4665

By Mr. O'Brien:

Q. In what respect do you use the phrase "low ideas"? A. I mean indecent and sexual ideas.

Q. Do you think, Father, that the matter which you have considered here is proper matter for public information and public dissemination? A. No, I don't. I don't think that kind of thing needs any encouragement.

4666 Q. What have you to say about this matter of sex education? A. I think it has a great tendency to discourage the efforts being made by decent agencies to build up fine ideas of these subjects.

Q. As to the tendency of literature of this type and sophisticated items, is there any great authority who has made a study of it whose word or estimate or appraisal you could quote? A. I think there has been a tendency—

Mr. Bromley: Just a minute. I object to that question as incompetent and immaterial.

4667 Mr. O'Brien: I think a witness, particularly of this category, has a right to quote an authority in support of his own views.

Chairman Myers: Oh, let him answer the question.

The Witness: I think people are disturbed about the increase in this particular kind of literature and the increase in what might be called its apparent respectability, and I have in mind the statement of John Buchan, Lord Tweedsmuir, who spoke of the people who are contributing to this kind of literature as vicious children who are trying to pick the mortar out of the foundation of society.

4668 I think that is a good definition of the kind of thing attributed to this type of magazine. The efforts being made by the decent and constructive element in society are being negated by this kind of alleged literature.

By Mr. O'Brien:

Q. In order to make the record specific in this matter I want to ask you if those are the magazines or similar magazines and these are the lists of items which were exhibited

to you for your examination (indicating magazines), and just to make it clear what we are talking about here, I show them to you. A. Yes, they are; from January to November, 1943. 4669

Mr. O'Brien: And these are the same items, so this will be clear for the record, that are specified in the proceeding and which have already been discussed by numerous other witnesses.

Your witness.

Cross Examination by Mr. Bromley:

4670

Q. Were you aware, Father Cartwright, that the Catholic Digest frequently reprints matter from this magazine? A. No, I am not.

Q. You never knew it? A. No.

Q. What is the Catholic Digest? A. The Catholic Digest is a monthly magazine which appears—which brings in—it is in analogy with the Readers Digest except that it reprints or brings in matters supposedly of Catholic interest.

Q. You think the Catholic Digest would reprint articles from a magazine, the general tendency of which was indecent? A. I think if it did it used very bad judgment.

Q. But, you didn't know that before? A. No. 4671

Q. Do you know Father Flannagan? A. Yes.

Q. You wouldn't call Father Flannagan one of these vicious children that you referred to? A. No.

Q. Would you? A. Oh, no.

Q. Did you know that he was a contributor to Esquire? A. Again, I wouldn't agree with his judgment if he was.

Q. Did you know he was? A. No, I didn't know it.

Q. Now—

4672 Mr. O'Brien: Let us get this clear. Is the witness being asked on the stand if Father Flannagan contributed any of these articles to which I assume his testimony refers, or some other articles of some other kind unrelated to sex?

The Witness: I would like to say, of course, from this particular survey of these magazines, there is evidently a great deal of other material in them.

By Mr. Bromley:

4673 Q. And some of it is very fine material, would you say, Father? A. I wouldn't call any of it fine material.

Q. Did you read everything in the January issue? A. No.

Q. You didn't? A. No.

Q. Yet you sit here and utter an opinion about the January issue as a whole, do you? A. No. I think the general tendency of the magazine is clear from an examination of eight or nine copies of it.

Q. Well, how much of an examination did you make? A. Well, I made a thorough examination of it the other day.

Q. You did? A. Yes.

Q. How long did it take you? A. Oh, possibly an hour.

4674 Q. For the whole eleven issues? A. Yes. You don't need to read it all. It wouldn't take you an hour to take twenty copies of the Atlantic Monthly to see what its general character would be.

Q. You only took sixty minutes on these eleven issues? A. I thought that was an ample time to form an opinion on it.

Q. Then, Father, you only took sixty minutes on it? A. Yes.

Q. That is all? A. No, I wouldn't say that is all. That

is all I took on these particular magazines. I have seen this thing before; it is on display in lots of waiting rooms. 4675

Q. I am talking about the eleven issues. A. Yes.

Q. Did you read any of the nine articles in the January issue? A. I don't remember. I remember a good part of one article in the May issue, I think it was in the May issue, by Gallico.

Q. The burlesque article? A. Yes.

Q. Did you read any of the seven pieces of fiction in the January issue? A. No, I don't think so.

Q. Is it true that the only article that you read out of the eleven issues was the Gallico article on burlesque? A. 4676
No, I looked over the others.

Q. I want to know how many you read in their entirety. A. I didn't read any in its entirety.

Q. Is your opinion, Father, of a magazine like Life the same as you have here expressed about Esquire? A. I didn't come prepared to testify on other magazines, sir.

Q. Are you familiar with Life, Father? A. I see it from time to time, yes.

Q. It is a fact, isn't it, that your opinion about Life is the same as you have here expressed about Esquire? A. I don't know as I care to go into it.

Q. I don't know if I asked you to. A. I came prepared 4677
to—

Mr. O'Brien: I object to this line of cross examination. It seems to have nothing to do with Esquire, what similarity is there?

Mr. Bromley: It seems to me it bears on the issue directly.

Mr. O'Brien: Life does not print fiction and articles; it doesn't print any such articles like that found

4678 here. It doesn't resemble Esquire except it is printed on paper and has pictures.

Mr. Bromley: It is material.

Chairman Myers: It is part of cross examination.

Mr. O'Brien: Cross examination, I assume, within some limit, decent limitation.

Mr. Bromley: I certainly did not mean to be indecent.

By Mr. Bromley:

4679 Q. Would you mind telling us, Father, if your opinion of Life is substantially the same? A. Not substantially the same, no. I think that Life makes many errors in the kind of material it presents. I don't think its main tendency is the same as this.

Q. But it has some tendency? A. It has a tendency in that direction.

Q. What would you say about the New Yorker magazine? A. I think something more or less along the same line I said about Life.

Q. You deplore that tendency, don't you? A. I deplore that tendency, yes.

4680 Q. You think it is bad for the people as a whole? A. I think it is bad, yes.

Q. Are you familiar with what we have referred to here as the N. O. D. L. list? A. The N. O. D. L. list?

Q. Yes. A. No.

Q. You don't know anything about them? A. What does that mean?

Mr. Harding: The National Order of Decent Literature.

The Witness: The National Order of Decent Literature, no; I am not familiar with them. 4681

By Mr. Bromley:

Q. Did you ever hear of a publication called the Acolyte? A. Yes.

Q. Where does that originate? A. What?

Q. Where does that originate? A. It is one of our Catholic papers, I forget where it is printed; I think in the Middle West.

Q. Don't you know that that regularly publishes the Code for Clean Living, a list of books which are prescribed to be read in the main? A. I am not familiar with the paper. I don't see it very often. I know that it exists. 4682

Q. You have seen it, Father? A. Yes.

Q. I show you Respondent's Exhibit 17-A, which purports to be the Acolyte for January, 1943, and ask you whether you do not recognize that? A. What about it, sir?

Q. Have you read the code? A. Yes, I just looked it over.

Q. Do you agree with it? A. No. It says—I think it is carelessly worded. It says, "All periodicals are listed which glorify or condone reprehensible characters or reprehensible acts."

I doubt if all periodicals are listed. I think he might say that all the periodicals listed glorify or condone, but I don't think he should say "All periodicals are listed which glorify or condone." 4683

Q. That list that you have before you, Father, is the list of magazines disapproved by the National Organization for Decent Literature, isn't it? A. I don't know anything about this organization except what you have just told me.

Q. Look at Respondent's Exhibit 17-B for identification.

4684 Do you see that is entitled "Magazines disapproved by the National Organization for Decent Literature"? A. I see that.

Q. Do you know Bishop Noll of Fort Wayne, Indiana? A. Yes.

Q. Do you know his connection with the National Organization for Decent Literature? A. I have not heard of the National Organization for Decent Literature very much. Under that title it doesn't come back to me.

Q. Do you know his connection with the Acolyte? A. He is connected more with the Sunday Visitor. I didn't know
4685 he was directly connected with the Acolyte. However, he may be. I am not very familiar with the Acolyte.

Q. You didn't know that the National Organization for Decent Literature had an office here in Washington? A. No.

Q. Have you ever been in the National Catholic Welfare office? A. Oh, yes.

Q. You have never seen the N. O. D. L. office? A. No.

Q. And don't know anybody connected with it? A. No. May I say I noticed among other things it says that "This list is neither complete nor permanent."

Q. That is true. They publish a list every month. We have all the lists here for 1943. Would it surprise you to know
4686 that Esquire was never on such a list? A. It doesn't surprise me a bit.

Q. Now, you are familiar with Our Sunday Visitor, aren't you? A. Yes, sir.

Mr. O'Brien: Just a minute. There is no such testimony in this case and I don't think any such testimony is proper in this record, that Esquire was never on the N. O. D. L. list.

Chairman Myers: This testimony, as I get the fact,

is that the witness has testified as an expert and he is asking a question on his opinion. 4687

Mr. O'Brien: But to ask a question not based on testimony already in the record is meaningless and improper.

Chairman Myers: He is asking about exhibits in the record.

Mr. O'Brien: He said, "Would it surprise you to know that the Esquire was never on the N. O. D. L. list?" There is no such testimony in this record. The question could not be based on any evidence.

Chairman Myers: It goes to the opinion of the witness. Overruled. 4688

Mr. O'Brien: It can't go to the opinion of the witness, Mr. Chairman, when there is no fact upon which to base it.

Chairman Myers: The objection is overruled.

Mr. O'Brien: Exception.

Chairman Myers: You may have it.

By Mr. Bromley:

Q. This paper, the Sunday Visitor, published in Huntingdon, Indiana, is a reputable Catholic paper, is it not? A. Most certainly. 4689

Q. And the director is the Reverend John Francis Noll, to whom I have referred? A. Yes, sir.

Q. And John Francis Noll is a bishop, isn't he? A. Yes, sir.

Q. Would you agree with the statement in this paper for November 7, 1943, as follows: "Those psychiatrists who are followers of the late Sigmund Freud glorify rather than denounce shamefulness. They believe in feeding the mind on

sex and directing the reader not away from sex but toward it."

Mr. O'Brien: I object to that question. It has no relation to the direct examination. We didn't bring in psychiatrists in any way. It is totally improper.

Chairman Myers: The objection is overruled.

Mr. Bromley: Do you carry the question in your mind?

The Witness: Will you read the statement again, please?

By Mr. Bromley:

Q. Do you agree with the statement:

"Those psychiatrists who are followers of the late Sigmund Freud glorify rather than denounce shamefulness. They believe in feeding the mind on sex and directing the reader not away from sex but toward it." A. I think a great many of them do.

Q. Well, that is a characteristic of the Freudian school of thought, isn't it?

Mr. O'Brien: I again object. Why is this witness being asked about the Freudian school of psychiatry? Nobody has appeared here who is a member of the school.

Chairman Myers: I don't see your point.

Mr. O'Brien: Why is he asked about the Freudian school of psychiatry any more than about those doctors?

Chairman Myers: The witness is an expert witness, he has qualified as such, and has given reasons—

Mr. O'Brien: Not on psychiatry.

4693

Chairman Myers: As I understand it, this is directed to test those reasons. This is directed to a piece in the exhibits. It is directed to the opinion of the witness. Hasn't the cross-examining attorney the right to find out what the opinion is based on?

Mr. O'Brien: This is not the proper way to do it.

Chairman Myers: I can't tell the attorney how to do it. The objection is overruled.

Mr. O'Brien: I think it is a scandalous procedure.

Mr. Bromley: Will you read the question, please?

4694

(Pending question read, as above recorded.)

Chairman Myers: If he knows. If he doesn't know, he can say so.

The Witness: I would think that a great many of the followers of Freud—I can't say for all of them—attempt to glorify sex unduly—sex understood in this particular sense—and they are not aware of the dangers implicit in it. I can't answer for the whole school.

Freud is represented not only by competent psychiatrists, but by literary people who are attracted by his theories because they are a little more sensational.

4695

By Mr. Bromley:

Q. Most followers of Freud agree with him that sex is to be found in everything?

Mr. O'Brien: There is no basis for any such question, if Your Honor please.

4696 Chairman Myers: I got the impression that the witness stated as one of his qualifications that he had studied psychiatry.

Mr. O'Brien: As a part of philosophy, but he didn't say anything about psychiatry.

Chairman Myers: There is a question as to whether Freudian theories are psychiatric or psychological. The objection is overruled.

Mr. O'Brien: There has been no statistical study testified to about most followers of Freud. There is no basis for asking Father Cartwright what they think.

4697 Chairman Myers: The witness can say he doesn't know if he doesn't know.

Mr. Bromley: Will you read the question?

(Question read as above recorded.)

The Witness: I don't like the word "most" because I cannot say that I have read most of the followers of Freud. I think a great many do.

Mr. Bromley: That is all. Thank you, sir.

Mr. O'Brien: That is all, Father Cartwright.

(Witness excused.)

4698 Mr. O'Brien: May we have a short recess?

Chairman Myers: We will recess for ten minutes.

(At this point a short recess was taken, after which the hearing was resumed, as follows):

Chairman Myers: Come to order, gentlemen.

Peter Marshall—for Post Office—Direct.

PETER MARSHALL, called as a witness by and on behalf of the Post Office Department, being first duly sworn, was examined and testified as follows: 4699

Direct Examination by Mr. O'Brien:

Q. State your full name for the record, please, sir. A. Peter Marshall.

Q. And where do you live? A. 3100 Cathedral Avenue.

Q. What is your profession? A. I am a minister of the New York Avenue Presbyterian Church.

Q. And would you state to the Board, Dr. Marshall, where you were educated and what degrees you received? A. 4700
The first part of my education I received in Scotland, studying engineering at a technical college, coming to this country 16 years ago, education in Columbia Theological Seminary in Atlanta, Georgia, and I have been in Washington six years.

Q. You have a degree in divinity? A. Bachelor of Divinity, from Columbia Theological Seminary.

Q. Dr. Marshall, as pastor of this church in Washington—which I understand is the church that used to be attended by Abraham Lincoln, an old, well-established church—is that right? A. That is correct.

Q. Do you come in contact with members of the congregation, the young people especially? A. I do. 4701

Q. Have you any special work with the young people? If so, will you tell us what it is? A. I have been interested in and particularly active in young people's work all through my ministry; young people's summer conferences and retreats, and I have been on many campuses in colleges conducting services in connection with religious emphasis weeks, and so on.

I should say that the majority of my ministry, or most of my ministry, has been with young people.

4702 Q. Before you became a minister of the Gospel, Dr. Marshall, when you first came to the United States, did you have an opportunity in your occupation at that time to circulate among men and to learn from personal conversation and contact how they think and react to various things? A. Well, I had been for six years employed in machine shops, in iron and machine manufacturing plants in Scotland; coming to this country, I had a year with some of the largest newspapers in the South. I have dug ditches in New Jersey.

Q. Now, Dr. Marshall, at my request did you examine several issues of the magazine known as Esquire? A. I did.

4703 Q. Which I showed you? A. Yes.

Q. Each one of which bears a list of the various items to which your attention was called, by page number and description; and did I ask you if you would study and examine these magazines and form an opinion? A. You did.

Q. Upon them? A. You did.

Q. You did that, did you not, Doctor? A. I did.

Q. I would like to ask you, Doctor, if you will state for the Board's information what is your opinion as to whether the items in Esquire are of a decent or indecent character? A. It is my opinion that the articles and pictures to which my attention was drawn are definitely in-

4704 decent.

Q. Do you think they would have any effect upon the morals of readers addicted to reading this type of literature? A. It is my opinion they would.

Q. What effect? A. An effect calculated to lower moral tone and to degrade.

Q. Did you notice some items which you mentioned with respect to satires or jokes upon virginity or marital fidelity? A. I did. I did in particular notice these and formed the impression that the tendency of such jokes, articles, and

pictures is to circulate the impression that virginity and chastity is a thing to be joked about and that its absence is prevalent and widespread, and would tend to suggest to the reader of the magazine that it is now not only smart and sophisticated but it is commonplace. 4705

Q. Would you consider, Dr. Marshall, that the contents of these magazines to which your attention has been called are information of a public character proper for dissemination to the public? A. I can't see how such information can add anything to public enlightenment or can make any contribution to public morals.

Mr. O'Brien: That is all. 4706

Cross Examination by Mr. Bromley:

Q. When did you first see the eleven issues? A. These particular issues in question I think were examined by me—I don't remember exactly when—last week, I think.

Q. How long a time did you spend looking at them? A. I imagine I spent an hour or more.

Q. Was that the extent of the examination which you accorded them? A. This particular collection, yes. I am not a regular reader of Esquire but I have perused several issues of it over a period of years. 4707

Q. I was concerned with those eleven issues. Your examination of them was limited to about an hour, was it? A. More or less. I didn't time my arrival and my departure.

Q. I want your best estimate. A. I should say about an hour or an hour and ten minutes, probably.

Q. You think the tendency of jokes ridiculing virginity and chastity—

4708 Mr. Cargill: Will you speak loud enough so we can hear you?

Mr. Bromley: Withdrawn.

Q. You deplore jokes ridiculing chastity wherever found don't you? A. I certainly do.

Q. You would deplore them even if they were in the Ladies Home Journal, wouldn't you? A. Certainly.

Q. Would you explain to me, please, just what it is that you find in the cartoon in the August, 1943, issue on page 90, in the upper left-hand corner, which you say is calculated to lower the moral tone and degrade? A. You are
4709 referring to this one here (indicating)?

Q. Yes, sir. A. Well, to me the suggestion of that particular drawing is calculated to suggest that a wedding and the resultant honeymoon is definitely sexual.

Q. Well, isn't a wedding definitely sexual? A. Not necessarily.

Q. It is not? See if I understand you. You say the girl in the wedding dress, working at the lathe, with the caption "She came directly from the wedding—Boy! That's patriotism", suggests that the wedding is definitely sexual. Is that what you said? A. No, it is not what I said.

Q. Say it again, please. A. The suggestion which to me
4710 this picture is to convey, is to connect the wedding and the aftermath of the wedding with sacrifice in the name of patriotism, which I think is a cheapening of that noble virtue, patriotism.

Q. Oh, your criticism of the cartoon is that it cheapens patriotism? A. That is a part of it, yes.

Q. What is the other part? A. As I stated before, the connection of the wedding and the honeymoon.

Q. Do you mean to say that it is indecent ever to mention a wedding and a honeymoon? A. No, I certainly do not.

Q. Well, how does it become indecent to mention it here? A. Appearing in Esquire, the suggestion would be indecent. 4711

Q. Well, then, your position is that everything in Esquire is indecent. Is that it? A. No, it is not.

Q. Do you really mean that this cartoon is indecent, or don't you mean that it cheapens patriotism? A. I mean both.

Q. It is indecent because it cheapens patriotism? A. No, that's not what I mean. It cheapens patriotism.

Q. Yes. A. It is indecent because of the suggestion which, in my opinion, it conveys.

Q. And that suggestion is that there is going to be something touching upon sex on the honeymoon? A. Yes. 4712

Q. Am I correct, then, in assuming that you only looked at the material to which your attention was directed by Mr. O'Brien? A. No, sir.

Q. What else did you look at in the January issue? A. I examined these magazines, looking at the content as a whole, particularly the items to which attention was directed on these notations on the cover.

Q. Did you look at the Varga girls? A. Yes, sir.

Q. You did not find anything objectionable in them? A. Yes, sir; I did.

Q. You thought they were a matter of bad taste? A. Very definitely. 4713

Q. Did you read Mr. Nathan's theatrical column in which he objected to some 35 or 50 things current on the stage? A. Is that part of the items referred to?

Q. You cannot remember? A. No, I do not.

Q. Did you read "The Savage Beast In Us?"

Mr. O'Brien: Might I suggest that it is very difficult for a witness to recall these things by title

4714 I think that these should be exhibited to the witness.

Chairman Myers: He is asking whether he read them.

Mr. O'Brien: I think he is testing his memory as to names.

Chairman Myers: He has a right to do that on cross examination.

Mr. O'Brien: It is very difficult to ask a man if he remembers a name.

Chairman Myers: Not when it is related to the subject at hand as it is here.

4715 The Witness: I do not remember—

Mr. O'Brien: Well, there are so many items here to be remembered.

By Mr. Bromley:

Q. What did you think was wrong with "Benedicts, Awake!"? A. That one I do remember. The whole tone and tenor of the article in question, which I think was in the form of a poem, was that marriage is simply a matter of indulgence in sexual license and liberty, and that marriage exists only for the gratification of the sexual desire.

Q. That is your recollection of what the poem was about,

4716 is it? A. Yes.

Mr. O'Brien: Now, Mr. Chairman, I think the witness if he desires to examine or refresh his recollection on any item concerning which he is cross examined, he has a right to look at it.

Chairman Myers: That is correct, he has, and if the witness wants to look at any one of these articles he has a right to ask for it.

The Witness: May I see it?

Chairman Myers: He has a right to.

Mr. Bromley: Of course he has. I am trying to find it. 4717

By Mr. Bromley:

Q. There it is, in the January issue (handing above-mentioned magazine to the witness). A. (The witness read the matter in question.)

Q. You are still of the same opinion? A. I am.

Q. Now, sir, will you look at this cartoon at the right hand bottom of page 37 of the October issue and tell me just what it is you find in it which you say is calculated 4718
to lower the moral tone and degrade? A. I would suppose the tattooing on the man's arm is moved by the flexing of his muscles. That would be the idea conveyed to me by that particular drawing, and that would suggest the sensuous dances that are performed to stimulate and excite passions of men.

Q. So that based on that inference it is your opinion that that drawing is indecent. Is that right? A. Well, I wouldn't find that particularly objectionable. There are more in the magazine that are more directly to the point than that one.

Q. Isn't the worst that you can say about this is that 4719
it is a matter of bad taste? A. It is definitely a matter of bad taste.

Q. Isn't that all? A. No, I think probably it is—

Q. Vulgar? A. Suggestive.

Mr. O'Brien: If the Board please, the expression "bad taste" is being used, and it is very unclear to me whether the witness and the counsel are referring

4720 to the same thing, whether the witness is referring to bad taste in a moral sense and the other in some other sense. I think it should be clear.

Mr. Bromley: Well, have you tipped him off enough now?

Mr. O'Brien: If I need to tip Dr. Marshall off I am badly mistaken, because he has more intelligence than the whole bunch of lawyers in the room here, including Mr. Bromley.

By Mr. Bromley:

4721 Q. Are you familiar, Doctor, with the sports sections of these eleven issues of Esquire? A. I have seen and read several of the sports articles.

Q. What is your opinion of them? A. I think they are good.

Q. Are you familiar with the art content of these eleven issues? A. I am not an art critic.

Q. Are you familiar with the art content of these eleven issues? A. No, I don't think I could claim to be familiar with the art content.

Q. Have you made a study of the fiction in these eleven issues of Esquire? A. I don't think it could be called a
4722 study.

Q. What is your opinion, based upon what you did do, with respect to the fiction in the eleven issues?

Mr. O'Brien: Mr. Chairman, he hasn't let the witness answer the question.

By Mr. Bromley:

Q. Go ahead and answer. A. Repeat the question, please.

Q. Did you read the fiction in the eleven issues? A. I did not read all of the fiction in the eleven issues. 4723

Q. Did you read it enough so that you are able to express an opinion with respect to it? A. I gathered an impression from a perusual of the issues presented to me.

Q. I am talking about the fiction. A. Yes.

Q. Did you gather an impression about the quality of the fiction? A. I did.

Q. What was that? A. If I may put it this way: My impression of the policy, editorial policy and tone of the magazine, is that it tends to make that which is immoral modern, sophisticated, and commonplace, to suggest that fornication and adultery, pre-marital relations, extra-marital relations, are the conventional conduct of the American people to which I, as a minister, must protest, knowing it to be not so and believing it to be definitely injurious to public morals, and particularly to the readers of this magazine. 4724

Q. Now, would you point out to me the piece of fiction which has any such tendency as that? A. That, sir, would take too long and it would require me to mark, I believe, every issue of the magazine to do so.

Q. Could you call our attention to one piece of fiction which has that tendency? A. If given time; yes, I could.

Q. Would you do so? 4725

Chairman Myers: Have you all the issues there?

Mr. Bromley: Yes, I will give them all to him.

Mr. O'Brien: I suggest, Mr. Chairman, if Dr. Marshall is going to do that, he will have to be given a recess so he won't be hurried.

Mr. Bromley: No, I want to keep you two apart.

Mr. O'Brien: He doesn't need to have any assis-

4726 tance whatever, as I told you before. Counsel very well understands how difficult it is under pressure to select items out of dozens that are before him on the table, and also any references in the record which in any wise color the testimony of this respectable witness and the dirty use of it should be stricken from the record.

The Witness: Here it is.

By Mr. Bromley:

Q. All right, sir; go ahead. A. I would like particularly
4727 to mention from page 134 of the June issue, the article headed: "Libel suits were as wine to that hell-firin' editor of the old West, Dave Day," and this particular reference:

"Here lies the body of poor old Charlotte.
Born a virgin, died a harlot.
For eighteen years she kept her virginity,
An all-time record in this vicinity."

That, it seems to me, expresses the very thing that I find most objectionable in the editorial tone and policy of the magazine, a suggestion that there is anything unusual
4728 in virginity until eighteen years of age.

Q. Had you ever heard that verse before, Doctor? A. No.

Q. You never had? A. No.

Q. In the first place, you notice that is not a piece of fiction, don't you? A. That is true.

Q. It is a factual report of what a rough-and-ready Western editor published in his newspaper years ago, isn't it? A. I don't see why that excuses it or any other magazine from reprinting it.

Q. You don't think that the fact that it is a factual report creates a distinction and serves as no justification? A. In the first place I don't know it to be a factual report. 4729

Q. We have had testimony that it was. A. I know nothing about that.

Q. If it were a piece of factual reporting and if those things had been published by Dave Day in his Western newspaper, would your opinion be the same? A. It would.

Mr. O'Brien: I object to the question. It is too indefinite and misleading. This word "factual report" does not refer to the fact that this jingle was published or the fact that virginity was so scarce in the district. 4730

Chairman Myers: Well, if questions of a similar character had been ruled out when asked by the other side this trial would have been over long ago.

Objection overruled.

Mr. O'Brien: I think it is fair to the witness to specify in any question what you are talking about or how could the witness answer intelligently?

Chairman Myers: Read the question to him, Mr. Reporter.

(Question read.) 4731

The Witness: You wish me to answer that?

By Mr. Bromley:

Q. Please. A. It would still be the same.

Q. In other words, you object to factual reporting? A. That is not the correct inference. I am objecting to its appearance in Esquire magazine.

4732 Q. You would object to its appearance in any magazine? A. I certainly would.

Q. Then you do object, Doctor, to factual reporting of sordid conditions?

Mr. O'Brien: I object to that question. It is unfair and not based upon anything in this record or anything heretofore asked between the witness and counsel.

Chairman Myers: Overruled.

The Witness: I am objecting to the appearance of such items as the one I have just read, as tending
4733 to suggest that virginity at the age of eighteen is rare.

By Mr. Bromley:

Q. Wouldn't you answer my question as to whether or not you object to factual reporting of sordid conditions?

Mr. O'Brien: I ask that the question be amended to specify what conditions and when and how that they ought to be reported.

Chairman Myers: He is asking the questions. Now,
4734 neither counsel on the other side nor myself can frame them for him.

Mr. O'Brien: But I have a right—

Chairman Myers: You have no right to put the question in his mouth and ask a question in words and figures like this. The cross examiner frames his own questions.

Mr. O'Brien: I understand that, but I also think I have a right to request that the questions be

fairly specific and not unintelligible, misleading, or entrapment questions. 4735

Chairman Myers: The objection is overruled.

Read the question, please.

(Question read.)

The Witness: I feel very definitely that we have far too much that is sordid, even if it be factually correct and accurate.

By Mr. Bromley:

4736

Q. You would, therefore, think, sir, that the newspaper reportings of the Errol Flynn seduction case were degrading and intended to lower our moral tone, would you? A. I would.

Q. You would also think that the newspaper reporting of the Chaplin paternity case was degrading to our civilization and definitely lowered our moral tone, wouldn't you? A. I would.

Q. You would think that the wide-spread newspaper reporting of the Dempsey divorce matters and the countercharges and charges of adultery and misconduct which appeared in our papers for so many weeks, lowered our moral tone and was definitely degrading, wouldn't you? 4737 A. I think a distinction has to be made between a factual reporting of an event and the way in which it is reported. A distinction must be made.

Q. Don't you think that over the period of time that you have been in this country, sir, there has been a great change in the amount of frankness and forthrightness with which matters of that kind are now reported in the press? A. Yes, I believe our moral tone has been definitely lowered.

4738 Q. And there is a great deal more frankness and forthrightness now than when you first came here, isn't there? A. Yes, I believe there is.

Q. Do you know the Reverend Fred B. Luchs, Ohio University in Athens, Ohio? A. I do.

Q. In your opinion, is he a clergyman of good reputation? A. He is.

Q. He has spoken in your church, hasn't he? A. Yes.

Q. He has had considerable contact with youth in his work, hasn't he? A. I believe so.

Q. Wouldn't you respect his opinion, Doctor, as to what
4739 might or might not corrupt the morals of youth? A. Yes, I would respect his opinion. I might not agree with it.

Q. Wouldn't you feel his opinion is entitled to respect and consideration by the Board?

Mr. O'Brien: I think until the opinion is spoken or shown to the witness that is improper.

Chairman Myers: Objection sustained.

By Mr. Bromley:

Q. Do you know Dr. William Jacobs, President of Williams College? A. Yes.

4740 Q. Is he a man of good reputation? A. Yes.

Q. He conferred an honorary degree on you, didn't he? A. He did.

Q. Would you say his opinion with respect to Esquire is entitled to respect and consideration by the Board? A. I know what his opinion is.

Q. You know what his opinion is? A. Yes.

Q. Do you know that he testified here and gave his opinion? A. He testified as to the sport articles.

Q. Did you tell him that in your opinion there was nothing indecent about the Varga girls? A. I did not. 4741

Q. The opinions you are expressing here are your own personal opinions, aren't they? A. Yes.

Q. Would you agree that in expressing an opinion about Esquire, a fair barometer might be found in the character of its contributors? A. I don't know the character of its contributors.

Q. Well, if its contributors were respectable people—regular contributors were respectable people—wouldn't that be some indication which the reputation was accorded generally? A. I don't know. 4742

Q. Did you ever hear of William Lyon Phelps? A. Yes.

Q. You know about him? A. Yes.

Q. You know he was a department head of the magazine? A. No, I didn't know that.

Q. Do you really mean that? A. Yes.

Q. You didn't know it. You don't think that William Lyon Phelps would regularly act as a department head of an immoral or objectionable magazine? A. I am very surprised to learn that he was a department head.

Q. I thought you looked at the magazine before the eleven issues. A. I had.

Q. I thought you had looked at the eleven issues. A. I had. 4743

Q. Did it escape your attention, Doctor, that William Lyon Phelps was a contributor in ten of the eleven issues which you examined? A. Yes, it did.

Q. How is it possible for you, sir, to come here and express an opinion and overlook so important a fact as that? A. I don't regard that as an important fact.

Q. Did you ever hear of William B. Ziff? A. No.

Q. You never heard of him? A. No.

4744 Q. Did you ever hear of Manuel Komroff? A. Never heard of him.

Q. Did you ever hear of Louis Paul? A. I never heard of him.

Q. Did you ever hear of George Jean Nathan? A. Yes, I did.

Q. Would you say his was the best reputation among theatrical critics in this country? A. I know he enjoys the reputation among them.

Q. Did it escape your attention that he was a contributor to each one of these eleven issues? A. No. I had noticed
4745 his contributions in some of them. I didn't count how many he contributed to.

Q. Do you know Father Flannagan of Boys' Town fame? A. I know of him, yes.

Q. Would you say that Father Flannagan would contribute to a magazine of questionable character? A. It all depends on what contribution may have been asked of him. I don't know what contribution he made, but knowing Father Flannagan, I have no doubt as to the quality and the tone of the contribution he did make.

Q. Then, if you had looked a little more closely you might have found a lot of fine material in these magazines,
4746 might you not? A. If I had looked closer I might have discovered a lot of things I didn't discover.

Q. Do you know Charles Carroll Smythe? A. I do not.

Q. Are you familiar with the fact that he wrote an article for Esquire entitled "Father of the C. Y. O."? A. No, I am not.

Q. Do you know what the C. Y. O. is? A. I do not.

Q. Did you know it was the Catholic Youth Organization? A. I did not.

Q. Are you familiar with the fact that the Catholic Digest

has on a number of occasions reprinted articles from Esquire? A. I am not aware of that. 4747

Q. Did you ever look at the Catholic Digest? A. No.

Q. Would agree with me, Doctor, that our present day customs sanction a frank discussion in print of such matters as venereal diseases? A. I believe that particular subject has come in for frank discussion, and I believe it ought.

Q. You don't find that objectionable? A. It depends who does it and how it is done.

Q. And suppose it were done in Esquire, would you find that objectionable? A. I might. 4748

Q. You might? A. Yes.

Q. Suppose it were done in Harpers? A. It might be objectionable, it would depend on how it was done.

Q. You did not mean to indicate that it might be objectionable depending on the magazine, but rather on the type of discussion of it? A. Yes, that is what I meant.

Q. Did you read the article in Esquire called "The Court of Lost Ladies"? A. I don't recall it by title. If I could see it I might remember whether I read it or not.

Q. It was about a typical night in a New York night court.

Chairman Myers: Let him see the article. 4749

By Mr. Bromley:

Q. Do you remember it now? A. Not yet.

Q. Not yet? A. No.

Q. (Handing document to witness.) A. I did not read this article.

Q. Did you read "Portrait Above the Fire Place"? A. Once again, I don't remember it by title.

4750 Q. (Handing above-mentioned article to the witness.) A. No, I do not remember this article.

Q. Did you read "The Fall of the Flattering Word"? A. I suggest, sir, that you are more familiar with those titles than I and I can't answer categorically whether I read any single title or not. My examination was rather cursory and with a dozen or eleven or twelve issues to look over I did not summarize the titles, nor did I read them all.

Chairman Myers: Why not let him see it so he can know what you are talking about.

4751 *By Mr. Bromley:*

Q. Here it is in the March issue (handing above-mentioned article to the witness).

Mr. O'Brien: That is "The Fall of the Flattering Word". I thought it was something else.

The Witness: No, I did not read all of this article. I may have glanced at it. I may have read passages marked, but all the article I did not read.

By Mr. Bromley:

4752 Q. Did you read "Wise Men Pick Pyknic Girls"? A. May I suggest that time would be saved if I stated that all the articles to which attention is directed were not read fully by me.

Q. Was any one of them read fully by you? A. I could not remember whether I read all of any one or not.

Q. You really can't, Doctor? A. No, I really can't.

Mr. O'Brien: I don't think that it is necessary for counsel to roar at the witness since he is standing beside him? 4753

By Mr. Bromley:

Q. Is there any way that you could refresh your recollection as to whether you read all of any article in this magazine? A. No, I don't think that I read all of any article.

Q. Who told you to read what you did read? A. These pages in the front of each issue indicated the articles or pictures in question, and following the directions printed here I looked at as many as I could. 4754

Q. As many as you could? A. Yes.

Q. Now, did you notice on this last one on which you just put your finger, the issue for October, that the typewritten reference has page 38 marked, an article entitled "Wise Men Pick Pyknic Girls"? A. Yes, I noticed that.

Q. And it still didn't occur to you that you should read that article? A. Well, I didn't have time in the first place.

Q. As a matter of fact, sir, you deplore the trend of modern times as detrimental to the morals of our Nation, don't you, just generally? A. Yes.

Q. And indeed, you have publicly advocated that women should return to the old standards of purity and decency, of the year 1900, haven't you? A. When did I do that? 4755

Q. You don't remember? A. I have publicly advocated that women should return to what?

Q. To the standards of purity and decency of the year 1900? A. Did I specify the year I don't think I specified that year, no.

Q. Well, did you say anything like that? A. I don't think I did.

4756 Q. Is that what you believe? A. I don't know what the moral standards were of the year 1900. I wasn't born then. I don't know what they were.

Q. You oppose and publicly oppose—and I mean no criticism, sir—the custom and habit of drinking and smoking by women, don't you? A. I do.

Q. You think that drinking and smoking by women evidences a decline in civilization, don't you? A. In the first place, I don't see what this has to do with my testimony with regard to Esquire magazine.

Q. I ask that you excuse me, but I think it has something
4757 to do with it. Now, would you mind answering the question? A. I believe that womanhood has definitely been lowered by the achievement of equality with men. I believe that for nineteen centuries, ever since the Annunciation came to a woman named Mary, who held in her arms the Lord Jesus, for nineteen centuries womanhood was respected and ennobled and was on a plane higher than that on which we mere men lived.

She was recognized as being en rapport with the angels and closer to God, made of finer clay. For nineteen centuries she had been not equal but superior.

In order to achieve equality she had to step down from
4758 that high plane on which she had been regarded and on which she had been living. The only things that men had which she had not were vices, and these she appropriated in the name of equality and broad-mindedness and liberty, and I can't see that stepping down from a pedestal could mark progress at all.

We don't make progress in a downward direction, and anything which cheapens or degrades womanhood could certainly not be called progress.

Does that answer your question?

Q. You don't like, therefore, such things as the modern woman's bathing suit, do you? A. I don't think that has anything to do with the matter at hand. 4759

Q. Don't you think that is degrading to woman? A. I think some of the bathing suits are indecent, yes.

Q. To put it generally, sir, you deplore what you call the smug sophistication which exists today, don't you? A. Yes, I do, and particularly do I deplore it in this particular magazine because, as I said, of its tendency to suggest that promiscuity, immorality, adultery, have become almost mores, and that chastity and virginity are objects for satire and ridicule, and the whole tendency of the magazine, it seems to me, is to degrade and definitely to lower that moral tone. 4760

I feel very definitely, as a clergyman, that there are certain things before God that are either good or bad, there are certain things that are evil, and I see no reason why, as a Christian clergyman, I cannot say that I regard such things in this magazine as evil. Nothing can make them good.

Q. How many pages out of the eleven issues would you say you read? A. I don't regard that as a proper question because I made no note, as I went through, of the number of pages I was examining.

Q. I withdraw it. How many pages do you suppose there are in the eleven issues you looked at? 4761

Mr. O'Brien: I object to that question.

The Witness: Once again, I am unable to state.

By Mr. Bromley:

Q. Did you know there were 1967 pages? A. I did not.

Q. Would it be fair to say that of these 1967 pages you did not read more than two or three? A. That would neither

4762 be fair nor accurate. I neither knew the total number of pages, nor the weight of the paper, nor the amount of ink that was printed upon them. These things I do not know.

Q. Forgetting about the ink for a minute, all you did was to take a quick glance at what was pointed out to you in the magazine? A. I spent, as I said, an hour or an hour and ten minutes. If that constitutes a quick glance, then a quick glance it was.

Q. But you only looked at the things that were pointed out? A. No. As I formerly testified, I looked at other things.

4763 Mr. Bromley: That is all.

Redirect Examination by Mr. O'Brien:

Q. As a matter of fact, Dr. Marshall, I handed you the magazines and left it to you to make the examination yourself? A. Absolutely. I was not told what I should read. I followed merely the suggestions printed on this piece of paper (indicating).

Q. I won't ask you but a couple of more questions, Doctor, to straighten things out.

At one time in his cross examination Mr. Bromley was
4764 discussing reporting various divorce cases and crimes and things like that, scandalous affairs apparently in his opinion, and he asked you if you objected to frankness and forthrightness in reporting. Did you mean by your answer to that that you objected to frankness or forthrightness, or did you mean that you objected to indecent dealing with intimate sexual details in such matters?

Mr. Bromley: I object to that question as leading, if the Court please.

Chairman Myers: It may be. Let him answer.

4765 The Witness: I took the counsel to mean frankness and forthrightness in dealing with details of a sordid nature. I do object to that. Frankness and forthrightness in reporting factual events, I couldn't object to.

By Mr. O'Brien:

Q. Now, does that fact that Father Flannagan or William Lyon Phelps or anybody else that has been mentioned here on cross examination as a contributor to Esquire, change your opinion as to the items which you surveyed in these 4766 eleven issues and upon which you decided to testify as you have here today? A. The fact that these gentlemen mentioned have contributed to Esquire may be a fault of judgment on their part. I am not responsible for their judgment. But the fact that their articles might be included does not in any way alter my opinion of the articles.

Mr. O'Brien: That is all.

Mr. Bromley: That is all.

(Witness excused.)

Mr. O'Brien: May we have a recess at this time, 4767 because I have a witness coming at 2:00 o'clock?

Mr. Bromley: I am forced to object to this, if the Board please.

It seems to me we have been putting up with enough dilly-dallying from Mr. O'Brien. We have been here at great expense and inconvenience. We have never asked for a five-minute adjournment. We have not asked for an adjournment at any time.

The Board has been very patient and has indicated a willingness to sit to almost any hour.

4768 It does seem to me that after all these weeks that this large force of lawyers could get enough witnesses to have here and not have these constant interruptions and delays.

Mr. Hassell: I explained to the Board when I asked the Board to permit Mr. O'Brien to take charge of the rebuttal, that I had been taken completely by surprise as a lawyer, that any of this kind of testimony was admitted here. There never has been a case in any court, before any tribunal, in which this type of so-called evidence has been admitted.

4769 Chairman Myers: If I recall, there was some in a case in New York.

Mr. Hassell: I never heard of it and don't know of it.

Chairman Myers: I have.

Mr. Hassell: Was that a Federal case?

Chairman Myers: No, a State case.

Mr. Harding: The Parmelee case in this District.

Mr. Hassell: That case was referred to without being cited by counsel in order to get the admission of this type of testimony. In that case, the majority opinion—two judges in that Court out of five—one

4770 judge, Judge Benson, dissented.

Mr. Justice Miller wrote the opinion of the Court. He, as a matter of pure and unadulterated dictum, indicated that expert testimony from philosophers and so forth might have assisted in that case, which was not at all like this case, didn't arise under the same statutes or anything of the kind.

The Court went out of its way, the majority of the Court went out of its way, to accept some statements in some books. That is the nearest to testimony of

this sort I have ever seen in a case of this sort. Of course that was no testimony. The opinion of the Court stated that it was not, that there was a total absence of such evidence in the court below. 4771

Under those circumstances I think it is entirely reasonable, and under the further circumstances that the Post Office Department has no funds out of which to pay for witnesses attending here, has no funds to pay their expenses here or their time here, or to pay them any fabulous fee such as has been indicated here has been paid to witnesses appearing for the publisher that we are under a most tremendous handicap in meeting this testimony that has been offered here, I think it would be utterly unfair— 4772

Chairman Myers: You have had two weeks in which to do it.

Mr. Hassell: I haven't had two weeks.

Mr. Bromley: The gentleman got our brief two and a half weeks ago, in which we told him clearly we were going to proffer this kind of testimony; right out in the open told him what we were going to do.

Mr. Hassell: Well, I would like to poll the Board to see whether we can have until 2:00 o'clock in order to bring our witnesses. 4773

Chairman Myers: Well, you are not going to poll the Board; the Board will poll itself.

Mr. Hassell: All right.

Chairman Myers: So far as we are concerned, we try to indulge you in every respect. If you impute motives like that to us, I resent it for one.

Mr. Hassell: I am not imputing any motive whatsoever.

4774 Chairman Myers: Then don't make any statement like that. So far as I have been concerned, I have been ready to go along with you all through, but when you come along with such a statement I will not.

Mr. Hassell: I am sorry. I apologize for that statement.

Chairman Myers: We gave you until 2:00 o'clock yesterday and we gave you until 10:00 o'clock today. We gave you everything you wanted. I think that that statement is entirely unwarranted.

4775 Mr. Hassell: I withdraw it. I am sorry I made it.

Chairman Myers: Let us try to get the rest of our witnesses in here at 2:00 o'clock.

Mr. O'Brien: We will try to get them in, one after the other. It is very difficult, we have no transportation to offer them, or anything else.

(Whereupon, at 11:45 o'clock a. m., the hearing was adjourned until 2:00 o'clock p. m.)

AFTERNOON SESSION.

4776

(The hearing was resumed, pursuant to the adjournment, at 2:00 o'clock p. m.)

Chairman Myers: Are you ready with the next witness?

Mr. O'Brien: Yes, sir. Dr. Metz, will you take the stand. 4777

SOLOMON H. METZ, a witness called by and on behalf of the Post Office Department, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien:

Q. Will you state your full name for the record, please, Doctor? A. My name is Solomon H. Metz. 4778

Q. You live in Washington, D. C., do you, Doctor Metz? A. Yes, sir.

Q. What address? A. 36 Channing Street, Northwest.

Q. You are a rabbi, are you? A. Yes, sir.

Q. Of what congregation? A. Adas Israel Congregation.

Q. Where is your synagogue located? A. 600 I Street, Northwest.

Q. Is this a large or a small congregation, as Jewish congregations go? A. Well, we have close to 600 members representing probably 300 families.

Q. 300 families? A. At least.

Q. Is it the largest congregation? A. It is the largest 4779 non-reformed congregation in the District of Columbia.

Q. Are there any schools connected with your congregation, Doctor? A. We have three Hebrew schools where the children are taught three times a week and we also have a very large religious school conducted at the Jewish Community Center. Our registration of our religious school plus our Hebrew schools is in excess of 350 children, ranging in age from five to about sixteen.

4780 Q. Now, are there any other organizations besides this school connected with your congregation for your people above sixteen? A. Well, we have a Brotherhood and we have, for instance, a group of boys between thirteen and seventeen who come to the synagogue for services. Then we have meetings of younger people, like the Junior Hadassah, young women, and then we have evening services, and I should judge that about sixty per cent of the people are between seventeen and thirty, I imagine, the early thirties.

Q. Rabbi Metz, will you tell the Board whether or not you are consulted by individual members of your congrega-
4781 tion, aside from the organizations you have mentioned or outside of your congregation, with respect to their personal problems? A. Very, very frequently.

Q. Would you say that some of those personal problems involve matters having to do with sex habits or morals? A. Well, morals, yes, including, of course, sex, too.

Q. Could you give us an approximation of how much of your time is devoted to such consultation? A. Well, I should judge about thirty per cent of my time probably is devoted to personal problems brought to me by various individuals, members of the congregation and non-members.

Q. Rabbi Metz, have you at my request, examined issues of
4782 a publication known as Esquire for the months of January through November, 1943, inclusive, with particular reference to certain items enumerated in lists attached to the cover of each magazine? A. I have.

Q. Have you formed any opinion, Doctor Metz, as to whether or not the matter to which I have just referred is of a decent or of an indecent character? A. Yes, I have.

Q. Will you tell the Board what is your opinion? A. It seems to me that the whole atmosphere of this publicaion is such as to reduce the main interest of living to sex, and

then degrade sex to its lowest vulgar expressions, and as such I deem it destructive of morality and consequently ethics, and I furthermore deem that such publication is in a way preparing the ground for the downfall of our democratic system. 4783

Q. Do I correctly understand your reply to include the answer to my inquiry that you do consider this an indecent publication? A. I certainly do in the sense that it is destructive of standards of morality.

Q. And referring specifically again to the matter which I have described, would you say whether or not, in your opinion, such items constitute information of a public character proper for dissemination to the public—the persons with whom you deal or other members of the public? A. I deem it improper. 4784

Mr. O'Brien: That concludes my direct examination, Mr. Bromley, of Dr. Metz.

Cross Examination by Mr. Bromley:

Q. When did you first look at the eleven issues, Doctor? A. The eleven issues, about a week ago.

Q. Do you find the following joke to be destructive of morality and ethics, and preparing the ground for the downfall of our democratic system? A. Yes—which joke? 4785

Q. I will tell it to you.

"She: 'Would you like to see the place where I was operated on?'

"He: 'No, I hate hospitals.'" A. It is not something which is very ennobling, is it? It is something which plays upon the pruriency of people.

Q. Will you answer my question? A. I certainly consider it improper.

4786 Q. I didn't ask you that, sir. I asked you whether you considered that joke as destructive of morals and ethics. A. It is destructive of morals, yes.

Q. And ethics? A. I am not prepared on that particular part that this is destructive of ethics. I said when you destroy morality you eventually destroy ethics, and when ethics is destroyed you prepare the ground for a non-democratic form of government. That's all I said.

Q. Do you think that joke which I have just told you is such a joke as to reduce the main interest of living to sex and then degrade sex to its lowest vulgar expression? A.

4787 It is a joke which is in line with exactly such a tendency.

Q. Did you read the joke about the blue booties in Esquire? A. No, I didn't.

Q. Did you read the joke about the man who saw the two girls in his Pullman berth? A. Yes.

Q. Is your opinion the same with respect to that joke? A. Yes, sir.

Q. Did you read "Portrait Above The Fire Place"? A. Yes.

Q. Did you read "The Fall of the Flattering Word"? A. I don't remember that.

Q. How long a time did you spend? A. Well, I am not

4788 what you would call a reader of Esquire, but I have spent about three hours in the last week or so going over these copies, and I also used to glance at the Esquire from time to time, especially when I went to the dentist, waiting for my turn, and some other places. I used to glance particularly at the cartoons and the pictures which I consider most indecent. All the pictures, the majority of them, have the tendency to exaggerate the sex organs of the female.

Q. You spent about three hours on these eleven issues, did

you? A. Yes, looking them over, particularly those cartoons and pictures. 4789

Q. Are you familiar with the author Sholem Asch? A. Are you addressing the question to me?

Q. To you. A. Yes, I am.

Q. What is his reputation? A. Well, Sholem Asch is considered an outstanding novelist, very popular.

Q. And he has a good reputation? A. I don't know about that.

Q. What would you think if he would write for an indecent magazine? A. I am in no position to answer that. It depends upon the temptation. Even the greatest were tempted. I don't know how much he is getting for his articles, but the temptation is very much. Even Sholem Asch may be tempted. 4790

Q. Would you write if you got enough money? A. No.

Q. Not you? A. No, never; no, sir.

Q. Did you know Sholem Asch was a contributor to Esquire? A. Oh, I didn't know.

Q. You didn't know that? A. No.

Q. Did you ever hear of Lord Dunsany? A. Yes.

Q. What about his reputation? A. As far as I know he was never in jail. I think his reputation is O. K.

Q. Would you think he would write for an indecent magazine? A. The answer that I gave to the first question applies to this case too. 4791

Q. Did you know that he was a contributor to Esquire? A. Well, I believe I saw his name in one of the issues some time back.

Q. Did you read Joseph Wechsberg's article on "School for Saboteurs"? A. No.

Q. Did you read William B. Ziff's article on "31 Lessons for Brass Hats and Bureaucrats"? A. I glanced at it superficially; I didn't read it carefully.

4792 Q. Did you think it had a tendency to destroy morality and ethics? A. I don't think so.

Q. Did you read "I Lobby My Hobby", by Cy Endfield? A. No.

Q. Did you read "The Future of Air Power", by Robert W. Marks? A. I glanced at it but I haven't read it carefully.

Q. Would you think it would have a tendency to destroy morality and ethics? A. I don't think so.

Q. Did you read "The Unholy Horatio Alger", by Stewart Holbrook? A. No.

4793 Q. Did you read "West Point's First Captain", by Thom Yates? A. No.

Q. Did you read "Japan's Mein Kampf", by Curt Reiss? A. No.

Q. Do you know anything about Curt Reiss? A. I said I haven't read it.

Q. Do you know anything about Curt Reiss? A. No, I don't.

Q. Did you read "The Unpredictable Profile", by John Decker? A. No.

Q. Did you read the article "Marriage Makes Strange Bedfellows", by Lawrence Gould? A. No.

4794 Q. Did you read "The Court of Lost Ladies", Doctor? A. Yes, I read it partly.

Q. Partly? A. Yes, sir.

Q. Did you read "The Savage Beast In Us"? A. Savage beast? I don't remember that.

Mr. O'Brien: The witness may consult it. I assume.

By Mr. Bromley:

4795

Q. That is the piece by Paul Gallico on burlesque. A. Yes, I read part of it.

Q. You read part of it? A. Yes.

Q. Would you name me one article or story or piece that you read in any one of these eleven issues that was not mentioned in the memoranda on the outside? A. No, I don't remember.

Q. It is a fact; isn't it, that you did not read all of the articles? A. No, I didn't.

Q. It is a fact, isn't it, that you didn't read all or any one of the articles or stories listed on the memorandum? A. I read a few of the shorter ones.

4796

Q. Could you name one that you read in its entirety? A. I read some of the jokes that are contributed, I think, by the readers. I read a few of them in their entirety.

And I looked at all the cartoons and all the pictures and I would say that when it comes to impressing young people it is the visual medium that is much more potent than the one we get by the ear.

Q. And thinking that way, you therefore did not pay much attention to the articles. Is that right? A. That is right, in part.

4797

Q. Now, would you point out to me which section of the eleven issues it is that contains jokes contributed by readers? A. My memory isn't that good.

Q. Upon reflection you know there is no such section, don't you? A. On page 10 I believe there are all kinds of things contributed by readers. The readers write in. I read some of them.

Q. You refer to "The Sound and the Fury"? A. I believe that's it.

4798 Q. Being letters from readers of the magazine? A. Yes.

Q. You thought they were jokes? A. Some are intended to be funny and some are written in a way that it is hard to tell really what is meant. It takes a psychiatrist really to explain that.

Q. Would you say that the following joke would be destructive of morality and ethics in the sense in which you have used that phrase?

"At a military wedding the groom only recently back from the Solomons had hardly glimpsed his bride before the ceremony. Therefore, when time came for the kiss it was
4799 a long one, lasting on and on until a child's voice rang out in the silence of the church: 'Mommy, is he spreading the pollen on her now?'" A. I think it is vulgar.

Q. But you do not think it could be destructive of morality? A. It is. Anything that is vulgar, systematically and consistently so; the whole atmosphere of the magazine is vulgar, always rotating around sex—I think such a magazine is destructive of morality and eventually other things, and eventually will pave the way for a serious political situation.

Q. Is your opinion of a magazine like the New Yorker similar to that of Esquire? A. I don't read the New
4800 Yorker. I have glanced at it but I don't know much about it.

Q. Is your opinion of a magazine like Life similar to your opinion of Esquire? A. I very seldom read Life.

Q. What magazines do you read? A. I read the Atlantic Monthly, Hebert's Magazine, Ethics; I read the United States News regularly, I read the newspapers regularly, I read the Christian Century, I read occasionally Forum; I read quite a good many magazines on religion and magazines on economics and political science, a good many of them.

Q. Do you read the Reader's Digest? A. Yes, I do. I get it regularly. I read most of the articles there—not all but most of them. 4801

Q. Would you say that the following joke was destructive of morality and ethics?

In "Caught in the Draft" Bob Hope, infatuated with Dorothy Lamour, is asked, "What's she got that the other girls haven't got?" "Nothing," he retorts, "but she groups it better." A. I am afraid I have not made myself understood. I am talking about the cumulative effect of this sort of thing, constantly being fed to the reader.

This joke in itself may not be exactly destructive of morality, but if you have a magazine that is entirely devoted to this sort of thing, I say it is definitely destructive of morality. 4802

Q. You mean that it is your opinion that Esquire is entirely devoted to that sort of thing? A. I said preponderantly.

Q. You don't mean entirely? A. I said preponderantly.

Q. You don't mean entirely. But you do mean preponderantly? A. Precisely.

Q. How many pages are these contained in the eleven issues which you examined? A. I can only give a guess—I don't know. They seemed rather bulky.

Q. What would your guess be? A. Probably about 100 pages. 4803

Q. About 100? A. Including the advertising pages.

Q. 100 pages including the advertisements, in the eleven issues? A. In each issue.

Q. 1100 pages altogether? A. That is right.

Q. How many pages do you suppose you have read? A. I have not read 1100 pages, I assure you. I must have read about a dozen pages and I have seen all the illustrations and all the pictures and all the photographs.

4804 Q. So you have read about twelve pages? A. Yes, sir.

Q. Now, how many pages of photographs and pictures to which you have objected, would you say there were in addition to the twelve pages? A. My impression is that a majority of those pictorial illustrations are objectionable from my point of view.

Q. Would you give me an estimate of the number of pages? A. I haven't that kind of a memory. My impression is the majority are definitely objectionable.

Q. You mean the majority of the pictures and cartoons listed on these memoranda— A. No, I mean the whole

4805 thing.

Q. So you object to much more contained in these magazines than the Government is specifying, do you? A. I certainly do.

Q. How many pages would you say altogether, counting the pictures, you objected to? A. I can't answer that question.

Q. Could you give me any estimate? A. No, I don't think so.

Q. Would it be as many as 50 pages? A. I haven't that kind of a photographic mind. I can't answer the question.

Q. Would it be 75 pages? A. I don't know the number.

4806

Mr. O'Brien: I object to pressing the witness. He has already said he can't tell.

The Witness: It would be impossible for a human being to go through 1100 pages or thereabouts and tell how many pages are taken up with pictures. I can't tell you.

By Mr. Bromley:

4807

Q. You couldn't give us any estimate at all? A. No.

Q. Did you look at the art section of each of the issues? A. Yes.

Q. Does your objection extend to that? A. You mean the Varga girls?

Q. Didn't you know there was an art section in each of the issues? A. I was interested in the pictures; I didn't look at the section they belonged in. Whether the thing is in an art section doesn't make any difference. It doesn't make any difference whether it is in an art section or not.

4808

You must realize my time is occupied—I don't say it is valuable—and the pictures are easy to read. You can glance through a number of pictures in a very short time. I don't read the headings or the explanations.

Q. I want to find out from you, sir, if you include in your condemnation the pictures reproduced in the art section of these eleven issues. A. I don't know if the pictures were included in the art section or in the other section, but I know that I looked at all the pictures and the majority are definitely objectionable.

Q. And you made no distinction in your mind between the art section and the others? A. I made a distinction between the pictures that were not objectionable and the others which were.

4809

Q. But you have no distinction present in your mind now between the art section and the other sections? A. I don't remember whether they were in the art section or the other section. I have no recollection.

Q. Now, would your answer be the same as you have previously given with respect to this joke:

"During a heavy bombardment of an English city in

4810 'Eagle Squadron'—that is a motion picture—a warden peered in and called, 'Are there any expectant mothers here?"

"After a very brief pause a feminine voice replied, 'Hard to say; we have only been down here a few minutes.'" A. I think it is vulgar.

Q. Destructive of morality? A. Yes, sir. Anything that is vulgar is destructive of morality, anything that is consistently and systematically vulgar.

Q. Destructive of morality? A. Yes, sir. Anything that is vulgar, that is destructive of morality. That is the persistence of it.

4811 Q. You make the same answer to this joke:

"Two London charwomen were discussing the inconveniences of the black-out. 'But it's a necessary evil', said the proverbial Mrs. Malaprop, 'else we're possibly likely to be blasted into maternity.'

"'Tis so', said her companion, 'But the worst of it is we'd never know who done it.'" A. I think it is definitely obscene, one of the worst you ever read.

Q. One of the worst I ever read? A. Yes, sir.

Q. And you feel the same way about this, then:

"In a restaurant at Columbia University, a refugee professor, speaking English with an acquired precision which so often shames the native-born, ordered figs and cream. The waitress brought a dish of figs covered with cream. 'I ordered figs and cream', the professor protested. 'They are there', she retorted. 'But this is figs with cream', he persisted. 'But I don't see—' she began, bewildered. 'Madam', said the professor icily, 'would you say a woman and child were the same as a woman with child?'" A. I think it is also a vulgar joke. What I am driving at is this, that to reduce everything to proportion in sex to the lowest level

4812

is very bad and men being fed on this sort of foolishness will have no respect for the sacred things and for human personality; he will have no respect for the Bible or those laws of chastity or purity or discipline. 4813

I said definitely that it is bad and obscene and from that point of view it is destructive of morality and, therefore, of ethics and ultimately of our very system of life and way of life, because it has no high regard for human dignity and for the eternal things in life, and sex is a sacred trust to man because it is a source of life.

Q. And should not be joked about? A. No, sir; not in that way, not systematically, and it is vulgar, obscene. As I see many of those cases, boys grow up without any respect for anything; they become sophisticated before they attain their maturity. 4814

Q. And you think of sophistication as an evil, don't you? A. Sophistication as a way of life. It is a way of life and not to be taken by looking at things in that way.

Q. Then it is an evil way of life, isn't it? A. I didn't say that at all.

Q. What did you say? A. I said sophistication is a way of life and a way of developing things. Sophistication that borders on evil is definitely a danger to our way of life.

Q. Because it is evil? A. Anything that is destructive is evil; anybody knows that. 4815

Q. And, therefore, you would think the same about this joke? A. Well, let us hear the joke first.

Q. "'I won't offer you a cocktail, Mr. Brown', said the hostess, 'since you are the head of the Temperance League.'

"'No, I am the president of the anti-vice league'.

"'Oh. Well, I knew there was something I shouldn't offer you.'" A. I don't see anything to that. It don't register, to use the vernacular. I don't think of it—don't really know what the whole thing is about.

4816 Q. You don't get that one? A. No.

Q. Well, do you get this one?

"A young lady with a touch of hay-fever, took with her to a dinner party two handkerchiefs, one of which she stuck in her bosom. At dinner she began rummaging to right and left in her bosom for the fresh handkerchief. Engrossed in her search, she suddenly realized that conversation had ceased and people were watching her fascinated.

"In confusion she murmured 'I know I had two when I came'". A. I can't get that either.

4817 Q. You don't understand that either? A. It is supposed to be funny but I can't see it.

Q. You don't think it is vulgar? A. It is too stupid even to be vulgar.

Q. And this one: "'Harvard men are gentlemen, says Margie Hart,' who outstrips (at the box office) even Gypsy Rose Lee. 'And you can always have a good long talk with a Princeton man. But do they teach anything at Yale but blocking and tackling?'" A. I think it is vulgar.

Q. And this one: "Remember when Dorothy Lamour came out on the screen in her sarong—how quiet it was?

"Yeah. You could hear the soldiers waiting for a pin

4818 to drop." A. I just guess it is suggestive, that she would drop her clothes probably. That is so they could see more of her. I think it is sort of lewdly suggestive.

Q. And, of course, Doctor, it wouldn't affect your opinion a bit if you knew that all of those jokes I have read were out of the Reader's Digest, would it? A. Not a bit at all.

Q. Not a bit? A. If it is obscene in the Reader's Digest it doesn't change it at all. I suppose if I should tell these jokes would it make any difference or even you?

Q. Look at that cartoon and tell me what you think of

that, will you? A. I don't think of it. It don't register either. I can't quite get this joke. 4819

Q. You see that a young girl and a young man are necking on a sofa? A. You call this necking here?

Q. What do you call it? A. I don't know. I am not experienced, I can't say very much about it.

Q. Did you see any pictures in Esquire of necking? A. Yes, I did.

Q. You did? A. Yes.

Q. But you can't tell that this is necking, is that right? A. I will tell you the reason why, you see. The other one is in color and this is in black and white. 4820

Q. You can't tell what necking is in black and white, is that it? A. That is right, it is exactly right. It is the color that makes all the difference in the world. It is the atmosphere and the color and the background and everything else. That is the way the human mind reacts.

Q. Well, look at this cartoon. That is not in color. That could be indecent, could it? A. That looks to me like a very strong necking act.

Q. Like what? A. A very strong necking act, I imagine.

Q. Well, is that decent or indecent? A. Well, I don't even say it is as bad as most of the things I have seen in Esquire. 4821

Q. Well, is it decent or indecent? A. It is on the borderline, borderline case.

Q. On the borderline? A. Yes, on the borderline.

Q. Look at this one (handing to witness.) A. This one here (indicating)?

Q. Yes. A. Well, it is vulgar.

Q. It is vulgar? A. I imagine so.

Q. When you say you imagine so, you mean to say yes it is vulgar? A. Well, not emphatically so; I like to be fair, all grades.

4822 Q. All grades? A. Certainly; all sorts of grades in black and gray; you know that is the way it is.

Q. Now, would your opinion be changed if you knew that those three cartoons were published in the Saturday Evening Post? A. Not in a bit.

Q. I show you this cartoon and ask you what your opin- of that one is? A. Well, I don't know what to say about this.

Q. Do you see that the lady has no clothes on? A. I don't see that at all.

Q. You don't? A. Only this part I see here (indicating).

4823 Q. What you mean to say— A. Maybe she has clothes; I am not sure that she is naked.

Q. Well, you find that decent, do you? A. Well, I wouldn't class it as obscene, no.

Mr. Bromley: I offer it in evidence.

Mr. O'Brien: I have no objection.

Chairman Myers: It may be admitted without objection.

(The cartoon above referred to was marked Respondent's Exhibit No. 141 and was received in evidence.)

4824

Mr. Bromley: Will you mark these three Saturday Evening Post pages for identification?

(The pages referred to were marked Respondent's Exhibits Nos. 142, 143, and 144 for identification.)

Mr. Bromley: I offer Respondent's Exhibits for identification 142, 143, and 144.

Mr. O'Brien: No objection.

Chairman Myers: They may be admitted without objection. 4825

(Respondent's Exhibits Nos. 142, 143, and 144 were received in evidence.)

By Mr. Bromley:

Q. In the November issue at page 83 I show you the cartoon in the upper left-hand corner and ask you if you studied that one. A. Yes, I saw these cartoons, yes.

Q. Did you look at that one in the upper left-hand corner? A. Yes. 4826

Mr. O'Brien: What page is that?

Mr. Bromley: 83.

By Mr. Bromley:

Q. Now, do you consider that to be an indecent cartoon? A. I think it is.

Q. You think it is? A. Yes.

Q. This is the cartoon that is subtitled, "My date's at the awkward age; all hands and no dough." Is that right? A. Yes.

Q. Now I show you this cartoon and ask you if you think that is indecent or decent. A. I think it is indecent. 4827

Q. Indecent? A. Yes, sir.

Mr. Bromley: I offer it in evidence.

Mr. O'Brien: No objection.

Chairman Myers: It may be admitted without objection.

4828 (The cartoon referred to was marked Respondent's Exhibit No. 145 and received in evidence.)

By Mr. Bromley:

Q. Did I understand you to say, Doctor, that 30 percent of your time was spent in discussing sex problems with your parishioners? A. I never said that. I said that about 30 percent of my time is devoted to personal problems that people bring to me.

Q. But those are not sex problems generally? A. Not
4829 all.

Q. Not all? A. No.

Q. About what percent? A. I am in no position to say.

Q. You can't tell? A. No.

Q. Well, less than a majority of the problems that come to you are sex problems? A. I beg your pardon?

Q. Would you say that less than a majority of the problems that come to you are sex problems? A. I think so, less.

Q. You are what is known as an orthodox rabbi, are you not? A. I am a graduate of the Jewish Theological Seminary, the conservative branch, so I am really a graduate
4830 of the conservative school.

Q. Is it proper to refer to you as orthodox, a term which we have been frequently using here? A. I don't think it would be quite accurate.

Q. You are not a reform rabbi? A. No.

Q. You are a conservative, is that right? A. Yes.

Q. Is there a more conservative branch for the Hebrew faith? A. Oh, yes.

Q. What? A. Orthodox.

Q. The orthodox is more conservative? A. In the sense of following everything that is traditional. 4831

Q. But with regard to their attitude toward morality? A. Well, I don't think there is any difference.

Q. No difference? A. Well, I am not intimate enough with all the orthodox rabbis.

Q. What is your general impression? A. I have no general impression. I am discussing the theology, ritualistic theology or ritual. The orthodox are more conservative than I am, that is, my school. As far as orthodox in other things, there are all sorts of variations. The personal equation, the personal way of looking at it. 4832

Q. Will you give me your opinion of this cartoon? A. I think it is indecent.

Q. Your answer is, you think it is indecent, is it? A. Yes.

Mr. Bromley: I offer it in evidence.

Mr. O'Brien: No objection.

Chairman Myers: Without objection it may be admitted.

(The cartoon referred to was marked Respondent's Exhibit No. 146 and received in evidence.) 4833

By Mr. Bromley:

Q. Will you tell us your opinion of this cartoon, Doctor? A. I don't think it is. The answer is, no.

Q. Meaning that you think it is decent? A. It is not indecent.

Mr. Bromley: I offer it in evidence.

Mr. O'Brien: No objection.

4834 Chairman Myers: It may be admitted without objection.

(The cartoon referred to was marked Respondent's Exhibit No. 147 and received in evidence.)

By Mr. Bromley:

Q. What is your opinion of this cartoon at the right-hand corner of the page? A. I don't know the meaning of it. I don't know what "traction splint" means so I am not in a position to tell you.

4835 Q. A traction splint is a piece of wood that first-aiders and Red-Crossers and doctors join on limbs to help spread the broken bone. A. I think it is indecent.

Q. Your answer is, you think this is indecent, do you? A. Yes.

Mr. Bromley: I offer it in evidence.

Mr. O'Brien: No objection.

Chairman Myers: Admitted.

(The cartoon referred to was marked Respondent's Exhibit No. 148 and received in evidence.)

4836 *By Mr. Bromley:*

Q. In your opinion is this cartoon indecent? A. I wouldn't say so.

Q. You wouldn't say so? A. That is right.

Q. Do you remember the cartoon in Esquire in which the sailor has a figure tattooed on his arm with the hula girl looking at it? A. Yes, sir.

Q. What would you say about that cartoon? A. It is the

grouping. It is the whole thing. What we are here discussing is the way things suggest—the suggestiveness of the thing. 4837

You will find the very same thing minus other elements will be perfectly innocuous. Add one little touch and the whole thing is changed. I don't think this is bad.

Q. But the one in Esquire you think is bad? A. I think so.

Mr. O'Brien: I suggest the witness be shown the cartoon in Esquire.

The Witness: It is the vulgarness of the picture, the whole action. 4838

By Mr. Bromley:

Q. And the fact that it is in color, too? A. It helps, certainly; that is why girls paint their faces.

Q. Did you mean by that last answer that women painting faces is indecent? A. Some women—I didn't say they are indecent. All I want to prove is that color is very important.

Mr. O'Brien: Here is the picture. It is in the October issue, page 37.

The Witness: I think this is much worse than the other. 4839

By Mr. Bromley:

Q. You see now that it is not in color, don't you? A. That is right, it is not.

Q. You think it is worse than the cartoon which I showed you? A. Yes.

Mr. Bromley: I offer the cartoon from Colliers for
4840 July 31, 1943, in evidence.

Mr. O'Brien: No objection.

Chairman Myers: Admitted.

(The cartoon referred to was marked Respondent's Exhibit No. 149 and received in evidence.)

By Mr. Bromley:

Q. I show you the pen-and-ink drawing on page 95 of Esquire for November, the camouflaged soldiers looking at the
4841 girls in swimming. Is that decent or indecent? A. I don't think this is indecent.

Q. You don't think it is indecent? A. That is right.

Q. Do you think the joke which is told beneath it is indecent? A. I think it is; it is definitely vulgar.

Q. It is definitely vulgar, you say? A. Yes, disrespectful.

Q. Disrespectful? A. Yes.

Q. Do you use "disrespectful" as a synonym for "vulgar"? A. No, I don't.

Q. Will you look at the joke at the bottom of the third column, at page 95 of the November issue? Is that vulgar? A. No, this is not, in my judgment.

4842 Q. Did you know at the time you testified on direct examination that these two things were things that had been complained of by the Post Office Department? A. I know nothing about it.

Q. You know nothing about it. I thought you told me you had examined all of the material that was specified in these eleven issues. A. I looked through all the pictures in all the issues.

Q. Then your testimony only goes to the pictures. Is that

right? A. And I also read some of the jokes that were indicated, some of the parts that were pointed out. 4843

Q. Didn't you mean to create the impression on this Board that all the material specified on these slips was indecent? A. I never said it.

Q. You never said it? A. No, sir.

Q. You never meant to create that impression? A. I am not testifying about impressions. I am giving my opinion on things that I saw. That is all I am here for.

Q. Didn't you see that these two things that you now say are perfectly decent were here, before? A. I knew they were here. 4844

Q. And you knew before you testified that some of the things complained of were decent, didn't you? A. I said the majority of the things were obscene. That is what I said from the very beginning—talking about the majority of the pictures. That is all I said.

Q. You did not mean all of it was indecent? A. That is what I said from the beginning.

Q. You did not mean all of it was indecent? A. Definitely not.

Q. Will you look at Life for July 21, 1941, pages 55 to 58, inclusive? A. If I looked at it—no, I did not.

Q. Will you look at it? A. I will be glad to. 4845

Q. Here it is (handing magazine to witness). A. Yes, I have looked at it.

Q. What is your opinion of those photographs? A. I think they are not the proper photographs for a magazine.

Q. What do you mean by that, Doctor? A. I think they are not conducive to strengthening morals and I mean they influence young people—the influence on young people is not at all desirable and, therefore, I would call them from this point of view objectionable.

4846 Q. But you wouldn't call them indecent? A. Yes, I think I would.

Q. You think you would? A. Yes.

Q. Are you familiar with the present-day bathing suits worn by many women on our beaches? A. Yes, sir.

Q. What is your opinion of it as far as indecency is concerned? A. I think they could stand reform too.

Q. Do you go so far as to say that a bathing suit as shown on page 55 is indecent, as worn by women? A. It is not only the bathing suit, but the pictures drawn on her legs to call attention. That is the thing that is more objectionable really
4847 than anything else.

Q. What do you say about the bathing suit with the bare midriff? A. The bathing suit itself without the trimmings, the pictures on the legs—that wouldn't be so bad. After all, *mores* change.

Q. And present-day *mores* do sanction bathing suits as pictured on page 55, don't they? A. It seems that present-day *mores* doesn't find them very objectionable.

Q. And you agree with that, of course? A. Who says I agree with that?

Q. What is that? A. I didn't say I agree with that.

Q. You do, don't you? A. All I said was that what makes
4848 this particular thing objectionable is the pictures on the legs and that makes it suggestive, and because it is suggestive it is objectionable. Because it is objectionable I think it is indecent.

Q. You agree, don't you, that present-day customs sanction this type of bathing suit? A. It doesn't sanction the rest of it.

Q. Let's take the flags off her legs. A. We can't. How can you take it off? It is all one picture, all one impression.

Q. You can't take it off? A. Of course you can't. Any psychologist knows that. 4849

Q. Suppose you rub out the flags. A. It would be less objectionable.

Q. Now, if the flags were rubbed out you would have no objection to the bathing suit? A. You mean personally?

Q. Personally. A. Personally I would.

Q. Personally you would? A. Yes.

Q. You think the fact that women wear such bathing suits is corrupting? A. Well, it is exaggerating this sex, as one would call it, and from that point of view I personally think it is not quite the thing to do.

Q. You think it is destructive of morality to that extent? 4850
A. I would say it is really a symptom more than a cause. It is a symptom of civilization, a condition and cause of condition. It is symptomatic of general laxity of the times pertaining to these things we are discussing.

Q. Do you think as of today there is a general moral laxity in this country, Doctor? A. You mean compared with what? Everything is comparative, you know.

Q. Compared to what you conceive to be right as distinguished from wrong. A. This is not a comparison. This is an opinion. I mean, compare one period with another period.

Q. Would you say that the period of the present day was 4851
one in which there was a general laxity of morality as compared to what conditions were fifty years ago? A. I should judge so, I think so, yes.

Q. Do you think things are getting progressively worse? A. They may get better.

Q. But up to now, for the past fifty years, things have been getting progressively worse? A. My memory doesn't go back fifty years.

Q. How far does it go? A. The last two generations, the
4852 last thirty years, I think things have been getting worse.

Q. Much worse? A. I can't say that. You can note a tendency. I can't measure those things, and neither can you.

Q. Well, whether you can measure it or not, it is a tendency which you deplore, isn't it? A. Precisely true.

Mr. Bromley: May I have this issue of Life for July 21, 1941, marked for identification?

By Mr. Bromley:

4853 Q. Are you a friend of Dr. Karpman? A. The first time I met Dr. Karpman was this afternoon.

Mr. Bromley: This issue of Life for July 21, 1941, I now find is Exhibit 57 in evidence.

By Mr. Bromley:

Q. What is your opinion of advertising such as this which I now show you? A. Definitely objectionable.

Q. Indecent? A. Well, I don't know. It is objectionable.

Q. What I have shown you is Exhibit 20. Would you find that sort of advertising destructive of morality to any ex-
4854 tent? A. To some extent, yes.

Q. Would you find it corrupting of morals? A. It is undermining our moral values, our moral judgments, particularly with young people.

Q. There is a lot of advertising like that in the bathing suit field, isn't there? A. I don't read those advertisements, as a rule, so I can't tell.

Q. Do you ever read any perfume advertisements? A. You mean in magazines?

Q. In magazines. A. I don't recollect. 4855

Q. You don't recollect? A. No.

Q. Do you ever read any tobacco advertisements? A. Read them, just systematically?

Q. See the pictures. A. I see the pictures but I don't remember them. I am not sufficiently interested. I have given up smoking six or seven years ago.

Q. Would you say these two photographs represent substantially the change in women's bathing dresses which has occurred over the last generation? A. It does.

Mr. O'Brien: I object to that question. That doesn't seem to have any relevancy to the witness' testimony, whether he has kept up with the changes— 4856

Mr. Bromley: He has answered it, Mr. O'Brien. He says it has.

Mr. O'Brien: I move to strike the question and the answer.

Chairman Myers: Overruled. It doesn't mean much anyhow.

Mr. Bromley: This one is Respondent's Exhibit 131 and this one I now offer in evidence.

Chairman Myers: Admitted.

(The document above referred to was marked Respondent's Exhibit No. 150 and received in evidence.) 4857

By Mr. Bromley:

Q. Did you read the column in the January issue of Esquire about "Doctor Diddle"? A. No.

Q. Did you read Gilbert Seldes' review of the "Star and

Garter"? A. I just read, I believe, the first paragraph. I
4858 didn't continue. I believe I glanced through it.

Q. Did you read "Shor Nuff"? A. No.

Q. Did you read "The Unsinkable Sailor"? A. I don't remember having read it.

Q. Did you read "Home Sweet Ruby Street"? A. I don't think so.

Q. You don't think so? A. No.

Mr. O'Brien: I think he should be shown the articles.

Chairman Myers: Refresh his recollection of the
4859 articles by showing them to him.

By Mr. Bromley:

Q. You remember "Home Sweet Ruby Street", don't you? A. I just glanced at it.

Q. You just glanced at it? A. I saw the pictures.

Q. I believe you told me before you had not read "The Fall of the Flattering Word" on page 68? A. No.

Q. You did not read it? And you told me before you had not read "The Court of Lost Ladies"? A. I glanced through some of it. I didn't read it in its entirety.

4860 Q. Did you know that several reputable witnesses have testified here that "The Court of Lost Ladies", was a good piece, a decent piece? A. I know nothing about it.

Q. You know nothing about it. That wouldn't make any difference to you, would it, no matter who testified? A. Not at all. I am supposed to give my opinion.

Q. You don't consider that indecent, do you, "The Court of Lost Ladies"? A. I remember the illustrations were definitely indecent.

Q. What about the article itself? A. As I said, I have not read it. I just glanced through it. I am unable to judge. 4861

Q. Now, will you point out what there is indecent on the page 60 about the illustration? A. Well, you can see what kind of ladies these are from the way they sit and their whole atttiude and this thing too, just an exhibition—just the same old prurience.

Q. This picture at the bottom of the left-hand corner of page 61 is just an example of the same old prurience to you, is it? A. Yes.

Mr. Bromley: I would like to call the Board's attention to this one down here, the officer with the girl in front of the jail door. 4862

By Mr. Bromley:

Q. Did you read "2 Libel Suits"? A. No.

Q. Did you read "Dog's Worst Friend"? A. That poem?

Q. Yes. A. Yes, I read that.

Q. Did you read "Many Wives Too Many"? A. You mean the whole article there?

Q. Yes. A. No, I didn't read all of it, but I read the illustrations and I read some excerpts there. They certainly were indecent. 4863

Q. Now, will you point out to me the excerpts from "Many Wives Too Many" which you found to be indecent? A. They tell us, for instance, that two—Dr. Joad is quoted: "I, for instance, like the company of different women for different purposes, one to go out to dinner with, one to go to church with, another to cook for me, another to mother me, another to play games with, and another to make love to."

4864 Q. Is that the indecent passage to which you refer? A. Others, too, impressed me as indecent.

Q. Point out another one. A. If you give me enough time.

Q. Take all the time you want. A. It gives you a schedule for a six-wife batting order which is something that should be done before it is too late.

I think the thing probably would go on a weekly time table like this, one wife to go out to dinner with four times a week, and so forth.

I found this objectionable.

4865 Q. Do you think that is indecent? A. Yes, sir.

Q. You think that is an article advocating six wives? A. Well, it is considering it a good policy, though.

Q. You think it is an article which puts forward the proposition of an American man having six wives? A. No, not that.

Q. What do you think it is about? A. I think the whole approach to the institution of marriage portrays vulgarity and desire for lowering established civilized standards of marriage.

Q. Did you hear of Dr. Joad? A. No.

Q. What has Dr. Joad got to do with this article, anything? A. I don't understand your question.

4866

Mr. Bromley: Will you read it to him, please?

(Question read.)

The Witness: I don't know about Dr. Joad in the article. I am just quoting you the passages that impress me as indecent.

By Mr. Bromley:

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Q. You haven't got the foggiest idea what the article is about, have you?

Mr. O'Brien: That's rhetoric. I don't know whether it is a question or not. It is a very insulting one if it is, and I move that it be stricken. I don't blame the witness for not answering it.

Chairman Myers: The witness is the judge of it. If he thinks so he can say so and if he doesn't he can say so.

4868

The Witness: What is the question?

Mr. Bromley: Read it, please.

(Question read.)

The Witness: Well, that is the general opinion.

By Mr. Bromley:

Q. Well, what is your opinion? A. I am not answering such a question.

Q. You refuse to answer? A. Yes, sir.

4869

Q. What is the article about? A. I told you from the very beginning that I didn't read the article in its entirety, but I read certain passages there that struck me as indecent. That is all I said.

Q. So you don't know what the article is about, do you? A. The passages seem to deal with an arrangement where a man would have six wives and he made an arrangement, a working schedule with his six wives. That seems to be the impression from the passages I read, but I said I didn't read the article in its entirety.

4870 Q. And that is the way you treated all these articles that you read, isn't it? A. I told you from the very beginning that I did not read the articles in their entirety. I read passages but I looked through all the pictures and the illustrations. That is what I told you from the very beginning. I don't want to go back over it again.

Q. You don't like to go over it again? A. I don't like to waste time.

Q. What is the article "Wise Men Pick Pyknic Girls" about? A. I don't remember it.

Q. What is Mr. Nathan's theatrical criticism in the November issue about? A. I don't remember.

4871 Q. Did you find anything indecent in it? A. I didn't read the article.

Q. Yet you come here and are perfectly willing, aren't you, to pass judgment on a magazine without reading anything in it and looking only at the pictures? A. That is right.

Mr. Bromley: That is all.

Mr. O'Brien: Just a minute, Doctor.

Redirect Examination by Mr. O'Brien:

4872 Q. Now, I show you "Many Wives Too Many". You have seen that before, haven't you, Dr. Metz, and you have seen these pictures? A. Yes, I did.

Q. That is the article you have just been discussing with counsel on cross examination. You see this picture of the woman in bed and the man looking at her? A. Yes.

Q. And the woman sitting on the man's lap? A. Yes.

Q. You saw this article that is marked about loving time interfering with feeding time and all that? Will you look at that again and tell the Board if you have any dif-

ferent opinion from what you previously expressed. Doc- 4873
tor? A. It says: "When it came time for the over-sexed spouse to get around to his loving assignment, the feeding female might also have other arrangements in mind, and out of the entire sextette she might be the one least inclined to cause any loving trouble".

That is the kind of stuff I glanced through and my impression, therefore, is that it is indecent and lowers the whole institution of marriage to a barn-yard level; systematically so. If this is not destructive of morality, I don't know what is.

Q. Now, Dr. Metz, or Rabbi Metz, counsel on cross exam- 4874
ination had some considerable discussion with you about bathing suits or swimming suits as used on the beach, appearing in photographs. Do you make any distinction about a situation in which a person goes swimming in a bathing suit and poses for a picture in a magazine in a bathing suit? A. I don't quite understand the question.

Q. The point I am asking you is whether there is any distinction in using a bathing suit to go bathing and a bathing suit to pose for a picture in a magazine? A. Definitely so.

Q. What distinction would you make? A. I think posing in a bathing suit is something entirely different from going 4875
in swimming in a bathing suit.

Q. In other words, you don't object to people bathing in bathing suits but posing before a camera and having it published for general distribution creates an entirely different impression, is that it? A. Exactly.

Q. And the second use of it for public exhibition in a bathing suit by means of pictorial distribution may be obscene or indecent, is that correct? A. Yes, sir.

By Mr. Bromley:

4876 Q. Did you read "Portrait Above the Fireplace"?

Mr. O'Brien: I object to further cross examination at this time.

Chairman Myers: Mr. O'Brien has not finished, Mr. Bromley.

Mr. Bromley: He sat down.

Mr. O'Brien: We are not in Congress now.

By Mr. O'Brien:

4877 Q. Now, Doctor Metz, at the time when you did examine these magazines and you looked at these articles, is it or is it not true that you did find in there passages at that time upon the basis of which you established in your own mind an opinion concerning the article itself? A. Yes.

Q. Yes. Some of those passages you were unable to remember since you haven't been perusing the magazine ever since, isn't that true? A. That is right.

Q. If those passages were pointed out to you by counsel on cross examination you would have been able to give him your opinion then and there— A. I imagine I would.

4878 Q. (Continuing): —as to whether they were indecent or not? A. I think so.

Q. Yes, sir. Now, Dr. Metz, I show you again the June issue, page 134, the item entitled "Libel suits were as wine to that hell-firin' editor of the old West, Dave Day." And I ask you to read the marked portions therein and tell the Board what you think about them, if you please, sir? A. It says: "Two weddings are on dit for next week. This weather kind of suggests two in a bed, spoon fashion.

"An epitaph:
"Here lies the body of poor old Charlotte. 4879
Born a virgin, died a harlot.
For eighteen years she kept her virginity,
An all-time record in this vicinity."

(Laughing.)

I don't think it is necessary for me to read the rest. Why bother with it?

Q. Would you tell the Board whether you consider these things decent or indecent? A. Well, I will leave it entirely to the Board's own judgment. 4880

Q. Now, Doctor Metz, I show you again the January issue, the two pages of jokes there and ask you whether you saw these or these marked in the last column on page 123, the one entitled "Dear Doctor Diddle"?

Mr. Bromley: He has testified he didn't see them; he didn't read them.

Mr. O'Brien: He forgot a good many things.

The Witness: Well, I remember reading about the blushing girl every time she takes her bath.

It says: "Dear Doctor Diddle. I am a beautiful brunet but I have a serious problem. Every time I 4881
take a bath I blush. What shall I do? Twenty.

"Dear Twenty: Before you undress, put on a blindfold."

I read this one; I just happened to remember that. I don't think I read the other one, though.

By Mr. O'Brien:

4882 Q. What do you think of that joke, Doctor? A. It says: "Dear Doctor, I am a lady forty years old. I have been married to eight different men in seven different countries. Please tell me what I have to look forward to. Anxious.

"Dear Anxious: I am not sure about what you have to look forward to, but lady, you sure have a hell of a lot to look back on."

Well, this I didn't read before; it is the first time.

Q. What do you think of those jokes, Doctor Metz? A. Not much.

4883 Q. You mean to say by that that you think they are indecent? A. I certainly do.

Q. Here is the article which you were asked about: "The Savage Beast In Us", an illustrated article in the May issue? A. Yes, I remember the illustrations. Yes, sir, I definitely remember them.

Q. Will you look at the marked passages and see if you remember reading those? A. I don't think I read them all.

Q. Will you read them, please? A. Here is a good one: "I have yet to hear of a single instance where any average male, having been confronted with this tidbit, has rushed panting into the night to seek assuagement for the fires 4884 kindled in his circulatory system". It goes on: "If anything, this abdominal replica of Polyphemus has the chilling effect of examining a fine piece of velvet and finding a cigarette hole in the middle of it", etc. I really don't think I want to read this. The illustrations are sufficient.

I said before I didn't read it in its entirety.

Q. What is your opinion; that it is indecent? A. Yes, it is indecent. I mean particularly the illustrations.

Q. Particularly the illustrations? A. Yes, and those passages I read.

Q. Here is the October issue: "Wise Men Pick Pyknic Girls". This is the one you said you couldn't remember. A. I couldn't remember that. 4885

Q. I call your attention to the illustrations in this article particularly the one in the center of the page concerning measurements. A. I haven't read it.

Q. You haven't read it? A. No, sir.

Q. Would you tell the Board what you think about the illustrations in this thing? A. Yes. Minus the text I don't think they are so dangerous, but not having read the text I can't express an opinion.

Mr. O'Brien: That is all I have. 4886

Recross Examination by Mr. Bromley:

Q. Do you know what the purpose or thesis of Paul Gallico's article on burlesque is? A. No.

Q. You are willing to condemn the isolated sentences which you have read without reading the article or knowing what it is about? A. I am just testifying on the parts I have read and the illustrations.

Q. I say you are willing to condemn— A. The parts I have read I definitely condemn, and the illustrations I certainly condemn as indecent. 4887

Q. It would not change your opinion, knowing that this was an article exposing the tawdriness of burlesque, would it? A. It wouldn't make a bit of difference.

Q. Wouldn't make a bit of difference? A. Many times you see this sort of thing, just to be within a so-called framework of—what shall I say—legitimacy.

Q. If a writer had a purpose in taking this approach just to be within the framework of legitimacy, that would be obscene, would it? A. I never said that.

Q. Wouldn't it be? A. I never said that.

4888 Q. Would it be? A. Would it be what?

Q. Obscene, to make it appear that he was opposing something when he was really highly endorsing it surreptitiously? A. What I am testifying to is how these illustrations in my judgment affect a reader, and I said definitely that these illustrations are definitely destructive of morality. There is no reason why this man couldn't have written his article without these lewd illustrations.

Q. Then you don't mean to say that there was anything in the article that was indecent? A. I said that which I read

4889 was definitely obscene.

Q. Then you found both in the text and the pictures things that are destructive of morality, Doctor? A. Yes, that which I read.

Q. Now, it turns out that Mr. Gallico was exposing burlesque and showing it up for being cheap and tawdry and nothing to it. If that were so, would that change your opinion, Doctor? A. There is no reason, for instance, why the article should not have been edited and some of the things deleted.

Q. Then it would change your opinion? A. If those objectionable things were deleted.

4890 Q. With the passages and pictures in? A. No.

Q. If you knew it was an article exposing burlesque, that wouldn't change your opinion in any way, would it? A. Well, it is like the story about the operation; the operation was a success but the patient died.

Q. It wouldn't change your opinion? A. It wouldn't change my opinion as to the unworthiness of this article.

Q. Therefore it is of no importance to you whatsoever if the article concludes with this paragraph, is it:

"I trust that I have faithfully exposed my argument: that

if Broadway flesh-peddlers think they're putting on hot shows, they have another guess coming, and if guardians of the public morals are worried about me and the other guys becoming corrupted by those dull, imbecilic, puerile, gyrations over which they are currently exercised, they can quit worrying, because it just ain't so." A. It would change my opinion of the writer but not as to worthwhileness of the article. 4891

Q. It would still be indecent to you? A. It would be objectionable to me.

Q. It would still be indecent to you? A. The article?

Q. Yes, and the illustrations. A. The illustrations definitely so. 4892

Q. And the article? A. Yes.

Q. Now will you read paragraph 15 on page 77 of the November issue out loud?

Can't you read it out loud?

Mr. O'Brien: Now, don't try to browbeat the witness.

The Witness: I haven't read this article; I never said I read this article.

By Mr. Bromley: 4893

Q. Is this the one that you told the Board was indecent? A. I never said that George Jean Nathan's article was indecent; I never said it.

Q. And you don't say it now? A. I haven't read it.

Q. Read paragraph 15 out loud, will you? A. Now you want me to tell you whether the article is indecent in paragraph 15 by these four or five lines that you take out of this context.

4894 Q. I want you to read it out loud. A. Suppose I don't want to read it out loud?

Q. I can't make you. A. You read it and I will tell you.

Q. You tell me. A. I am not here to read, I am here to testify.

Q. You won't read it out loud? A. Not the way you ask me.

Q. How would you read it out loud? A. I don't want to read it; I am not a professional reader.

Mr. O'Brien: I have an objection to this.

4895 The Witness: You read it and I will tell you how it sounds to me. You read it and then I will tell you how this article should be judged; just read it to me.

By Mr. Bromley:

Q. What shall I do? A. Just read it to me and I will tell you what it means to me.

Q. Fifteen? A. Yes.

Q. "Any more plots about someone who mistakes an innocent institution for a bawdy house, or vice versa." Now, is that indecent? A. It is not enough, it conveys no meaning to me. You might as well take a whole phrase out of a sen-

4896 tence; it has no context.

Q. You couldn't possibly express an opinion as I read it to you out of its context, could you? A. Of course not.

Mr. Bromley: That is all.

The Witness: On this particular selection I couldn't.

Redirect Examination by Mr. O'Brien:

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Q. What do you think of this paragraph? I think it is an enumeration of characters, scenes, dialogue, and so forth, which Mr. Nathan said should be edited out of plays:

"Young floozie characters wearing short skirts that tightly embrace their hinterparts and who interpret their roles by crossing their legs three inches above the knees and dangling red handbags big enough to hold the books of the Corn Exchange Bank." A. Definitely objectionable because this particular selection conveys a whole picture whereas this one conveys nothing, just words. You must realize the difference between a descriptive piece of writing and just expository.

4898

Q. I ask you a similar question with regard to Item No. 21 in the same article, reading: "Den don't gimme any a dat crap! What da hell did yuh tink I wuz gonna do? Hang around dis dump waitin' fer Santa Claus tuh take care a me, fer Chris' sake. Looka you! What a yuh got? Six years yuh went tuh college an' what da hell a yuh got? A lousy handout a thoity bucks a week! Not fer me! Yeah, I got mine, but I *took* it!" A. Well, I wouldn't be able to judge unless I know who this particular speech is addressed to. I don't know what to say about that.

Mr. O'Brien: That is all.

4899

Mr. Bromley: That is all.

(Witness excused.)

Chairman Myers: We will take a ten-minute recess.

(At this point a short recess was taken, after which the proceedings were resumed, as follows:)

Chairman Myers: Proceed, gentlemen.

CHESTER W. HOLMES a witness called by and on behalf of
4900 the Post Office Department, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien:

Q. State your full name for the record, please? A. Chester W. Holmes.

Q. And you live in the District of Columbia, do you? A. No, I do not.

Q. Where do you live? A. Alexandria, Virginia.

Q. Are you employed in the District of Columbia? A. I
4901 am.

Q. Will you state in what capacity? A. As Assistant Superintendent of Public Schools of the District of Columbia.

Q. And what particular part of the public schools do you devote your time to? A. Supervision of the Teachers College and senior high schools, the white schools.

Q. Dr. Holmes, would you tell the Board what educational degrees have been conferred upon you? A. I hold a Bachelor of Science degree, and Master of Education degree from Harvard, and Doctor of Education degree from George Washington University.

4902 Q. That Bachelor of Science degree was 1916. Is that correct? A. That is correct.

Q. And the other Harvard degree was 1924? A. That is correct.

Q. And the George Washington degree was 1936. Is that right? A. That is right.

Q. How long have you been superintendent of the senior high schools? A. Four years and a half.

Q. And before that what were you doing in the District school system? A. In 1928 I came here from Chicago to

Langley Junior school, as principal, and then to the Anacostia School and then was placed in charge of vocational 4903
schools, junior high schools, and in 1935 came to my present position.

Q. So you have been a teacher, a superintendent of junior high schools, and now superintendent of senior high schools, and Teachers College. Is that correct? A. Since 1928 in the District.

Q. Have you, Dr. Holmes, at my request, examined several issues of Esquire Magazine? A. I have.

Q. From January to November, 1943? A. I have.

Q. And have you formed any opinion as to what the effect 4904
of reading these magazines would be upon persons, boys or girls, of the age of the students over which you have supervision and with whom you come in contact? A. Yes. I don't believe it would be beneficial to them.

Q. Do you believe it would be unbeneficial in any way? A. Yes, I believe it would be unbeneficial.

Q. Would you say whether or not you think it would have an effect upon their morals? A. I think it would.

Q. What effect? A. I think it would be harmful to their morals.

Q. Harmful to their morals? A. Yes.

Q. Would you say whether or not you consider the con- 4905
tents of these magazines as you have examined them, that is, the items that have been pointed out to you, decent or indecent? A. Indecent.

Q. Do you consider these items, Dr. Holmes, to be what you would consider to be proper information of a public character for general distribution? A. No, not from the school point of view.

Mr. O'Brien: That is all.

Cross Examination by Mr. Bromley:

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Q. When did you first see the magazines? A. I believe it was Friday of last week.

Q. How long did you spend looking at them? A. About two hours and a half.

Q. Did you examine the sports features of each of these? A. Not all of the sports features of each issue.

Q. Did you examine any one of them? A. Yes.

Q. What was your opinion of the one you examined? A. I would have to know which one that was. I couldn't tell you what it was—whether it was in the October number or which

4907

particular number.

Q. Could you find it for me? A. Which one would you have in mind?

Q. I only want the one you looked at, Doctor. A. I may have looked at more than one. As I say, I didn't catalogue them. I looked over the entire group of magazines.

Q. Would you pick out the first sports feature in the first issue that you looked at? A. I would have to be handed the magazines.

Q. They are right in front of you, sir. They are all in order. A. As I say, I don't know in which particular issue the sports numbers I looked at occurred. I looked through all

4908

the magazines and looked at the numbers that were marked.

Q. You concentrated your attention on the material specified on the slip of paper on the outside of each one of them, didn't you? A. That is what I concentrated on.

Q. I want to know if you have enough familiarity with the sports section of any of the issues to express an opinion about it. A. Not about the sports section, no.

Q. You couldn't do that? A. No.

Q. Do you know Major Griffith? A. No.

Q. Clark Shaughnessy? A. Do you mean personally or by name? 4909

Q. Personally first. A. I do not know either of them personally.

Q. Do you know Clark Shaughnessy? A. I believe Clark Shaughnessy was coach at the University of Maryland.

Q. Is he a man of high reputation in the sports field? A. I should say he was.

Q. Did you know he was now athletic commissioner of the Big Ten in the Middle West? A. No, I did not.

Q. His name is Griffith. A. I thought you were talking about Shaughnessy.

Q. I shifted all of a sudden to Griffith. A. I didn't know that. You didn't specify that you had shifted. 4910

Q. I now specify I have shifted to Griffith. A. I know nothing about him.

Q. Did you examine the art features of any or all of the eleven issues? A. Yes, sir.

Q. Can you express an opinion about the art features of the eleven issues? A. By the art features, I take it you mean the Varga pictures.

Q. No, I mean the reproductions of works of art. A. I would have to have you specify more particularly and precisely what you mean by works of art. Which works of art?

Q. You do not now remember that there is an art section in each of these magazines? A. Not classified as art as such. 4911

Q. You don't remember that? A. Not as art, no.

Q. Did you look at the covers of any one of these magazines? A. Yes.

Q. Did you notice that on the covers there was a department headed "Art"? A. I didn't read particularly along here, no, sir. I looked at the pictures and I looked at the date on it and turned inside.

Q. Did you look at the Table of Contents? A. Sometimes,
4912 not all of them.

Q. So, in the January issue you are not in a position to express your opinion as to the art of Covarrubias reproduced in that issue? A. I should have to see it first to see if I have seen it.

Q. Are the names Derso and Kelen familiar? A. No.

Q. Or Leydenfrost? A. No.

Q. Or the name Bohl? A. No.

Q. Or the name Pachner? A. I should want to see what you are alluding to. The names are unfamiliar as such.

Q. Have you ever studied art or the history of art? A.
4913 Not as such.

Q. You are not an expert in the art field? A. No. I am not testifying as such.

Q. I show you this colored map in the January issue at page 47. Can you express an opinion as to that?

Mr. O'Brien: What opinion, as to whether it is pretty or not? I would like to know what kind of opinion counsel is asking for.

Mr. Bromley: Any opinion.

The Witness: I would say that it would not be particularly helpful as an art exhibit for me, and I
4914 can't see where it would be very helpful to students.

I am testifying only in its relation to students, not personally.

By Mr. Bromley:

Q. Do you think that is an example of the contents of this magazine which you said would be unbeneficial to students? A. I would say it would be unbeneficial.

Q. Would you say it was harmful to their morals? A. Not that much, no.

Q. Would you say it was indecent? A. Not that map, no.

Q. Did you look at these travel posters? A. Yes. 4915

Q. Did you recognize them to be works of art? A. I certainly wouldn't call them works of art.

Q. Would you call them unbeneficial to students? A. Yes. I cannot see where there would be any benefit to students looking at those.

Q. Do you think they are harmful to morals? A. Not this particular set that you are showing me.

Q. Have you in mind some other particular set? A. No, not without seeing them. I wouldn't attempt to testify without seeing what I was discussing.

Q. Do you remember looking at the Leydenfrost painting 4916 on page 76? A. I remember that one.

Q. Would you consider that one— A. Yes, I think that could be considered art, from my point of view, anyway.

Q. Would that be beneficial or unbeneficial to students? A. I think that might be beneficial.

Q. Would you consider that information of a public character from the school point of view, sir? A. I think it could be, depending upon its use.

Q. Yes. Well, if it could be used for the benefit of students, then you would call it information of a public character? A. I would call this particular piece of art, yes.

Q. Did you make any analysis of that such as you and 4917 I have just done of these eleven issues? A. Yes. Some I thought all right, and some I did not.

Q. Would you mind pointing out one instance of art which you thought was not all right? A. Again, I can't tell you in which particular issue a particular picture would not be pleasing and what was. I would have to look through them there. I can't call the page and edition number.

Q. I shouldn't think you could. I wondered if you had anything in your mind as to the art content which you didn't

4918 think would be beneficial? A. I looked these through without regard to the subheadings and classifications.

Q. Did you read any of the articles? A. Yes.

Q. Which ones, do you remember? A. Those that were marked.

Q. Only those? A. I read some others. I can't recall the names now. This was almost a week ago, six days ago.

Q. How many articles other than those that were marked did you read, sir? A. I would think possibly from four to six. I didn't keep any record. As I went through and saw a title which attracted me I read it. But I was not reading them item by item.

4919 Q. Does that apply to the fiction too? A. Yes, that applies to the fiction. When I saw an article that attracted my attention I read it and if it did not I skipped it.

Q. Did you find anything that was interesting? A. I couldn't tell you in which particular issue because I was not thinking of its relation to this meeting because I didn't know I would be asked any such question.

Mr. Cargill: Will the witness speak so we can understand?

By Mr. Bromley:

4920

Q. Does this figure of four to six include the articles and the fiction stories as well? A. Yes.

Q. You read four to six of the articles and the fiction stories? A. Yes.

Q. Can you remember any one of the four to six articles or stories which you read which you found objectionable? A. I don't think I could recall them by title. I think I can find them rather quickly through some of these. As I recall there was one in the later numbers, that is, towards the close of this year.

Q. Could you find that for me? A. Yes, I think probably I could. 4921

Q. They are in order here so you won't have any trouble. A. Here is one here, at page 56, "Portrait Above The Fire Place."

Q. That is a piece of fiction? A. I think it is pretty cheap. I think it would be a let-down, to anybody who read it.

Q. You don't think it is very good literature? A. No, because I think literature is something more than the mere putting together of words pleasing to the ear or to the eye.

Q. What other article have you got in mind? A. Well, another one happens to be in this same one, page 104, "The Sporting Scene." 4922

Q. Do you recognize the author of that? A. Just by name. I recognize it looking at it now, that he is the author.

Q. You don't know who he is? A. No, sir.

Q. You don't recollect he is the man who wrote the sports section of the magazine? A. No, because, as I say, I didn't read the magazines with regard to sections. I looked through them just as one would thumb through casually.

Q. What do you teach in the public schools? A. Mine is an administrative position; I don't teach.

Q. You have never taught? A. Yes, not in Washington. 4923

Q. What did you teach? A. English and foreign languages.

Q. Are you an expert on literature? A. I do not so qualify.

Q. Did you think this second article was cheap, too? A. Yes, it doesn't appeal to me at all, and I can't see how it would appeal to the average person.

Q. Have you another article in this issue in mind? A. This one on page 30 of the August edition, "Many Wives Too Many".

Q. Did you read that? A. I read it.

4924 Q. Did you think that was cheap? A. I thought it was pretty far-fetched and sort of uncalled for. It may be funny to some.

Q. Do you know Mr. Channing Pollock by reputation? A. I do.

Q. Would it surprise you to know that he testified here that that story that you said was cheap was one of the best stories he had ever read? A. No, it wouldn't surprise me.

Q. People of intelligence might well differ with you, might they? A. Of course.

4925 Q. Indeed, you would be prepared to admit that the majority of opinion might be that that story possessed literary excellence? A. Certainly. I am testifying simply as I review that for those in our public schools, and those in our teachers college. I am not giving my personal opinion at all.

Q. You wouldn't use this in your schools? A. No.

Q. Did you think this magazine was published for grade school or high school children? A. No. It simply might find its way in. There are a number of magazines we do have on our lists which are not published alone for schools but which we find useful in our instruction.

4926 Q. Is Life one of them? A. I haven't the list here but I believe it is not.

Q. Did you ever hear of William B. Ziff? A. No.

Q. Did you read in the January issue, "Thirty-one Lessons for Brass Hats and Bureaucrats"? A. I do not recall it as such. I would like to see it first.

Q. This is described as "Excerpts from 'The Coming Battle of Germany' which every American citizen should read." and it is on page 109. A. May I look at it a moment, please?

Q. Yes, please. A. No, I did not read that.

4927

Q. From what you see of it now couldn't you well form an opinion that that would be most useful to students? A. From that cursory glance I should think so, but I would want to read it more thoroughly.

Q. Did you read Joseph Wechsberg's article on "School for Saboteurs"? A. I did not.

Q. That is an article by a refugee who says that, "Sabotage being the only weapon left to the people enslaved by the Nazis, they make the most of it."

You have no recollection about that at all, have you? A. I have not.

4928

Q. Will you glance at it? That might well be of very considerable educational value, might it not? A. It could be.

Q. It could be? A. Yes.

Q. This article, "Japan's Mein Kampf," by Curt Riess, saying, "The Tanaka Memorial, given to the Emperor in 1927, contains plans for Jap conquest now under way." Did you look at that? A. I did not.

Q. It is on page 56. Would you glance at it for me, if you please, sir? That looks like a valuable article for educational use, doesn't it? A. It could be.

Q. Here is an article I notice by Robert W. Marks on "The Future of Air Power" at page 77. Did you read that? A. I did not.

4929

Q. Would you look at it, please? You would think that would be especially valuable, wouldn't you? A. Well, I would object to the use of "especially valuable." I think it could be valuable. It would depend on what use you would put that to. I think you should specify what use you would want me to put it to, whether for casual reading or for lectures in the field of social studies or the field of current events.

Q. I would suggest turning to the field of current events
4930 since this article suggests— A. I think it would be useful there.

Q. I notice an article by Thom Yates on "West Point's First Captain." Did you read that? A. No.

Q. That appears at page 58 and has to do, I believe, with the Generals Pershing, Lee, MacArthur, and Wainwright, all of whom were first captains at West Point Military Academy.

Will you look at it, please? A. Yes.

Q. It has to do with a matter of current interest, doesn't it? A. Yes, a matter of just general interest, however.

4931 Q. Do you know who George Jean Nathan is? A. Yes.

Q. What is your opinion of him? A. You are asking my professional opinion but not my personal opinion, because that is the only ground on which I care to testify for the schools. I don't feel my personal opinion is being sought here.

Q. Whichever you wish, sir. A. It is very hard to express exactly what one's opinion is about a person because there are both good and bad features. I would say in general he is all right.

Q. Wouldn't you go a little further and say he is perhaps America's outstanding theatrical critic today? A. I don't
4932 say that I would say he is the outstanding one. I would say he is an outstanding one.

Q. Do you know William Lyon Phelps? A. I would have far less reservation about William Lyon Phelps than about George Jean Nathan.

Q. Do you know he appeared as a department head in each of these issues throughout October? A. I read that.

Q. You noticed that? A. Yes.

Q. You have no reservations about the value of his contributions, have you? A. No.

Q. Did you notice that Mr. Nathan appeared in each of the eleven issues as the head of the theatrical department, always with an article of criticism of his own? A. I didn't notice that. I don't question your statement but I didn't notice that particular fact. 4933

Q. Did you find anything to object to in any of the Nathan pieces in any of the eleven issues? A. Well, I didn't study them with regard to whether I should object to anything that Nathan wrote. I would have to review, refresh my mind on each one of those, to be able to say. Asking me in this way, I couldn't say that. I either did or did not. I would need to know just what he said in each one of them. 4934

Q. Well, do you remember at all anything that he wrote to which you took exception? A. No, neither do I remember those which I agreed with. I didn't read them with that in mind.

Q. Well, do you recollect one of the articles of his was specified on the slip of paper attached to each copy? A. No, I don't remember that. I would be glad to see the article to refresh my mind on it if it were.

Q. It is in the last one, the November issue, page 77 (handing the above-mentioned article to the witness). A. I remember that. I could not recall that until I looked it over. 4935

Q. Now having looked it over again, do I understand you to say that that article is harmful to morals? A. No, I wouldn't say the article is harmful to morals. I think that the discussion in it leaves something to be desired but there are parts in it I think should have been omitted.

Now, I want to emphasize that I am testifying with regard to students; I am not testifying with regard to adults. I think there are things in there that could have been omitted and no real harm done.

4936 Q. That is, the omission of certain parts would not have done any harm? A. The omission of certain parts would not have done any harm to the original purport of the article.

Q. You don't really think, do you, Doctor, that Billy Phelps would regularly contribute to a questionable magazine? A. Now, of course, that is capable of various interpretations as to what is questionable there. He was probably contributing to one on an adult level, and articles on the adult level are not likely to be read by students. He was probably not writing for children of high school age or college age.

4937 Q. So that the fact that he regularly contributed to this magazine would lead you to believe that he considered it to be acceptable for adult use? A. Not necessarily; not necessarily. A person might write for a magazine for money without regard to the rest of the contents. His article may be perfectly fine but he may not be interested in what other connections it is used.

Q. You really think that Billy Phelps was that kind of man? A. No, but I am confident that his thoughts were writing for adults and not writing for high school students.

Q. You express no opinion whatsoever as to whether this magazine is acceptable for adults? A. I would express no

4938 opinion on this magazine as to harmlessness nor wrongfulness to adults. I am testifying only as to its harmfulness to high school and teachers' college students. That is all I am doing in my testimony.

Q. Do you know Dr. Ernest Osborne, Professor of Education at Teachers College, Columbia? A. Surely.

Q. Do you know Dr. William Allen Neilson? A. I do; I know him by reputation.

Q. What is that reputation? A. Very high.

Q. Do you know Mary Ellen Chase of Smith College? A. I have heard of Mary Ellen Chase by reputation. 4939

Q. What is that reputation? A. Very fine.

Q. Do you know Professor Gleason of Vassar? A. I do not.

Q. Do you know Professor Herbert B. Smith of the Francis W. Parker School in Chicago, Illinois? A. No.

Q. Do you know J. Halsey Gulick of the Gulick Camps in Maine? A. No. There are three or four Gulicks; I am not familiar with that one. There is a Walter Gulick, not that one.

Q. This Gulick to whom I refer is headmaster of Proctor Academy now? A. I don't know him. 4940

Q. Would you say that the opinion of William Allen Neilson and Mary Ellen Chase as to this magazine was entitled to great respect and weight? A. Depending on the basis on which they rendered their opinion on it. If they were commenting on its use in high school, I would want to know what it was before I commented further. I said, as to its adult level I am not commenting on.

Q. What about your view of their opinion as to its effect upon college age youth? A. I would listen to that with respect, because I think they would know what they were talking about.

Q. Did you know that all the persons whose names I just read so testified personally or by stipulation? A. I did not. 4941

Q. That this magazine was decent or respectable? A. I don't know anything about what they said about this magazine. I haven't heard one way or the other.

Q. Doctor, based on the analysis which you and I have just made, wouldn't you say that all of the eleven issues contain a large amount of information valuable to high school and college students? A. I wouldn't say a large

amount, because I haven't weighed it. We have picked out
4942 at random articles and I would say that they contain some information of that nature, that is as far as I would care to go without weighing it further.

Q. Based on the analysis that you and I made of the January issue, wouldn't you say that you and I have pretty well demonstrated that the bulk of it was of such a character? A. No, because I don't know how many pages you quoted from. There were some left in there that I didn't see. I only know the parts that we discussed.

Q. Did you know that the parts we discussed composed all the articles except one? A. No, I didn't know.
4943

Q. Didn't you know it? A. No. I didn't read that with you; I just listened to your statement of the names and the contents.

Q. Did you ever hear of the author Manuel Komroff? A. No.

Q. I take it you didn't read his story "The Christmas Surrender"? A. I don't think so. I would have to refresh my mind on that. No, I didn't.

Q. Did you ever hear of the author, Louis Paul? A. No.

Q. Did you read his story "Strictly Legitimate Deals?" A. I can not answer that without checking to refresh my mind. After all, reading through eleven of those it is not
4944 likely to make things stand out by name.

Q. Had you ever read this magazine before? A. I have read it occasionally, glanced through it but have not read it page by page.

Q. Looking over the titles of these seven stories, "Black Angel Reef," "Strangers Defeated," "Sixty-one Shopping Days till Love," "Rose into Cauliflower," "Testimonial to Hillel," and the two that I have mentioned here, are you able to form any opinion as to the character of those

stories? A. Well, I wouldn't judge simply by the names; 4945
no, sir, because I think that would be a very unwise way to judge a story, simply by its name.

Q. But you see there is a summary opposite. A. I will read the summary.

It would be hard to tell from this whether they were acceptable or not, just by looking at that; on the surface, they appear, shall I say, innocuous.

Q. Do you remember the double page spreads of Army camp jokes that appeared in these issues? A. Yes.

Q. Did you find them objectionable? A. Some; not all.

Q. By and large, would you say the great majority of 4946
those jokes were not objectionable from any possible standpoint? A. Well, I didn't count the number, so when you say the great majority, I don't know. I would say that some were and some were not, but I would not attempt to testify how many were and how many were not.

Q. Didn't you notice on one two-page spread there were only two jokes to which objection was taken; to which even the Post Office Department objected? A. Yes.

Q. And there were 30 to 40 jokes in there altogether? A. Yes. On some pages there were that many jokes, I would say.

Q. Is it your opinion, Doctor, that it is harmful to the 4947
youth with whom you have had the greatest experience to print a joke such as this:

"She: Would you like to see the place where I was operated on?

"He: No, I hate hospitals." A. Oh, I think it is bad taste.

Q. Bad taste? A. Yes.

Q. You remember that was one of the jokes? A. For youngsters of high school age?

Q. Yes. A. Yes.

4948 Q. Do you remember that that was one of the jokes? A. I do.

Q. You wouldn't call that indecent, would you? A. I would say indelicate.

Q. Indelicate? A. Yes.

Q. Wouldn't you say that most of the Army jokes that were reprinted in this magazine from month to month, to which objections have been made, were indelicate rather than indecent? A. No, I think some were disgusting, indecent, but the others were indelicate.

Q. Could you give us any approximation as to the proportion? A. I would say they were about evenly divided.

4949 Q. About evenly divided? A. That is based on my quick recollection. I didn't keep any personal account of it.

Q. I know. So that, even from the point of view of the high school youth, you find only some of the material complained of to be objectionable? A. No, I would say the majority of that which is complained about is objectionable; the majority of it.

Q. As to the rest of it, you have no opinion at all except as you have expressed? A. Except as I have expressed it here. Remember, I did not read every article in there, as I have testified to.

4950 Q. You know, do you not, that the material complained of represents but a very small proportion of the total contents of the magazine? A. Well, that may be, but it only takes one rotten apple to spoil a barrel.

Q. Now, coming back to my question, you know, don't you, that the material complained of represents but a very small proportion of the total content of the magazine; isn't that so? A. That is right. Based on those pages, I would think that was correct.

Q. Doctor, here is an exhibit, 128. Would you look at it and tell me whether you have the same opinion of that as

you have of the material in Esquire which you condemned? A. I saw that. I think it is cheap. That was in last Sunday's Star. 495

Q. You think it is cheap? A. Surely. I read it.

Q. Well, now, is it any better or any worse than those pictures of camouflaged soldiers looking at girls in swimming? A. I have a notion that Bud Fisher may have gotten this from that.

Q. You therefore think that this comic strip is no better and no worse than the former? A. That particular strip is no better than that which you have just alluded to.

Q. Do you think that a comic strip like that really does have any harm to children? A. Yes, because I think it cheapens them. You know that we in our classes try to spend a great deal of time in, shall I say, raising their point of view in regard to literature, and anything that lowers it makes our work much more difficult to carry on. 495

Q. You say that even though the material which you criticize is just published for the purpose of getting a laugh? A. I say that for that very reason. I say that to get a laugh out of something cheap is cheap itself. It shows very poor taste on the part of the publisher.

Q. You have no hesitation in characterizing that kind of cheapness as indecent? A. No, I wouldn't characterize it that way. Just because a thing is cheap doesn't mean it is indecent. There are degrees of indecency. 495

Mr. Bromley: That is all.

Redirect Examination by Mr. O'Brien:

Q. Doctor Holmes, Mr. Bromley asked you a number of questions concerning articles or stories in various issues of Esquire here, other than those which you were shown

and those which you read at your own option when you
4954 had the magazines for examination. By the way, how long did you have them? Did you have them in your possession? A. Yes, I did.

Q. And you made your examination without consultation with anyone? A. I did. I made it by myself.

Q. You made it by yourself? A. Yes.

Q. These articles which he discussed with you, which you thought might have some educational value, for instance, these articles about brass hats, or whatever they were, what would you say if in presenting them to high
4955 school students they should be presented in this form, accompanied by these various and sundry jokes that you did not approve of, or these Varga girl pictures or cartoons? A. No. That would be my objection to the total magazine, the fact that they came mixed that way. I think by themselves or under another cover or another editorial program, they would be probably accepted by the schools.

Mr. O'Brien: I have no further redirect.

Mr. Bromley: That is all.

Chairman Myers: That is all, Doctor.

(Witness excused.)

4956

Mr. O'Brien: Well, my witness walked out on me; I guess he didn't wait very long; so I can't go ahead. I have had three of them here.

Chairman Myers: Does that conclude all your witnesses?

Mr. O'Brien: No, I have listed for appearance here four other witnesses.

Chairman Myers: About seven altogether?

Mr. O'Brien: Yes. I had one man who caught a cold and couldn't be here.

Chairman Myers: There is no way of getting any of them in this afternoon? 4957

Mr. O'Brien: No, sir. I told the others to be here tomorrow. I thought these two men would take up the rest of the afternoon. Of course, I cut my direct so short that it has created a hiatus.

Chairman Myers: Well, I suppose there is nothing to do but to go over until tomorrow. If we start at 9:30, do you suppose there is any chance of getting through tomorrow?

Mr. O'Brien: Well, I will try very hard but there is one witness tomorrow that I don't think I can get out of bed until Saturday. 4958

Chairman Myers: Who is he?

Mr. O'Brien: He is a very well educated psychiatrist and has been studying this thing for a week or more.

Chairman Myers: I was going to make a suggestion to both of you gentlemen, that this has been a very long drawn out hearing, and I don't know whether you can go ahead with your argument at the time when it is generally set, at the end of the hearing. It seems to me, if you can agree on how much time you would like to have, it would be better. Whatever time you gentlemen can agree upon would be satisfactory to the Board. 4959

Mr. Bromley: Two hours apiece.

Chairman Myers: You want two hours apiece?

Mr. Bromley: Yes.

Chairman Myers: I rather figured that you would probably want a little time to get your thoughts together.

Mr. Bromley: That is what we would like to do.

Mr. Hassell: Two hours would certainly be enough
4960 for us.

Chairman Myers: There is no objection on your part to it?

Mr. Hassell: No, sir.

Chairman Myers: Then suppose we just figure it that way. Perhaps these hiatuses we are having here may help us because they will give you some time to put your thoughts together.

Mr. Bromley: Can't we persuade Mr. O'Brien to finish tomorrow so we can sum up Saturday?

Chairman Myers: I would like to see if that could
4961 not be done, very much.

Mr. O'Brien: Mr. O'Brien would like to do that, Mr. Bromley. Mr. O'Brien is not enjoying your company any more than you are enjoying his, but my witnesses unfortunately are sick or have some business to attend to, and I have tried very hard to shorten this thing, because it has been going a long time, and the Board has been inconvenienced, and I know Esquire has been here at its own expense, and all that, but still there are some men whom I feel the Board should have an opportunity of hearing. I will be as brief as I can on my direct examination,
4962 and as you observed it has not taken over 10 or 15 minutes in any case.

Mr. Bromley: If you tell us who they are, we might stipulate as to them.

Mr. O'Brien: Well, I will think about it.

Mr. Bromley: Thank you.

Mr. O'Brien: But there are some men I would prefer not to stipulate. If it comes to a point of stipulation perhaps we can do that tomorrow.

Colloquy.

Mr. Bromley: Why can't we take them all up now? 4963

Mr. O'Brien: Because there are a few of them anyway that ought to be heard. There are some that we can probably stipulate.

Chairman Myers: Maybe you can agree on those you can stipulate with regard to their testimony and then take those you think ought to be heard. You might confer as to that.

Mr. Bromley: It is a terrible personal inconvenience to me to be kept in town over the week end when I have to start on Tuesday the 9th on an anti-trust case that is going to take the rest of the winter. 4964

Mr. O'Brien: Well, of course, most of the time has not been taken up by the Post Office Department. We finished our case on direct in half a day.

Chairman Myers: Suppose we adjourn until 9:30 in the morning. In the meantime maybe you gentlemen can get together on the stipulation.

(Whereupon, at 4:30 o'clock p. m., the hearing was adjourned until Friday, November 5, 1943, at 9:30 o'clock a. m.)

4965

HEARING OF NOVEMBER 5, 1943.

4966

PROCEEDINGS RESUMED.

Chairman Myers: Are you ready to go ahead?
Mr. O'Brien: Yes, sir; I am ready.
Chairman Myers: Suppose we go ahead.
Mr. O'Brien: Doctor Rustin.

JOHN W. RUSTIN, a witness called by and on behalf of the Post Office Department, being first duly sworn, was examined and testified as follows:

4967

Direct Examination by Mr. O'Brien:

Q. State your full name for the record, please. A. John W. Rustin.

Q. You are a Doctor of Divinity? A. That is right.

Q. You live in Washington in the District of Columbia? A. Seven years.

Q. Seven years? A. Yes.

Q. You are the pastor of the Mt. Vernon Place Methodist Church? A. That is right.

Q. Doctor Rustin, will you tell the Board where you received your degrees, what education you have had? A. I am a graduate of Emory College in Atlanta, Georgia. I have a Master's degree from Columbia University, New York, and I have my Doctor's degree from my alma mater in Emory College, Atlanta, Georgia.

4968

Q. Besides being pastor of the Mt. Vernon Place Methodist Church, do you hold any other positions in Washington with any other organizations? A. I am a member of the arbitration committee of the War Labor Board. I am also a member of the Board of Education Advisory Committee

to the juvenile delinquent problem in the city, and President of the Federation of Churches in Washington. 4969

Q. Do you have any connections with any other organizations, Doctor? A. I am one of the speakers for the Federated Council of Churches of Christ in America, speaking to universities and colleges across America.

Q. You visit these various colleges, do you, Doctor? A. Well, I have been in some thirty in the last two years, living for a period of from three to five days on the campuses.

Q. Now, what activity or interest do you have in the case of young people; on the part of young people in the community? 4970 A. Well, I suppose the very fact that I am on the Board of Education Advisory Committee for this juvenile delinquent problem would show that I have been selected as a Protestant minister for the District of Columbia because of my great interest, and in a recent article by J. Edgar Hoover, Mr. Hoover said that our church was doing more than any other church he knew of to work in the field of juvenile delinquency.

We have had for the last two years over 300 of these dirty, ragged urchins off the streets of Washington in our church Saturday night to a picture show. We also have on Saturday night something like 100 of our young people 4971 bowling in the Lafayette bowling alleys.

We also have our whole social hall turned over to newcomers and soldiers, servicemen, on Saturday night, so I imagine my whole emphasis has been on the liberal side, on the positive side, rather than the negative side of religion.

Q. In other words, you try to build up the moral structure of youth. Is that your statement, Doctor? A. I hate to keep talking about it because it sounds like you are an

4972 egotistical jackass or something, but I think I would be considered that.

Q. Doctor Rustin, I want to show you the January, 1943, issue of Esquire magazine, and call your attention first to pages 97 to 108, containing several pictures.

Will you please examine those? A. What would you want?

Q. I want to know, Doctor Rustin, what your opinion of these pictures is as to whether or not they would have any effect upon the minds of the readers to produce decent or indecent or other kinds of reactions or thoughts. A. I

4973 think there is some difference in them. I rather think that one is rather suggestive (indicating).

Q. You mean the top one. That is the February Varga girl. A. I also think that June—

Q. You think June is suggestive too, Doctor. Is that your answer? A. Yes, I think so. A rather thin line of demarcation, maybe, but the others are not so bad.

Mr. Bromley: Those are all out of the January issue, just for the record.

Mr. O'Brien: That is right.

By Mr. O'Brien:

4974

Q. What do you think of the August picture, Doctor Rustin, and the September picture in the same book? A. Well, August is not so good either. September is not quite as bad as far as I am concerned.

I say again, I don't know where you draw the line. I still would say the June and February ones, so far as I am concerned, would be the most objectionable.

Q. Do you think that these pictures that you have seen

Doctor, would constitute information of a public character proper for dissemination amongst the children or the young people, the adults, with whom you come in contact? A. I think so. I wouldn't want my 15 year old daughter to see these, for instance. I would rather for her not to. 4975

Q. You think they are not information of a public character? A. I'd certainly say that, yes. I would rather not have them accessible to my own daughter.

Q. Turn to page 45, Doctor. There is a picture on page 45, and a verse beginning:

"Men, sleeping beside your wives. Awake! 4976
Awake, to gaze longingly, lastingly
Upon soft-skinned thigh and softer breast
revealed by careless gown."

Will you read that poem, please? A. I wouldn't object to that. I mean, there may be more good than there is harm in an article or poem like that. I don't know. I just wouldn't question it.

Q. Will you turn to page 137, Doctor? A. This same one?

Q. The same issue, showing two men looking through a skylight with the caption: "And to think I gave up drawing". A. My persona! reaction to that is this, that that would have great harm with soldiers because I think it is suggestive and I think we need as little bit of suggestive literature that is going to fall in the hands of soldiers as possible, having been in the last war myself I think we are not going to need to throw temptations in their way. 4977

I don't know whether this would do any good or not. I also happen to believe in the positive thing. The other day I ran into this thing; that happens to be attractive (ex-

hibiting), so whatever the soldier gets at Christmas time
4978 I am going to have him get that.

I have 350 of my boys in the service, which is about one-tenth of my congregation. The reason I am going to send that is because I think he is going to need something like that to counteract a lot of things that are coming into their hands. I don't know whether this would do any good or not.

Q. This is a picture of Christ with a prayer? A. That is right.

Q. Is that the item to which you referred? A. Yes.

Q. Do you mind if I show it to the Board? A. No, not
4979 at all. It is just something that we are advertising at the Federation of Churches right now, because we think this is kind of a positive thing rather than a negative thing.

I would like to emphasize the fact that I happen to be one of those who never believes that you are going to accomplish very much through negations. I always believed that you have to have counter reactions by positive things.

I think that is something that a boy is going to put into his pocket and pull out now and then. While it is going to cost us a hundred dollars to do it. I don't know if the Post Office is going to help us mail it; especially since we write them every week 350 letters and it is costing us
4980 a bit of money. Maybe I will get a little help down here.

Mr. Bromley: You should have made a deal with O'Brien before coming up here.

The Witness: Yes, I should. I don't know why I didn't.

Mr. O'Brien: Mr. O'Brien would be delighted to help you, I assure you, as any other man would.

By Mr. O'Brien:

4981

Q. Now, Doctor, let me hand you the February issue of this magazine and direct your attention to the folded picture at page 34.

Page 34 is a folded picture of a Varga girl. A. Yes.

Q. May I unfold it for you? A. My frank appraisal would be that again in the hands of young soldiers, they are tempted enough anyway. I am not sure that this is good, I would rather say that I personally would be against it.

Q. You think it might— A. It is a very attractive picture, not nearly as crude as the other pictures I selected in the other group. I think there is a difference when a picture is beautiful and lovely and can appeal to one's appreciation of beauty, but when it is just out and out vulgar, then there is a very different situation. 4982

This is not nearly as vulgar as the two pictures I called your attention to, February and June, in the other magazine.

Q. Will you turn to page 65? That is a hard page to find. It is not numbered. A. Here it is. Well, that is more the vulgar type that I am talking about.

Q. What is your opinion as to whether this is— A. I would be definitely opposed to this. 4983

Q. As an indecent picture? A. Yes. In other words, I think there is a line there. I don't know how I would draw the line, but I would certainly draw it, between vulgarity, vulgar display, and simply an artistic display.

Q. Will you turn to page 77, please, at the bottom of the page, the picture showing a couple by the bed undressing and two women and a man looking on? A. Yes, that is again decidedly, perhaps, the worst one I have seen. I don't like that at all.

4984 Q. Do you think that is an indecent portrayal, Doctor? A. That is the kind of thing that I happen to be—I feel that is just vulgar and nothing is accomplished by something like that.

Q. Now, will you turn to page 95, Doctor, at the top of page 95—it begins at the bottom of the second column from the right:

"There is a new secretary in the union hall who isn't used to sailors or their language. It seems Showboat went up to her when she was alone in her office, bent over her shoulders —loop-legged drunk—and rasped, in his peculiarly hoarse 4985 and penetrating voice, 'How's chances to lower the boom on you, sister?' The girl jumped up in terror and ran screaming from the room. 'Oh, that man! That man!', she cried. 'Help! He wants to do something terrible to me.' It took quite a few people to calm her down and convince her that this is only Showboat Quinn's way of asking, 'How about lending me two bucks for a cup of whiskey, lady?'"

What do you think of that anecdote, Doctor? A. Well, I think it is a pretty crude way to ask for two bucks for a cup of whiskey.

Q. What do you think of the expression "How's chances of lowering the boom on you, sister?"? A. That's the crude 4986 part of it and I think rather vulgar.

Q. Do you think it is indecent? A. Well, I suppose I would.

Q. If one of your parishioners voiced that expression to a girl in such circumstances in your parish, what would be your reaction? A. Well, I wouldn't like it.

Q. Why? A. Because I do think it is vulgar.

Q. And indecent? A. And indecent, yes.

Q. On the same page, Doctor, in the first column, just about the center of it is a paragraph beginning:

"'I take the deck at a union meeting,' he says, 'and I start lambasting them. I peg them for the phonies they are. Everything is copasettic till I get back alone in my hotel room. Then four of the ISU goons come in They kicked my teeth in and they kicked three of my ribs to smithereens. I crawled to the window and busted the glass. I grabbed a piece of the broken glass and I yelled, "The first sonovabitch that moves I'll cut his head off!" They left the room—but I went to the hospital.'" 4987

What do you think of the expression "sonovabitch" in that paragraph, Doctor? A. Being a Southerner, I would oppose it.

Q. Do you think it is information of a public character to use that in a magazine? A. It happens to be fighting words down where I grew up. I don't think it is. I would call it indecent. 4988

Q. Doctor, let me show you the March issue of Esquire and call your attention to some items in it.

The first item, Doctor, is on page 9. It is an advertisement of Thorne Smith's three wittiest, most ribald novels.

I call your attention to the description of this material under the caption: "America's one and only Rabelaisian humorist", and also to the pen and ink drawing in the left hand column showing a man and a woman on a bathing beach. 4989

Would you examine that page? A. I would call that indecent. I would like to see which one I refer to. I refer to this part down here especially (indicating).

Mr. Bromley: Meaning the lower left-hand column?

The Witness: Lower left-hand column. I mean this thing here especially and also that (indicating).

By Mr. O'Brien:

4990 Q. On page 36, Doctor, is another picture of a Varga girl. A. I have already looked at that. I am not so much against that. I don't think it is—of course, it is an over-display of legs.

Q. How about the breasts? A. Well, that too.

Q. And the buttocks? A. You see so much of that in other places that I don't have to go to Esquire to see it.

Q. You think it is proper to display it in public, Doctor? A. No, I am not for it.

4991 Q. You think in a man's magazine, you note the cover says: "Magazine for men", that this would be conducive of morality? A. Well, frankly, all these things go back to the fact that we are desperately trying to counteract some of this through the kind of literature we are sending to boys. Our church sends "Backstage", which is the first religious, church religious, theatrical group. I think it has been written up in the outstanding Little Theatre Guild because it is the type of thing we are doing, so once a month we send all the happenings in about 15 pages in Backstage.

4992 We put on four major productions a year and here in Washington you have to put on a fairly decent play to draw people. We packed the church five nights in succession and then we send the account of that to our boys, who many of them were in the plays in the last seven years, so we are really sending about five different publications that we issue ourselves to the boys that are all over the world, and frankly I would rather for them not to see that kind of picture.

Q. Will you turn to page 49, Doctor, that is a Sultan cartoon in the same issue. A. Well, that is that same type that is easy to brand. So far as I am concerned I think it

is indecent; that is the one I happened to refer to, this type here (indicating). 4993

Q. Will you turn to page 107, Doctor, please? A. I would not object to that as strenuously and maybe I would not even call it indecent. I don't know, I don't like it, but I wouldn't have the same feeling that I would against the one I just looked at on page 49 or whatever it is.

Q. Do you think this is good material to send to soldiers, Doctor? A. No, I wouldn't recommend it, I certainly would not send it. I think there is some difference in that and that type of thing (indicating).

Q. I call your attention to the April issue of the magazine, page 38, picture of the Varga girl. A. It is a beautiful picture and would have been just as effective if they just hadn't opened up the girl's waist to show her breast. I think it would have been much more attractive in every way. I mean there is a deliberate effort there to show more than you would normally expect. 4994

Q. Do you think that is indecent, Doctor, to do that? A. I don't know whether I would call it indecent or not. I just don't like it; that is not as indecent as some of the other things.

Q. Do you think it is objectionable? A. I think it is objectionable, yes.

Q. I call your attention to the May issue, Doctor, on page 32 and the caption: "The Savage Beast In Us", and there are several pictures. A. Well, that is the vulgar type of things I was talking about. I would call it indecent. I would brand that, so far as I am concerned, as indecent. It is a different thing, pure vulgarity. 4995

Q. You haven't had an opportunity to read the article at all, have you? A. No, not this one. I was reading an article this morning, I don't even know which issue it was.

4996 but it is the kind of thing that I thought was indecent. It had to do with girls, lost women being in court.

Q. That was in the previous issue. That is in the April issue, "The Court of Lost Ladies". A. Yes.

Q. On page 60. Would you look at that, Doctor. Take your time, and tell the court what you think about it. A. That part at the top of page 61 where:

"I asked her after we got there if this was the place where we were going to have the good time. She said: 'Yes, darling.' She then pulled off her dress and otherwise divested herself. I asked her if I ought to pay her first."

4997 I think it is indecent.

Q. You don't think that would contribute to the public morals? A. I think it is indecent.

Q. You have, I think, the May issue at your hand. We were talking about that a moment ago. Another picture on pages 37 and 38, this being a large picture of the Varga girl. "A little girl grows up" is the caption. A. I wouldn't brand that as indecent. I want to be sure that I make a line in my own mind as to what I call indecent. I think it is hard to do. I don't especially approve of this but I just wouldn't brand it as indecent.

Q. Does the fact that it will be sent to soldiers in a man's
4998 magazine have anything to do with your opinion? A. I would rather they wouldn't have it. Some things are, I think, indecent, and others are more suggestive but I wouldn't call them indecent.

Q. When you use the word "suggestive" do you mean sexually suggestive? A. Yes.

Q. Now, will you turn to pages 86 and 87? A. I was going to say that on pages 86 and 87, that series of pictures—part of it, I would call indecent, just plain indecent.

For instance, the statement, "A time when women can become pregnant by taking an electric shock." I think there is a lot of difference in a statement like that and any picture that might be suggestive. 4999

Mr. Bromley: Don't you know, Doctor, that you started in the middle of a sentence?

The Witness: Yes, but I read the whole thing.

Mr. Bromley: You didn't read the whole sentence.

The Witness: I read there (indicating). But I am talking about—if you want to be technical, I will tell you, that happens to be one of the articles I have read, and I just don't like pages 86 and 87. 5000

By Mr. O'Brien:

Q. Will you turn to page 93, please? A. I imagine you are much more familiar with this than I am, so I wasn't trying to give information to the Court.

Q. I think you are correct about that. We have seen it so often. A. I imagine you are rather fed up on it, and let me get through as quickly as I can because I am leaving town in the morning.

Q. I am trying to do that, Doctor. A. All right.

Q. Will you turn to page 93? There is a picture on one page and on page 93 is a caption, "Broadway for the Boys. The juke joint scene from The Eve of St. Mark." 5001

The text reads: "These soldiers have just come from a discussion of a hygiene lecture in which it was estimated that in the Army 20 percent don't, 20 percent do, and 60 percent might."

Do you have any doubt what that "do," "don't," and "might" refers to, Doctor? A. I don't think there is any

5002 question in anyone's mind unless they are kind of feeble-minded.

Q. And that refers to something sexual? A. I don't think there is any question. I think the very words before it, "the hygiene lecture"—

Q. Do you think this matter is proper to circulate to boys in the Army or to anyone? A. I don't like it. I think it is rather indecent—not nearly as bad as some of it, neither the picture nor the statement.

Q. Have you any opinion as to the picture accompanying this text? A. No. I don't especially like the girl sitting on
5003 the soldier's or the boy's lap in that fashion, but since that is done in polite society I don't suppose I can say much about it.

Q. Do you think that the fact that the girl sitting on the boy's lap, apparently with drinks in their hands while this is going on— A. I think it makes the words a little bit worse and I don't approve of the words there.

Q. Page 34, Doctor, of the June issue, another Varga girl. A. Well, that is more indecent as far as I am concerned because it is apparently a definite part of the artist's mind to give a rather bolder display of that particular woman's breast rather than anything else.

5004 Q. Now, Doctor, in the same issue, just one more item on page 134 entitled, "Libel suits were as wine to that hell-firin' editor of the old West, Dave Day."

I call your attention especially to the left-hand column, at the bottom, the verse labeled, "An epitaph." It reads:

"Here lies the body of poor old Charlotte.
Born a virgin, died a harlot.
For eighteen years she kept her virginity,
An all-time record in this vicinity."

What is your opinion of that, Doctor? A. Well, I would say this, that it is the thing that Mr. Hoover has been saying is causing—that is, part of the responsibility lies here in this kind of thing—that in 1942 there was an increase of 102 percent in sex arrests of girls under 21 years of age, and the first six months of this year is 98 percent over the first six months of last year. That is a thing that is concerning us on the Board of Education Advisory Committee here. We are up against something here which the Police Court says they can't handle, so many prostitutes; they don't know what to do with the 13-, 14-, and 15-year-old girls; so some of us are deeply concerned with what has to be done with the morals of the young girls, and I think that statement here, that it is an unusual thing for a girl to keep her virginity before she is 18 years of age, why, we don't need it expressed right like that. 5005 5006

Q. No, sir. The July issue, Doctor? A. I think I have testified enough. I already have been here 25 minutes and I imagine the other side wants to say something to me.

Mr. O'Brien: If that is the way your time is limited, Doctor, I won't go ahead with direct examination.

The Witness: You know I told you I had an hour when I came in here. I have to leave town tomorrow and any man knows when he leaves town for a week there are lots of things you have to do. 5007

Cross Examination by Mr. Bromley:

Q. Coming back to page 134 of the June issue, did you read that article entitled, "Libel suits were as wine"? A. No, I read from here down through that "eighteen years she kept her virginity." I read the first part.

5008 Q. The first column? A. "Two weddings are on dit for next week. This weather kind of suggests two in a bed spoon fashion," which is along the same line that I think is rather bad.

Q. Now, did you know that that article described what that old-time editor used to publish in his paper? A. Yes.

Q. You knew that? A. Yes.

Q. And you realized that? A. Yes.

Q. And you know this verse about virginity is an epitaph? A. Yes. It goes back a long time, instead of being modern.

Q. It is very bad? A. Yes.

5009 Q. Then you object, do you, to the repetition of an epitaph in a factual article? You think anybody could— A. Yes. that kind, because I don't think there is anything in the world to it but suggestive, of a suggestive nature.

Q. It seems to me to be purely factual and therefore justifiable. A. I don't think so. I think you can have anything that is not factual or anything factual, that if it suggests something, even in the modern time here today for a girl, you wouldn't want your girl to read; I wouldn't. That is what I am going to judge these things by.

Q. Therefore, you say— A. My daughter is not one of those prudes, either.

5010 Q. Therefore you would think it corrupting to use the word "prostitute" in print? A. No.

Q. You wouldn't? A. No.

Q. That is all right, you say? A. Yes. It is according to where you are putting it out. I wouldn't just throw it out in a magazine that is going to go to children or girls, but if you are going to have to use the word "prostitute" in order to give information where you are giving information, I would say it is correct.

Q. Did you consider, Doctor, the article, "The Court of

Lost Ladies," to be highly informative and a factual article of vice conditions as reflected in the New York night court? 5011
A. Yes, sir. That is the reason I wasn't so sure that it was altogether bad. It couldn't have been included as being altogether bad.

Q. We have had testimony here that it was an excellent article and one that ought to be widely circulated. A. That is the reason I say it is not altogether bad.

Q. You wouldn't be willing to agree that the wide circulation in pamphlet form to young people of that kind of an article might have a healthy prophylactic effect because it shows the end of the road of ruin and disgrace and disease? 5012
A. No, I would much rather put on the thing we are doing at the present time, the school of Christian living, which we are teaching with the best authorities, of courtship and marriage, and I know that the thing I do for every couple I marry is to give them a copy of "Sex Harmony in the Home," which I think is the best information that can be given, rather than that sort of thing.

Q. It wouldn't surprise you to know that another clergyman from that stand has suggested that it ought to be put in pamphlet form and circulated? A. I am only expressing my own views here.

Q. I say, it would not surprise you? A. No, it would not surprise me. I wouldn't be surprised, no; anything that anyone would do. I wouldn't be surprised at. I am president of the Federation of Churches, but I wouldn't be surprised at any one of the 180 people, the things they do. I just happen to preside over the meetings. 5013

Q. This costume in the Varga girl-picture, that the Varga girl has on in the June issue, you recognize as a straight ballet costume? A. I am not too familiar with the ballet.

Q. Have you ever gone to the ballet? A. Not for a long time, back twenty years I used to go.

5014 Q. You recognize the slippers as being dancing slippers? A. It looks like it.

Q. You recognize the costume as an ordinary ballet costume, Doctor? A. That is the reason I am not opposed to it as some of the others. I do not stress it. If you want my opinion of the two pictures I objected to, they are February and June of the January issue of Esquire.

Q. I just wanted to bring out the fact that you have no serious objection to the ballet costume. A. No, I don't.

Q. You don't? A. I am just trying to save your strength and time, having to ask me those questions, by telling you
5015 there is a line of demarcation between love and beauty and the showing of it, even for legs and breasts.

Q. So it would be fair to say, sir, summing it all up, that the only two Varga girls out of the group that you have any objection to are the two in the January issue that you mentioned? A. The two that I would seriously object to, I would say so, yes.

Q. Now coming to page 93, still in the June issue, you would be willing to admit, wouldn't you, that soldiers do discuss such things as sex? A. Not only soldiers but every college campus I go on, I sit down in a fraternity house and that is the primary subject that is brought up. I think they
5016 are seeking for the kind of guidance, and it is rather an interesting thing to find out, if you are frank and candid in talking with them, that they want some help rather than something to tear them down, however.

Q. I meant to refer to page 92 of the May issue, which has the picture, Doctor. A. Yes.

Q. Do you realize, sir, that that picture is a picture from an actual Broadway play? A. No, of course I didn't know that.

Q. Did you ever hear of Maxwell Anderson? A. Yes. Poetic drama, "Valley Forge."

Q. He is one of our finest playwrights? A. Yes, that is right. 5017

Q. Did you know that that picture was from his current play, "The Eve of St. Mark"? A. Well, if you will notice that I testified that I wasn't against the picture so much. I just said it was built up to this suggestive thing, over to the right (indicating).

Q. I was just calling your attention to something I think that you may have overlooked. A. I didn't know that this was an actual picture.

Q. It is. Did you see "The Eve of St. Mark"? A. No, I didn't. 5018

Q. Did you know by reputation that it is one of the finest plays produced during this present war? A. I knew it had a fine reputation.

Q. Did you know that the words to which you objected, in the boxed-in portion, were actual quotations from lines uttered every night on the stage? A. Well, it very clearly says so.

Q. Do you know, sir, that those soldiers sitting with those girls have just come from a hygiene lecture, that they had resisted temptation and went back to the barracks and had nothing to do with them, and that is why it was such a moving scene in the play? A. I did not. 5019

Q. Now, knowing that, wouldn't you want to revise your opinion that that quotation from that splendid play, together with that picture, was decent? A. No, I don't know that I would, because you pull it out here and you arrange it in a boxed way and put it into something, then I just have an idea that many soldiers would do as I would, looking at this, would come to the conclusion that this was the thing that they would read about, and that picture.

Now, if they knew all this that you are talking about, I

wouldn't object to it, because I have no objection—I tried
5020 to point out I have no objection to anything that in the end is constructive, but when you sit, for instance, as those of us spending a great deal of time, by sitting here in the District of Columbia, and charged with the responsibility of trying to know how to help the Board of Education in this tremendous problem we have got of this increase in juvenile delinquency, and especially with girls 13, 14, and 15 years of age who are caught up with the glamour of these boys in uniform, I guess that is all I am concerned with; I am not even against your magazine, I am not against anything except when it comes to things that are indecent, I just think
5021 we better stop it.

Q. I understand your position and I sympathize with you, but what amazes me is that you can apply a term such as "indecent," which would properly be used to describe a Parisian postal card, to a picture from a beautiful play and a quotation from the text. A. I didn't call that indecent.

Q. The text, coupled with the picture from the actual play; it amazes me. A. That is the reason I want to stop at some things I do call indecent. I think there are some pages I have seen that are very indecent.

Q. Now, do you think this page is indecent? A. No, I
5022 don't.

Q. You used the word "indecent". A. I don't think I used the word "indecent" covering that one.

Q. If you did, you didn't mean to? A. No. That is the reason I kept saying there was a line I would like to draw. That is why I wouldn't describe one as being indecent when I didn't think so.

Q. In May, at page 32, in this article: "The Savage Beast In Us", you didn't read that article, did you? A. No, not all of it.

Q. And you didn't realize that Mr. Gallico was fulminating against burlesque, did you? A. I wouldn't say that I didn't know it, because it was one of the articles that I had not read all the way through, because I didn't—I didn't want to take that much time. 5023

Q. I know. A. But I did look at it and scanned this particular article.

Q. Did you read the last paragraph of it? A. Yes, just now. It is a good article, a good statement, a good paragraph.

Q. You hadn't read that before, sir? A. No, but I still just don't think there is any excuse in just throwing this kind of thing before the public. 5024

Q. Even though it is a dissertation against it? A. Even though it is a dissertation against it.

Q. You believe that the best way to control that is by a conspiracy of silence? A. No, I don't. I think I have already shown that. You don't put on courses on courtship and marriage with the best experts, if you think you are going to keep things in silence, do you?

Q. Isn't your position again more properly to be that you object to this type of treatment? A. No, I wouldn't say it. I just object to those pictures. I think they are altogether indecent to be thrown on the pages of the magazine, any magazine. 5025

Q. Now, your objection is just to the pictures then? A. The pictures more than anything else. I haven't read the article close enough to know whether I would agree with it or not. I am talking about this (indicating to Board).

Q. Now, come to the article in April at page 60. "The Court of Lost Ladies" at page 61. You pointed out a sentence: "Is this the place where we are going to have a good time". Is that right? A. Yes. It begins: "A sad voiced policeman."

5026 Q. Did you realize when you read that that the article was quoting from the sworn testimony of a policeman who had arrested a girl? A. I had an idea that is what it was.

Q. And you object to that kind of reporting in an exposé of the degree of prostitution that is present today in our night courts? A. I just simply object to that kind of thing coming out in the type of magazine that just goes to the readers, to the boys in service. I keep thinking of those boys because I feel such a sense of responsibility to them right now.

5027 Q. Now, in the March issue, the Sultan cartoon at page 49, just what is it that you think is indecent about that picture? A. Well, I would say that the costume that the girl has on—she might just as well be practically nude—plus the fact that here is a soldier away from home who is delighted over having a girl or one of the wives, apparently, of the Sultan sent to him on his birthday.

Q. You didn't catch the point of the cartoon that the girl was destined for another Sultan and the fatuous soldier thought— A. He thought, "Gee, what a break for me."

Q. That is where the humor lies? A. Yes.

Q. You didn't think this cartoon advocated any course of conduct or sale or barter or exchange of women, did you? A. I had an idea he was delighted because he was receiving
5028 the girl. But I still say that is an indecent picture so far as I am concerned.

Q. Is that because of lack of clothing on the girl chiefly? A. Chiefly, yes. I would have to add the suggestion that is there that the soldier thinks he has got this rather nude woman that he is going to have the privilege of having. I think that is there too.

Q. Now, on page 9, the advertisement. Haven't you seen advertisements like that in many magazines? A. Well, I can't say that I have. I would not be surprised if they

should be in other magazines. I wouldn't like it, I wouldn't care what magazine it was in. 5029

Q. I was trying to find out if you didn't know it was a common ad. A. I imagine it is.

Q. Do you realize who is advertising those books? Did you look at that? A. No.

Q. Did you realize it was the Literary Guild? A. No.

Q. Do you know what the Literary Guild is? A. I was reading that the Literary Guild membership was free and you save fifty per cent or more on the books. But, so far as I am concerned, this ad is altogether unfamiliar to me.

Q. Again, you feel it is objectionable? A. I would object to it, yes. 5030

Q. And that is as far as you go, do you? A. That is right. Far be it from me to come down here as an expert on anything. I am not here for that purpose. I just happened to be one of those who is deeply concerned for the welfare of juveniles right now because I am charged with that responsibility for the District of Columbia, and also because I have 350 boys in the service from my church.

Q. Now, in the February issue, the article "The Unsinkable Sailor", you didn't read that in its entirety, did you? A. I don't think I read any of them in their entirety.

Q. Wouldn't you say that there were situations in published articles or stories where due to the setting and the type of person described, the use of the word "son-of-a-bitch" was justifiable? A. Oh, I have been to some of the shows on Broadway where they use expressions like that, but I always had a feeling that you kind of flinched from it. I don't know that you should publish it in a magazine. 5031

Again, that is not something that I would have picked up.

Q. You would not have objected to it if left to your own devices?

5032 Mr. O'Brien: I object to the question of "left to your own devices". It implies something—

Mr. Bromley: What I meant was, unless it was called to his own attention.

The Witness: I suppose you know I am not trying to testify on behalf of anything. I am not here for you or Esquire or anyone else.

By Mr. Bromley:

Q. I know that. A. I don't like the word.

Q. That is as strong as you would put your condemna-
5033 tion on it? You just don't like it? A. I just don't like it. That's pretty strong for me because I don't rave and rant.

Q. That is all you mean to say about it. You just don't like it? A. I just don't like it.

Q. Is that your opinion of the other part of the article to which your attention was called, about the boom? A. Which is that?

Q. This article, up here, the phrase that means "Lend me two bucks for a cup of whiskey". A. I think that is a different thing. That other has to do with a term that most of us are big enough to know is used. "Son-of-a-bitch" —you don't like it, but it doesn't have to do with sex and
5034 morals as much as "lowering the boom" as used there. I don't think there is any question but that anyone would think that was a sexual proposition. That is the way I read the article.

Q. Does it make any difference to you that the meaning of the term is explained in the very paragraph in which it is used? A. I didn't like that. I thought that was a poor excuse for the way a sailor was going to borrow two dollars for a cup of whiskey.

Q. You were in the last war, were you? A. Yes.

Q. In the Army or the Navy? A. Army.

5035

Q. So you wouldn't know that was a common phrase in marine circles? A. I have heard it a good deal. I imagine most of us would know.

Q. Don't you know that is the way a sailor says: "Let me put the touch on you for a couple of dollars"? A. I don't think anyone would read that article and think that.

Q. Not even with the explanation? A. It would have to be a sailor. Some things I do know. But as I read that article just as an intelligent person—I hope—reading an article, I would certainly think that had something to do with sex.

5036

Q. Having been a sailor myself and having been in the Navy in the last war, I still am confirmed in my opinion that soldiers just don't understand us. A. I expect that's right, but maybe we could turn around and say the same about you.

Q. I am afraid you have demonstrated that. A. We wouldn't quarrel over the little difference in this particular article.

Mr. Bromley: That's all.

Mr. O'Brien: That's all.

Chairman Myers: We will take a short recess.

5037

(Witness excused.)

(Whereupon, a brief recess was taken.)

Mr. O'Brien: Mrs. Wiley.

5038 MRS. HARVEY W. WILEY a witness called by and on behalf of the Post Office Department, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien:

Q. Will you state your full name for the record, please? A. My name is Mrs. Harvey W. Wiley, W-i-l-e-y.

Q. You live in Washington, D. C.? A. Yes.

Q. Are you related to Dr. Harvey Wiley? You are his widow, are you not? A. I am his widow.

5039 Q. Will you tell the Board what organizations you are now connected with or represent? A. I am speaking as an individual, but I am the chairman of the legislation of the General Federation of Women's Clubs, about 2,500,000 women.

We have eight departments of work, one is the American Home, which is devoted exclusively to the uplift of the home. My job is to contact Congress in regard to national legislation.

I am at the present moment president of the Housekeepers' Alliance, a group of home-makers. We started in 1908.

I am a past president of the Women's Civic Club.

I have been six years chairman of the National Women's
5040 Party, which seeks, as you know, to secure an equal rights amendment to enhance the status of men and women, to give men and women the same status constitutionally.

I have been corresponding secretary of the Washington Institute of Mental Hygiene under Doctor William A. White, the noted psychiatrist.

I have been recording secretary of the Twentieth Century Club.

I have been vice-regent of my chapter of the D. A. R., the L'Enfente Chapter.

I have spent my life devoted to that type of work.

I am also editor of the Equal Rights magazine at the present time. 5041

Q. Now, Mrs. Wiley, in these various organizations or in some of them have you been concerned with the problems which affect society sociologically and morally? A. Yes.

Q. I want to show you some copies of the magazine, Mrs. Wiley, and ask you to state your opinion to the Board concerning certain items that I have called to your attention.

The first magazine I show you is the January, 1943, issue of Esquire, and I call your attention to a certain item on page 45, entitled "Benedicts, Awake!" 5042

I ask you to examine the poem that is there printed. Take your time so you will have a good chance to look it over.

Would you state to the Board, having examined the item I have called to your attention in this Esquire magazine, whether you consider this item decent or otherwise? A. I would like to say to the Board and the gentlemen in this room that I have a son in the South Pacific, a lieutenant in the Navy.

I am perfectly certain that my son has no such thought as that. I would feel if he had that I would be an unworthy mother. 5043

I think to send that to the boys abroad, the young men we have brought up, would be an insult to them.

I rather like to think of what young Mr. Magee, the son of the assistant clergyman in St. John's Church, said, that he felt as if he touched the face of God. I think the young men I know in the armed forces, and I know a great many boys besides my son, do not dwell on this subject matter. I think that is all I care to say.

5044 Q. If they were induced to dwell on it by sending this article, do you think it is to their moral welfare? A. I would not.

Q. Do you call the item an indecent item? A. I do.

Q. Now, Mrs. Wiley, I call your attention to the Varga girl pictures on pages 97 to 108 of the January issue of Esquire. What is your opinion with respect to these pictures as to whether they are proper or whether they contribute to moral welfare of boys or men or otherwise, that have come under your observation?

Do you consider them decent or indecent? A. I had occa-
5045 sion before I left home to see what the definition in the dictionary was of "obscene". I believe this case hinges upon that word. I found it was "disgusting, offending to chastity or to modesty".

I think these pictures answer that definition.

Q. Now on page 137 of the same issue, the cartoon showing two men looking through a sky-light with the caption: "And to think I gave up drawing". What is your opinion as to whether that is a decent or indecent cartoon or an obscene cartoon? A. I should think that also was indecorous, morally offensive, and unfit. It is also the definition in the dictionary.

5046 Q. Now, on page 83 of the same publication, the January issue of Esquire, an article entitled: "Those Star and Garter Blues", I call your attention to this article and to this language:

"The scene is the old familiar burlesque routine of the court room; Clark is presiding, as an owl should; and merely as an incident, Gypsy Rose Lee is the defendant against whose navel Clark finally blows a paper tickler."

What is your opinion of that language in this magazine? A. I would say that it was degrading.

Q. In the same article there is some further language, beginning at the bottom of the first column on the left: 5047

"This time Bobby Clark is in a sexy show which has even a few dirty spots, I suppose. And novelty is the last thing you look for there. Burlesque patrons are single-minded, if that's the right word; and the grinds and teases follow a pattern which can't be altered much; because like children listening to an oft-told tale, the fans of burlesque do not want novelty; they think that something has gone wrong if the tale is different. So you have girls stripping to a riotous dance or you have girls stripping not to a dance. And since this is uptown stuff, you have the odd spectacle 5048 of Gypsy Rose Lee stripping awkwardly and self-consciously, which may be a novelty, but isn't very good fun. Certain little gestures as she fluffs the ruffles on her jacket are enticing; but the major part of her strip she does from under the cover of a bouffant dress, working strings and letting petticoats drop * * * and down to the planted scream in the audience and the laugh Miss Lee manages every night after the scream—it is just this side of the simple honest denudation she was capable of five years ago. Miss Lee was on the verge of matrimony the week I saw her, but it wasn't modesty that seemed to restrain her; it was a snobbish superiority to her material. And she wrote it herself." 5049

What is your opinion, Mrs. Wiley, as to these characters and this scene in this magazine? A. I would say it was extremely degrading to the people who saw it.

Q. How about the people who read about it? A. Equally so.

Q. Equally so? A. Equally so.

Q. Continuing the same article:

"Between Bobby Clark who appears in a long funny scene wearing flannel drawers and Miss Lee whose specialty is

5050 being dressed in three well-placed, presumably provocative flowers, you have the essence of burlesque. In this particular show there is also a young slender dancer named Leticia, who does a wonderful trick ballet dance—a trick because it is actually erotic, whereas so many of the hip grinds are not. There is also a character from the night clubs who makes her breasts jiggle, and this is considered funny, but I didn't think so even at the night clubs where her frankness was greater, her skill no more engaging. A stripper who does an orgiastic dance verges on the erotic; but the entertainment value isn't high. In fact, the bur-
5051 lesquers learned long ago that the strong emotions they wish to arouse are quenched by the cold water of comedy."

What do you think of that description, Mrs. Wiley? A. It is almost beyond me for words.

Q. Well, will you give us an expression as to whether you think it is decent or not? A. Extremely indecent.

Q. In the last column—I had better read the whole paragraph so it will be clear to you:

"But the combination is tried and sometimes it succeeds, with always a shade in favor of comedy. Notable in Billy Rose's show a year ago was Professor Lamberti (an American wight named Lambert, but he had to be Lamberti to
5052 go with his wig); this same Lamberti has a spot in the Clark-Lee show, bringing with him the revelry of a smoker-entertainment, the riotous satisfaction in a job which isn't dirty in the least—but you couldn't show it in vaudeville and probably not to Will Hays. Lamberti plays what he calls the 'ixilphone' with many a flourish; and as he goes into his big number ("Wishing") a tall cutie saunters in behind him and begins to strip; she sheds a garment just as Lamberti finishes a chorus; applause recalls her and starts him again; his bland and leering ignorance of why

the piece is so popular (he played 103 choruses of it once at a Legion convention, he says) is masterly: he smacks his lips and flutters his tongue and waves his toupee and rolls his eyes—purely as a virtuoso of the xylophone. And even the old, sad, faithful lechers of the audience prefer him, I think, to the naked strip, so to speak, of some of the other acts. 5053

"The business of getting comedy out of the sexual appetites isn't an easy one. Infinite variety, sex may have; but its singleness of purpose dulls the brilliance of its techniques. The coming together of the male and female principles in the vegetable world (if they do come together there) would not be interesting, unless cowslips flirted and violets were really bashful and false-ragwart were a seducer. It's the trace of mentality that gives us sex as a subject for fun; the trace (not more) of morality that adds spice. So an entertainment which by-passes all the refinements, and whoops it up about cohabitation, with a sneer or a laugh or a cackle or even a shout, has a limited field. Burlesque and all other exhibitions seem to run into a groove; it's the best groove and you mustn't call it a rut. The girls in two-bit burlesque are seldom beautiful, but by being where they are they touch off lubricity; they combine some exceptional qualities because they are outspoken and pretend innocence and corruption at the same time. They make familiar gestures whose meaning cannot be in doubt; but these gestures become a special formalized movement which one would be surprised to encounter on the street or in private. The whole event is mass-seduction with a delayed satisfaction, if any. It can't be the divine event towards which all aesthetic creation moves; but it is a relief after some mincingly disagreeable expressions of sexual impotence or variation." 5054 5055

5056 Do you have any opinion of that description? A. A very decided opinion.

Q. What is your opinion? A. I think that one of the finest things in life is a happy marriage. I think that a happy marriage is based upon sacrifice and nobility. I think sex is the underlying feature in life—of course, we all know that—we are all grown people. I have two sons and four grand-children. I look upon nobility and sacrifice as the two highest things in life to fit us for the future life, which I deeply believe in. I think that all of this is degrading and drawing down character. Mothers of sons want to see their sons fine men, and I think that last thing
5057 I have heard is about the most indecent, most degrading thing I ever heard or seen in a publication.

I must say I don't deal in those publications. I don't know anything about them. I haven't the time. I am too busy with important things in my life to descend to such. I would like to recite a poem by Ruskin:

"Oh, wasteful woman, she who may on her own self set
her price,
Knowing he cannot choose but pay,
How hath she cheapened Paradise,
How spoiled the bread, and spilt the wine,
5058 That spent with due respective thrift,
Had made beasts men and men divine."

I have known that since a child. I believe it. The higher dignity you place upon women, the higher the race, and this magazine is degrading and depressing to women, and it is degrading to the race.

Q. Now, I want to show you a copy of the February issue of Esquire and call your attention first to a picture on page

65 showing a cartoon of a woman and an Oriental girl with the caption: "What am I bid for this 100 pounds of sugar?" 5059

Will you express your opinion as to whether or not you consider this a decent or indecent picture? A. Indecent.

Q. I also show you page 34 of the same issue, the picture of the Varga girl in what apparently is a night robe of some description, and ask you whether you consider that a decent picture? A. I would say indecent.

Q. I call your attention to page 77 of the same issue and particularly to the picture on the bottom of the same page showing these colored folks in the act of undressing in the presence of other people with the bed in the foreground. 5060 I ask you what you think about that picture? A. Very degrading, indecent.

Q. Do you mean morally? A. Morally degrading. The suggestion is very harmful.

Q. Now, I show you the March, 1943, issue of Esquire and call your attention to an advertisement on page 9 thereof of Thorne Smith's three wittiest and most ribald novels, with the further caption: "America's one and only Rabelaisian humorist," and the pen and ink drawing of the man and woman on the bathing beach, and ask you to please state your opinion of that. A. I object to it very much.

Q. On what grounds? A. Because it is harmful to morals. 5061

Q. I show you page 49 of the same issue, a cartoon with the caption, "I wonder how the Sultan knew this was my birthday," and ask you to examine that, please.

What is your opinion of that cartoon, Mrs. Wiley? A. I think it is harmful.

Q. Morally? A. I think it is morally harmful. It suggests slavery of women.

Q. It suggests concubinage of women? A. Absolutely.

Q. I show you in the same issue page 107, a cartoon with

5062 the caption, "It seems like somebody's allers clamorin' to somebody to open up a second front, don't it?" and ask you if you have any opinion of that cartoon. A. I don't even understand the picture.

Q. You don't understand the picture? A. No.

Q. Mrs. Wiley, I show you the front cover of the April 1943 issue of Esquire, showing the character known as Esky and two females portrayed, and ask you what is your opinion of that. A. I object to it very much because the suggestion of the leary-eyed man with the women is inimical to the dignity of women.

5063 Q. Now, would it have any effect, in your opinion, upon decency to contemplate that picture? A. I think it might suggest very wrong thoughts in the minds of other men.

Q. You mean indecent thoughts? A. Indecent thoughts.

Q. I call your attention to the May issue, particularly to pages 32 and 33, illustrations, and the article entitled "The Savage Beast In Us," showing women in various poses, and ask you if you have any opinion with respect to those. A. I object to them very much on the ground of indecency.

Q. I show you the June issue and call your particular attention to a girl on page 34, this costume, and ask you whether you have any opinion on that picture. A. Yes. I dislike it very much indeed. I think it is undignified and

5064 unwomanly. It is contrary to the highest ideal that women should hold up before mankind.

I would like to say right here, if I may, of course this is getting a little monotonous, they are all the same to me, I have spent my life in trying to build up the dignity of women. I have been thirty years in the movement, to secure votes to give women political equality and now to secure equal rights for men and women, to secure an equal constitutional status, and all of this that I have seen

this morning is contrary to the campaign that we women have carried on and sacrificed so much to carry on for thirty years, with our time and our effort. Everything we could possibly devote to our campaign we have done, and this is all tearing down that which we have tried to accomplish, that women have gained their point by chicanery and the lure of sex. 5065

It is contrary to every fiber of me, seeing the things I have seen here. I don't think I need see any more, I have seen enough; I am convinced from what I have seen.

Q. You would have the same opinion about any similar matter I might show you at this time, Mrs. Wiley? A. I imagine from the pile you have over there that you have quite a bit more. There is no use of looking at it. I am a very busy person and I would like to get home. 5066

Q. Your opinion would be the same about any material I might show you at this time, Mrs. Wiley? A. I imagine if they were worse it would be more so. It is a matter of opinion. Of course some things are worse than others.

Mr. O'Brien: Your witness.

Cross Examination by Mr. Bromley:

Q. Do you find there is a great deal of this sort of thing in current magazines today? A. I don't see it. 5067

Q. You don't know about it? A. I don't see it. I read the U. S. News, I read Reader's Digest, I read Time, I take the Good Housekeeping magazine, I take the Saturday Evening Post, and I read two newspapers every day. I am not conscious of seeing this.

Q. Do you ever look at the bathing suit advertisements? A. Well, I suppose if I were to buy a bathing suit I might, but I don't think I have for many years.

Q. Are you familiar with the type of bathing suits women
5068 are wearing today? A. I believe at the Chevy Chase Club I have seen women out there in bathing suits.

Q. You approve of that, don't you? A. It is necessary in the water to have the ability to swim but you don't have to see a bathing suit in a parlor.

Q. I say, you approve of the bathing suits? A. On the bathing beach where it belongs.

Q. I show you this exhibit. You have no objection to that kind of costume on the bathing beach, have you? A. I have never seen one like that; I don't know, I would have to see it to be sure.

5069 Q. You can't tell from the picture? A. No. I wouldn't— as I look at it, I am revolted by it. At Chevy Chase I have seen nothing like that. I don't think they would allow it out there.

Q. You think that is indecent? A. I do.

Mr. Bromley: Exhibit 24 is referred to.

By Mr. Bromley:

Q. Is this bathing suit decent or indecent in Exhibit 150? A. Is that—are those stockings or is that the shadow of the
5070 sun? I can't make it out.

Q. Those are stockings. A. Those are stockings. That is the ~~kind of suit I~~ used to wear with the stockings.

Q. Is that decent or indecent in your opinion A. I think the figure is clad for aquatic sports and I would think that was all right.

Q. You would think that was decent? A. It seems to me the woman is thoroughly covered.

Q. You would think that was decent, would you? A. I think it is suitable for the beach. I am not raising the

question of decency. I think it is suitable for the beach. 5071
Bathing is a special sport and you have to be untrammeled in order to swim. You can't swim with your ordinary clothes on, so therefore you resort to a bathing suit, but the point I was making is—

Q. I am asking you if you think this is decent or indecent. A. I don't care to say. I do not wish to pass an opinion. I would have to see that woman outside to be sure. I do not like the pose of her head, or attitude.

Q. You think her attitude is indecent? A. No, I wouldn't say that. I am not a prude but I like suitability and I would have to see that person in order to pass judgment. 5072
I do not wish to pass judgment on that picture. Am I compelled to?

Chairman Myers: Just express your opinion as you wish to.

The Witness: I am not prepared to pass judgment—I am not compelled to pass judgment on that, the Judge says.

By Mr. Bromley:

Q. Do you recognize this picture, then? A. No, I don't.

Q. Did you ever hear of Annette Kellerman? A. Yes, 5073
I have heard of her. She is a great exponent of health.

Q. A great exponent of health? A. Yes.

Q. Now, in your opinion is this picture decent or indecent? A. I told you that I think on the bathing beach a bathing suit was a suitable costume, but I don't like to see it in a drawing room. I thing Miss Kellerman did fine work in building up health and so forth. I haven't expressed an opinion on that picture.

5074 Q. Would you mind expressing one, please? A. I should express admiration for Miss Kellerman's work for health.

Mr. O'Brien: I think, Mr. Chairman, that in order that the witness may be fairly treated, counsel should specify the use of the picture or under what circumstances it appears, if he insists on an opinion.

By Mr. Bromley:

Q. Now that you have heard Mr. O'Brien, could you tell me in your opinion whether that picture is decent or in-
5075 decent? A. Well, taking the expression of the picture and who the person is and what her attitude in life is, I think it is decent. I think the purpose for which you do things in life has a great deal to do with it. It is the motive in those pictures which is harmful.

Q. Will you look at this Exhibit 133, and tell me if this picture is decent or indecent? A. I think I am being trapped, Your Honor.

Q. You found that out, have you? A. Yes. I knew I was going to be trapped when I came here and I know I shall be in every column tomorrow.

Q. You haven't been reading the newspapers, have you?
5076 A. I read Dr. Marshall's testimony yesterday.

Q. You did? A. Yes.

Q. Now, just where and how are you being trapped? A. I am trying to be made a prude. I am not a prude.

Q. Well, would you mind telling me if that picture is decent or indecent? A. If I had a daughter I shouldn't like to have her photograph in that costume. I have no daughter. I have only sons.

Q. Is that your criterion for decency, Madam? A. My criterion for decency is anything that is proper, in order.

certainly not harmful to human dignity. This woman is evi- 5077
dently by the ocean. I see the ocean there. She has probably come in and out of the ocean and if she stays there all right for me, but I do not wish to see that picture displayed except where it belongs. I believe in suitability, suitability; I don't like the picture. It is not pleasing to me and to my eye because I don't believe in such poses.

Now, I am going to be raked, I know, over the coals by those people over there for being a prude. No, I am not a prude. I know I am not a prude; I am a dignified woman who believes in life being lived for a purpose.

Have you ever been to the headquarters of the National 5078
Education Society and seen the statue of Horace Mann: "Be not afraid to die unless you have won some victory for humanity". Do you think this sort of thing is winning a victory? I don't.

Q. Well, do you think it is decent or indecent? A. I think it is indecent. You force me to an answer. I say it is indecent for a picture, not for the beach. You asked me about the picture. Now, I don't know that young lady. On the beach I think it would be all right, but not as a picture to be published in a magazine.

Q. This picture, Exhibit 131, do you think it is decent or indecent? A. I object to it very much.

5079

Q. Do you think it is decent or indecent? A. Do I have to answer, Your Honor?

Q. I wish you would, please. A. It is a matter of please?

Q. Yes. A. Then I refuse to answer. You have shown me enough. You know my state of mind.

Q. Now, why do you refuse to answer? A. Because I will be misinterpreted.

Q. You did not have any fear of misinterpretation when you came in here and bitterly condemned Esquire, did you?

5080 A. Because all the implications in Esquire are derogatory. I saw nothing—I saw it was a magazine for men, right on the top page.

Q. You find that indecent, do you? A. No, that is the implication, that this is the kind of man you have right here on the cover as this person called Esky, with his goggly-eyes and his leering expression; and it advertises right on this cover what the purpose is.

Now, don't pin me down. You are a mature person and I am a mature person. You know exactly what the implication is and I know exactly what the implication is. Why dispute it?

5081 Q. Did you find a single decent thing in any one of these eleven issues of Esquire? A. I see William Lyon Phelps' name as one of the heads of the departments. He is one of the acknowledged writers and leaders of the country. I am surprised to find his name in this magazine, and I don't know why it should be in there.

Q. Did you find a single decent thing in any one of these eleven issues of Esquire? A. I didn't take time to read every page and I wouldn't. I answered on the things Mr. O'Brien read to me or the things which he showed me and they are the things I condemn. I haven't time to read Esquire, nor do I wish to. I am not a man.

5082 Q. You did not read a single article or story in its entirety in any one of the eleven issues? A. I didn't have time.

Q. Did you? A. No, I haven't, nor would I.

Q. And the only thing you know about the magazine is what Mr. O'Brien showed you or read to you, isn't it? A. Absolutely. He showed me enough. He has shown me enough. By and large, I have seen enough of this magazine.

"By their fruits ye shall know them". I have seen enough fruits in this magazine to know this magazine.

Q. Did you have a little talk with him before you came in? A. I did. Witnesses always talk with the attorney beforehand. You can't intimidate me that way. I have been on the jury. 5083

Q. In that little talk he pointed out these things that he showed you today? A. He didn't have to point out these things.

Q. Didn't have to point those things out to you? A. No. This is the first time I have seen it. I saw the top of this magazine, this particular one he showed me, and I saw the Varga pictures in the December issue. I think I was only in there a few moments. 5084

Q. And that is all you saw? A. That is all I saw. But I have seen enough in court—that's enough to condemn the magazine.

Q. Is this the first time, I mean today, that you have ever considered this objected-to material with Mr. O'Brien or anybody else? A. I have seen copies of the magazine before.

Q. You are not deliberately misunderstanding me, are you? A. What was your question again?

Q. Is today, this morning, the first time that you have taken a look at the material complained of in these 1943 issues? A. It is. I am telling the truth. I am sworn to tell the truth. 5085

Q. How long a time did you spend looking at this material before you took this witness stand? A. A very few moments.

Q. How many moments? A. I couldn't tell you. How many moments was it, Mr. O'Brien?

Mr. O'Brien: Mr. Chairman, you know how long the recess was. I think that answers the question.

The Chairman: About twelve minutes.

By Mr. Bromley:

5086 Q. The recess was about 12 minutes. Will you accept that as a fair estimate of the time you have spent looking— A. Yes, but I have seen enough in this court room, shared by this entire group of people, to condemn the magazine.

Q. As a whole? A. Yes, as a whole.

Q. And that is all you have seen? A. I have seen samples. My husband, when chief of the Bureau of Chemistry, had to take samples first. He had to sample things. He couldn't see the whole output of the manufacturer or canner. They took samples and took them to the laboratory. I consider
5087 this as a laboratory.

How many did we look at, Mr. O'Brien?

Mr. O'Brien: Six out of eleven issues.

The Witness: That's fifty per cent.

By Mr. Bromley:

Q. Oh, you only looked at six out of eleven issues? A. I saw them.

Mr. Bromley: That's all.

5088 Mr. O'Brien: That's all, Mrs. Wiley. Thank you very much.

(Witness excused.)

Edwin Holt Hughes—for Post Office—Direct.

EDWIN HOLT HUGHES a witness called by and on behalf of the Post Office Department, being first duly sworn, was examined and testified as follows: 5089

Direct Examination by Mr. O'Brien:

Q. Will you state your full name for the record, please? A. Edwin Holt Hughes.

Q. Will you state your title of dignity in your profession, please? A. I am Bishop of the Methodist Episcopal Church for what is known as the Washington area.

Q. And will you tell the Board something about your education or some of the degrees of learning which have been conferred upon you? 5090

Mr. Bromley: I object to this question as immaterial and irrelevant on the ground that this is merely cumulative and the Government has already exceeded its quota of three clergymen.

Chairman Myers: I think he is entitled to qualify him. Objection overruled.

Mr. O'Brien: I might say the Bishop is an educator as well.

The Witness: I am a college graduate with a fair record. I was college president for five years, acting president of the American University one year, acting president of Boston University in Boston, Massachusetts, for one year. I have succeeded by degrees in life. 5091

I think I have fourteen honorary degrees in addition to the under-graduate degrees, and I would be perfectly willing to sell some of them at a good price.

Q. When were—were you president of De Pauw Univer-
5092 sity, Bishop Hughes? A. For five years.

Q. And do you consider yourself, Bishop Hughes, well acquainted with the problems of humanity with respect to education, morals, and social conditions? A. Well, I am just an ordinary man. I don't claim to be particularly expert except in my general observations of life, and the contacts I have had through my experience.

Q. Yes, sir. Now, Bishop Hughes, you have not had any extended opportunity to examine the publication which is here before the Board, known as Esquire, have you? A. I shouldn't say extended, no. I don't know, gentlemen, how
5093 much liberty a witness has here. My appearances hitherto have been before Senate committees and committees of the Lower House where I have had a great deal of liberty.

The Esquire magazine is one for which I have never subscribed. I have seen it quite often in barber shops—occasionally in barber shops and quite often on Pullman trains. I travel a great deal.

Q. Well, sir, I wish to exhibit to you here before the Board, certain issues of Esquire containing certain items which I will call to your attention and ask if you will tell the Board whether you consider these items to be of a decent or indecent character.

5094 The first issue I call your attention to is the issue of January, 1943, pages 97 to 108, each page of which bears a picture of what is known as the Varga girl.

Will you examine those, if you please, Bishop, and give the Board your opinion as to whether these are decent or indecent pictures?

Mr. Bromley: I object to that question because it is incompetent, immaterial and irrelevant, because of no qualifications of this witness shown.

Chairman Myers: The objection is overruled.

The Witness: I have seen this already. I should say that they are plainly suggestive in the wrong direction, plainly so. 5095

By Mr. O'Brien:

Q. You mean by that that you consider them indecent pictures?

Mr. Bromley: I object to leading the witness. When you don't get an answer you like, I object to the leading question. I object to the form of the question. 5096

Mr. O'Brien: I withdraw the question and ask the witness whether he considers the pictures decent or indecent.

He has raised a technical question, a technical objection to my question, Bishop.

Mr. Bromley: I object—

Mr. O'Brien: I have a right to explain to the witness why I am repeating the question.

Mr. Bromley: No, you haven't.

Chairman Myers: I think the witness understands the question. Read the question.

The Witness: That is a difficult question. I have already said that I consider the pictures definitely moving in the wrong direction, stimulating appetites that do not need any stimulation. 5097

If that is what you mean by indecent, then they are indecent.

By Mr. O'Brien:

Q. I call your attention to the February issue, Bishop Hughes, another picture of the Varga girl on page 34, which

I hold up for your examination, and ask you to express your
5098 opinion of that picture. A. Well, with the poetry that's written at the bottom it is looking in the wrong direction and cannot be intended to do anything but that.

Q. To stimulate appetites?

Mr. Bromley: That is objected to as leading.

Mr. O'Brien: I want to complete the record. May I have a ruling?

Chairman Myers: Go ahead and ask your question. You have not finished it.

5099 *By Mr. O'Brien:*

Q. Do you consider this picture that I showed you an indecent picture? A. Together with the piece of poetry there, yes.

Mr. Bromley: You mean in the sense you have defined it?

The Witness: Yes.

Mr. Bromley: Could I ask a question?

Chairman Myers: Yes.

Mr. Bromley: The piece of poetry referred to is
5100 not one complained of by the Post Office, is it, Mr. O'Brien?

Mr. Hassell: I submit to the court that the poetry and the pictures are all in here and they should be considered together.

Chairman Myers: That was my understanding, the understanding I had. I may be wrong.

Mr. Bromley: I think where they objected to the verse they specified it in the citation and they did not specify this verse.

Mr. Hassell: That may be true, but we called attention to the picture and the picture has a title and the title is on the verse. 5101

Mr. Bromley: But you made a careful distinction when you filed your pleading.

Mr. Hassell: I have stated and I have told counsel repeatedly that there are many other things in these magazines that are of an objectionable character.

Mr. Bromley: I would like to look at the citation because I think that is a deliberate misrepresentation of the charge.

Mr. O'Brien: May we postpone that discussion? 5102

Chairman Myers: Let's go ahead with the witness.

Mr. Bromley: I move to strike the testimony regarding the Varga girls and the verse, on the ground we have received no objection to it in the citations. It is not matter complained of.

Chairman Myers: The objection is overruled.

By Mr. O'Brien:

Q. Bishop Hughes, I show you the February issue again and call your attention to the cartoon on page 65, calling attention to the girl and the Turk, presumably, with the caption, "What am I bid for this 100 pounds of sugar?" 5103

What is your opinion of this picture? A. Of course it is not good.

Q. Not good? A. Absolutely not good. Any man with a daughter knows it and knows the meaning.

Q. I also show you, Bishop, the picture on the bottom of page 77 showing two colored persons in the act of

5104 putting on or removing garments in the presence of other persons, with a bed in the left-hand corner of the picture. A. That is just a plain piece of vulgarity.

Q. I show you the March issue and call your attention to an advertisement on page 9 thereof with the caption, "Thorne Smith's three wittiest, most ribald novels; America's one and only Rabelaisian humorist," and the picture right under that of the two persons on the bathing beach. I ask you to express your opinion of that advertisement. A. Is anybody defending that?

Q. Yes, sir. You think it is indecent too, I gathered
5105 from your answer. Is that correct?

Mr. Bromley: That is objected to as leading.

Chairman Myers: Has he answered the question?

Mr. O'Brien: He has asked if anyone is defending that.

Chairman Myers: Go ahead and answer the question.

By Mr. O'Brien:

Q. I show you a picture in the April issue displaying the Varga girl again, Bishop Hughes, and ask you if you con-
5106 sider this, too, decent or indecent.

(At this point, a flashlight picture was taken of Bishop Hughes.)

Mr. O'Brien: After all that annoyance and interruption, Bishop—

The Witness: All right, reporter—just write it up nicely; don't make it a joke.

By Mr. O'Brien:

5107

Q. Now, coming back to the picture, Bishop—I am a most annoying character, I know—would you say whether you consider it decent or indecent? A. I would say it was not uplifting. I wouldn't care to exhibit it in my Sunday schools. It is not quite as bad as some of the others.

Q. What do you think of this picture on the April cover showing Esky in a reclining position with two women in the background? A. Maybe there is something there that I don't read. I shouldn't regard them as a trio of beauties.

Q. Do you consider this attitude and expression of the Esky character as decent? A. I couldn't say, Mr. O'Brien, that I see anything indecent in that. I don't see any point to it. I think it is just plain cheap. 5108

Q. I show you the May issue of Esquire and call your attention to pages 32 and 33, being a number of pictures of women in an article entitled, "The Savage Beast in Us," and ask you to express your opinion, please, on those pictures. A. I think the heading represents it—what is the heading?

Q. "The Savage Beast in Us." A. That is good.

Q. You think the pictures represent that? A. I think they represent the heading very nicely.

Q. I show you a number of pictures on pages 86 and 87, showing Esky in various situations, and ask you if you find anything decent or indecent about those pictures. A. Yes, I don't think they are worthy of circulation. 5109

Q. Do you consider those information of a public character? A. Pardon me?

Q. Do you consider such pictures information of a public character? A. I shouldn't think that they carried any tremendous information or inspiration or illumination.

They were not intended to, and the man who got them together knew it.

5110

Q. Page 34 of the June issue, Bishop Hughes, also bears a picture of a Varga girl.

I ask you to tell the Board what you think about that picture. A. And the legend coming in again?

Q. There is a verse in the corner. A. I wouldn't put it up in my study.

Q. Would you consider it a decent picture, Bishop? A. I think if any man in this room came into my study and found it on the wall, he would wonder what kind of a man this preacher was. If that is indecent, you will have to make the best of it.

5111

Q. I call attention to page 134 of the June issue and wish to read you—unless you desire to read for yourself—this verse at the bottom of the column, this one here (indicating and handing book to witness). A. Just plain dirt, filth.

Q. That is the item entitled, "Libel suits were as wine to the hell-firin' editor of the old West." That is the name of the item, for the record.

I call your attention to page 141 of the July issue, certain lines there, and ask you to please read those and tell us what you think about those. A. I would call that, Mr. O'Brien, vulgarity rather than indecency.

5112

Q. Would you call it filthy? A. Well, it would depend again on your definition. It is certainly vulgarity.

Chairman Myers: You had better note what it is, where it is in the book. I don't believe you have the notation of where it is in the record.

Mr. O'Brien: Page 141 of the July issue, "Dog's Worst Friend," the item just presented to Bishop Hughes for his opinion.

By Mr. O'Brien:

5113

Q. I call your attention to the August issue of Esquire, page 38, another picture of the Varga girl, which I will hold up for your examination. A. I wouldn't call that indecent, Mr. O'Brien. It is not a thing I would want around, but then I wouldn't call it indecent.

Q. I call your attention to page 89, a picture of a girl and a sailor, with a vacant space which says, "Paste your face here." A. That is indecent, plainly so.

Q. That is the August issue.

Would you call that picture I have just shown you, Bishop Hughes, information of a public character? A. I don't think it would be adopted for any encyclopedias. 5114

Q. I call your attention to this advertisement on page 127 of the August issue, a girl reclining on her back, and ask you whether you consider that decent or otherwise—with the caption. A. Of course it is not decent.

Q. I call your attention to page 38 of the September issue, another Varga girl picture. A. I wouldn't think that that was indecent, Mr. O'Brien.

Q. You don't think it is indecent? A. No. It is not a thing that I would care to have circulated. I don't think it would do any good, but it is not as definitely suggestive as some of those others were plainly meant to be. 5115

Q. I show you a cartoon on page 65 showing a milkmaid outside the door of a dwelling house, with the caption, "Come back later, sweet; my wife hasn't left for the factory yet." A. Well, everybody knows that is wrong and indecent. Everybody knows it; there can be no debate about that.

Chairman Myers: Mr. O'Brien, is this a convenient place for us to adjourn?

Mr. O'Brien: I have two more issues to cover yet, Your Honor.

5116

Chairman Myers: All right, go ahead.

By Mr. O'Brien:

Q. I show you the October issue of Esquire, Bishop Hughes, another picture of a Varga girl on page 44. A. Well, there has been a good deal of discussion, Mr. O'Brien, about those Varga pictures. There is a good deal of skill in them, as you will see. Personally, those things don't appeal to me, that is all. I can't understand why one would want that thing around, but when it comes to definitely classifying it among the indecent and obscene things, I wouldn't want to go that far.

5117

Q. You wouldn't think that a contemplation of this picture might arouse indecent thoughts? A. Yes, I think it might do that.

Q. I show you a picture on page 49 of the same issue, October Esquire, showing a woman seated in a man's lap and another man standing by, and the caption, "Hello, dear, this is the gentleman who sells us our fuel oil." A. It just is some more vulgarity, that is all.

Q. Would you say that the vulgarity amounts to indecency, Bishop? A. Well, it moves very largely in that direction.

5118

Q. What is your opinion, Bishop Hughes, of the picture on page 60 of the November issue, showing these women? A. That is not awful.

Q. Well, what would you term it if not awful? A. What?

Q. What would you term it if it is not awful? Would you say it is vulgar? A. Well, it is not nearly as vulgar as some of the rest of them. It is the kind of thing that I don't care for, Mr. O'Brien.

Now I am a Puritan and proud to be a Puritan, absolutely. I apologize to no man for the Puritanistic attitude that I take toward life. That is not the sort of thing I should want to have around, but I wouldn't stick a label of indecency on it. 5119

Q. Would you say whether or not, in your opinion, the contemplation of this picture might arouse indecent thoughts? A. Well, perhaps with some people without particular self-control.

Q. The cartoon on page 52 showing some men and women in an Oriental setting, where one man is departing with two women, and the caption, "Such a neighbor, always borrowing." A. Now, of course, if I read into that what it suggests, then immediately the persons who are interested in it would say that I am most likely an old man, and probably would quote that passage, "To the pure all things are pure." 5120

Q. Assuming that it represents a man borrowing two concubines, what would you say about the cartoon? A. Well, if that is what it represents, why, of course it is indecent, and that is what apparently it does suggest.

Mr. O'Brien: I have no further questions on direct examination.

Chairman Myers: Well, suppose we adjourn until 1:30. 5121

(Whereupon, at 12:08 o'clock p. m., the hearing was adjourned until 1:30 o'clock p. m.)

AFTERNOON SESSION.

5122

(The hearing was resumed, pursuant to the adjournment, at 1:30 o'clock p. m.)

Chairman Myers: Are you ready?

Mr. O'Brien. I am ready, if Your Honor please; and the witness is ready for cross examination.

Chairman Myers: All right, Mr. Bromley.

5123

EDWIN HOLT HUGHES, resumed the stand and testified further as follows:

Cross Examination by Mr. Bromley:

Q. Had you ever seen any of this material in these eleven issues, sir, before you took the witness stand this morning? A. Yes.

Q. When did you look at them? A. I was shown them by Mr. O'Brien.

Q. Was that this morning, Bishop? A. Yes.

5124

Q. How long a time did you spend with Mr. O'Brien looking at them? A. Oh, I suppose fifteen minutes, Mr. O'Brien, would you say?

Mr. O'Brien: Fifteen minutes, I would say, and I think you had some previous conference with my assistant.

The Witness: I reached a conviction, though, quite a little while ago, Mr. Bromley, with respect

to this matter through another issue that is older than this. 5125

By Mr. Bromley:

Q. And your opinion that you express here today is based upon your examination of that older issue as well as these? A. Yes. That was a June issue, if I remember correctly, for 1942.

Q. 1942? A. Yes.

Q. June? A. Yes, June, 1942.

Q. Therefore, am I correct in saying that as far as these eleven issues are concerned, prior to the time you came on the stand you spent but fifteen minutes looking at them? A. Yes. Fifteen convincing minutes. 5126

Q. And I take it that the only material that you examined was the material which has been called to your attention this morning? A. Not wholly that. There were some other things that I looked at, but in the main, however, as you say.

Q. I take it you did not have time to read in its entirety any article or story or piece in the magazine? A. Oh, I venture to say I have seen some very good things in Esquire. I read a while ago, when I was going to bed, someone had some stories from Esquire that were not at all bad; 5127 a rather good thing to go to sleep on.

Q. They were not designed for that purpose, Bishop? A. What?

Q. They were not designed for that purpose. Then you were probably familiar with the fact that among the contributors to this magazine were men like Sholem Asch? A. Yes, Rex Beach.

5128 Q. Rex Beach? A. Yes.

Q. Theodore Dreiser? A. Yes.

Q. Lord Dunsany? A. Yes.

Q. And Havelock Ellis? A. I didn't know that Havelock had gotten in.

Q. Leon Feuchtwanger? A. Yes.

Q. F. Scott Fitzgerald. Did you know that? A. I didn't know that, no, but unquestionably, Mr. Bromley, I presume some very fine people contributed to it. I wrote an article once for Smart Set.

Q. Was it published? A. It was, the biggest fee I ever
5129 had for writing an article.

Q. Any trouble with the Post Office Department about it? A. No, not the slightest need of that.

Q. Now, sir, I direct your attention to this "Paste-Your-Face" cartoon about which you have spoken. Did Mr. O'Brien or anybody else call your attention to the July issue, page 81, which is another "Paste-Your-Face" cartoon? A. No.

Q. You have never seen that before? A. I don't remember that I did, sir.

Q. Do you notice over here at the left there is a little box of text? A. Yes.

Q. I want to direct your attention to this part of it—
5130 A. And that printed matter does come in, does it?

Q. That printed matter is with relation to the cartoon, yes.

Now, do you see that this cartoon is a picture of a Marine with "Paste your face here"? A. Yes.

Q. Do you understand that the purpose of that is to enable soldiers to cut out their own photographs and paste it there? A. No, I wouldn't understand that.

Q. You would not understand that? A. No. I can see readily how that can be done. In the other case—

Q. It never occurred to you before that— A. I didn't see that until just now. 5131

Q. Now, now that you see it, do you see that obviously that is the purpose of it? A. Yes.

Q. I want to show you the one for September at page 72. Will you look at that one, please?

Do you see that is the same idea? A. Yes.

Q. And the one of the Marine in July, do you notice at the beginning of this text it says:

"Just take your best photograph and a pair of scissors (an old penknife will do), cut out your handsome pan and paste it in the blank space north of the collar and south of the cap." 5132

Do you see that? A. Yes.

Q. So that is a pretty clear direction as to what use, if any, is to be made of it, isn't it? A. The first sentence starts nicely.

Q. "Step right up, Devil Dog, don't keep the girls waiting." A. Yes.

Q. Now, come to the second sentence. Don't you see that tells us what to do, "Just take your best photograph and a pair of scissors"— A. Yes.

Q. That is relatively clear, isn't it? A. Yes.

Q. Do you find anything indecent about that? A. There is a distinct picture, Mr. Bromley, a difference between that picture and the one you showed me. 5133

Q. I was trying to lead up to the next one. A. In this case it is not lead up, it is lead down.

Q. Do you find anything wrong about this? A. No, I wouldn't say anything particularly, certainly not in that "paste" business.

Q. Come to the next one, August. Did anyone call to your attention the fact that the same directions are contained over here at the left as follows:

5134 "To be a Don Juan for a day, you need only paste your own likeness in the indicated blank space. A half-teaspoon of flour from the cook's galley and a drop of water will do the trick."

Did anyone call your attention to that before? A. It wouldn't have made any difference in my estimate of that picture, Mr. Bromley, if my attention had been called to it.

Q. You see now that it is expressly for the purpose of enabling a sailor in the service to paste his photograph in that space. Did you see it? And the text goes on and says: "What you eventually decide to do with the seascape is
5135 your own problem. If you go in for whimsy, you might air-mail it to your family and tell them you're engaged."

Did you know that?

Now, having that called to your attention, that text, would you tell me just what it is that you think is indecent about it? A. I would rather not do it, Mr. Bromley.

Q. Why? A. I think the thing seems to me so obvious. It is a matter of location. It seems to me so obvious that I really do not care to go into any detail as to why I object to that.

Q. Would you consider that if a sailor was on the bathing beach and took his girl and hoisted her on his shoulders
5136 and carried her around in that position, that would be inescapably indecent? A. A great deal of it would depend on his relation to that young lady, I should say.

Q. Suppose he just knew her as a girl friend. A. Well, that assumes presumably a fair amount of acquaintanceship.

Q. You would judge that that would be a sufficient acquaintance so there wouldn't be any impropriety in carrying his girl friend around on his shoulders, would you? A. No, I wouldn't want my daughter to do it.

Q. You wouldn't want your daughter to do it? A. No, sir. 5137

Q. Then do I understand the core of your objection to this is the fact that the girl is sitting on the man's shoulders? A. No, that is not it. You know that is not it.

Q. I don't know what you are thinking about. A. All right, I do.

Q. You do? A. Yes.

Q. But you don't care to express it? A. No.

Q. Do you have the same reaction to this picture in the magazine Life, the one at the top of page 88, August 12, 1940, Respondent's Exhibit 91? A. No, I wouldn't have 5138 the same to that at all. I would say it is not the kind of thing I care for; between you and me, and it is not the kind of thing that I am accustomed to. Of course it may be I am just a nice old man.

Q. I am sure you are that, sir. Nothing wrong about that? A. No. Probably you were brought up that way.

Q. I was, yes, sir. I take it that this picture in Life, you would not find anything indecent in it? A. No, I wouldn't use the word "indecent" with reference to that. Is Life in question?

Q. I just brought it into the question. A. Oh, I see. I thought maybe it was before the Court. 5139

Q. No, sir. A. Oh.

Q. Now, in the August issue at page 127, when you gave your testimony you knew, did you not, that that was a fashion picture and not a cartoon? A. I rather judged it was an advertisement, am I right about that?

Q. I think it could be properly described that way because if you will notice it says that if you will write in, it tells you where you will get the articles illustrated on that page. A. It says also concerning that, that "Esquire

5140 will accept no responsibility for what may happen if male readers fail to tear off the bottom of this page before letting their female dependents see it." That is there, too, right there.

Q. You think that is an indecent reference, Bishop? A. I don't know what was in their minds. They thought that it was just as well to put it there.

Q. I don't think you really see what that means, do you, sir? A. I don't know.

Q. Let me explain it to you. That is supposed to be a joke and it is telling the man, "You better tear off the 5141 bottom here because if you do tear it off, then your wife can't find where to send for those clothes and won't be buying clothes." That is all that means, Bishop. A. A very kindly thing to do for your wife. That was the intention, was it?

Q. It is a joke, yes. You did not find anything dirty about that, did you, sir? Did you? A. Oh, I bet you never thought about it that way, did you?

Q. Did you find anything indecent about that picture? A. Haven't I seen that one before?

Q. I believe not (indicating a picture other than the one in the August issue). A. We have there again the same thing, haven't we, Mr. Bromley?

5142 Q. No, I just showed it to you because it has the same warning at the bottom of the page. A. The wife is there. It says the same thing right there at the bottom. Is the gentleman holding her up, that other lady?

Q. Yes, that is right. A. Well, he wouldn't stand that long.

Q. He wouldn't stand that long? A. No, he wouldn't stand that long, that weight, no, not that weight. That is what he says, you know his wife wouldn't get tired doing that.

Q. So that is decent, is it? A. What?

5143

Q. You say that is decent? A. I don't say that. That is your construction of it.

Q. Well, I put it in the form of a question. Is that perfectly decent? A. Well, I wouldn't want to say it was indecent; on the other hand, I don't see anything that resembles a high mind in it.

Mr. Bromley: That is all.

Mr. O'Brien: No further questions for Bishop Hughes, and may I have a minute and I will produce the next witness, who is in my room at this time.

5144

(Witness excused.)

Chairman Myers: All right, we will recess for a few minutes.

(At this point a short recess was taken, after which the proceedings were resumed, as follows:)

Mr. O'Brien: I want to state to the Board that I am presenting Dr. Moore as a psychiatrist and not as a clergyman.

5145

THOMAS VERNER MOORE, called as a witness by and on behalf of the Post Office Department, being first duly sworn, was examined and testified as follows:

Direct Examination by Mr. O'Brien:

Q. Will you state your full name for the record, please? A. Thomas Verner Moore.

Q. And you are a Catholic priest, are you, Father Moore? A. Yes.

5146 Q. Are you also a doctor of medicine? A. Yes.

Q. From what college did you receive that degree? A. Johns Hopkins, in 1915.

Q. Are you also a psychiatrist? A. Yes.

Q. Will you tell the Board what your background is as a psychiatrist? A. I am a member of the American Council for Neurology and Psychiatry, American Board of Neurology and Psychiatry, and since 1916 I have a license to practice in the District of Columbia and have had a clinic for problem children, first in the Providence Hospital from 1916 to 1937, and it was then transferred to the Catholic University and somewhat enlarged by a Rockefeller grant 5147 in 1939.

So I have been dealing with the behavior problems of children and mental problems for adults during that period.

Q. Are you the head of any other organization, Father? A. Head of the Department of Psychology and Psychiatry, Catholic University, and Prior at St. Anselm's Priory.

Q. Do you have many patients, Doctor? A. Well, in that time I have probably had 200 to 250 new patients in the course of a year.

Q. Each year? A. Yes. I might say that in the last war I was in the Medical Corps in France, captain and major in the Medical Corps, dealing with war neuroses.

5148 Q. Dr. Moore, have you at my request examined several issues of the magazine known as Esquire, from January to November, 1943? A. Yes.

Mr. O'Brien: May I explain this to the Board and Mr. Bromley? Dr. Moore has made a study of the terms which he intends to employ in his testimony here. He has prepared a statement which explains what he means by those terms in the light of various things which he has studied.

I would like the indulgence of the Board to be granted so he may make this statement preliminary to any testimony he may give. 5149

Mr. Bromley: I object to that as incompetent, irrelevant, and immaterial, and not competent procedure.

Chairman Myers: It may be a little irregular but it is for the purpose of explaining his position. Let him read his statement.

By Mr. O'Brien:

Q. You may read the statement, Doctor Moore. A. Why, when I was asked by the representatives of the United States Post Office to pass an opinion on obscenity of the journal known as Esquire, it seemed to me a matter of primary importance to find out just what first of all is meant by "obscene". 5150

If you are going to say a thing is obscene you must know what obscene means.

Secondly, having determined the concept of obscene, to find out whether or not why the magazine termed Esquire is obscene, so I made a little investigation of my own of the concept of obscenity.

The 71st Congress of the United States, the Second Session, published in Document 54, entitled "Obscene Literature", a list of all the states of the union on obscenity, but, in general there was no definition of the concept of obscene; and the League of Nations entered into the problem in its publication "Obscene Literature" and here again, however, though practically all the nations of the League had laws against obscene literature the word obscene in general was not defined. 5151

5152 I thought that this might mean that the word "obscene" would therefore have the sense that it is in ordinary use in the English language, so I turned to the meanings of the word in the English language.

The word comes to us from the Latin *obscenus* which means filth, with the accessory notion of loathsomeness, and in Latin pictures, scenes, gestures, and movements could be termed obscene because they suggest impure thoughts; and the New Standard Dictionary defines the word as follows:

"Offensive to chastity, delicacy, or decency; expressing or
5153 presenting to the mind or view something that decency, delicacy and purity forbid to be exposed.

"Offensive to morals, indecent, impure.

Webster gives essentially the same definition:

"Offensive to chastity of mind or to modesty; expressing or presenting to the mind or view something that delicacy, purity and decency forbid to be exposed."

The new English dictionary edited by Sir James Murray, sometimes termed the Oxford Dictionary, gives two meanings of the word which has been in use since the 16th Century.

First, "Offensive to the senses, taste or refinement". Secondly, "Offensive to modesty or decency, expressing or
5154 suggesting unchaste or lustful ideas."

Now, we might turn to some of the examples given in the documents above cited. The United States publication, that of the League of Nations, and the Colorado law thus describes obscene:

"All pictures of nude or partly nude men or women in indecent attitudes or positions; or which publishes, by pictures or descriptions indecent or immoral details of crime, vice, or immorality, calculated to corrupt morals, or to offend

common decency, or to make vice and crime, immorality, and licentiousness attractive." 5155

Now, the English report in the League of Nations quoted Lord Chief Justice Cochrane as making the fact of obscenity dependent on whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort might fall.

I also looked into the legal book known as Ruling Case Law.

Mr. Bromley: Have you got the name of the case that the Lord Chief Justice cited? 5156

The Witness: Queen versus Hicklin, 1868,—L. R. B.

Mr. Bromley: You had it right there?

The Witness: Yes.

Ruling Case Law gives the following test of whether or not a publication or other article may be looked upon as obscene.

"The test ordinarily followed by the courts in determining whether a particular publication or other thing is obscene within the meaning of the statutes is whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds 5157 are open to such immoral influences and into whose hands a publication or other article charged as being obscene may fall. Thus it has been held that where a publication or other article suggests to the young of either sex, or even to persons of more advanced years, thoughts of an impure or libidinous character, it is obscene."

Now, from all this and the wording of the various laws we may say that there are three elements that may be spoken of as involving obscenity:

5158 First, vulgarity such as use of words and pictures in reference to sexual matters as would be offensive in ordinary good society of the country.

Second, a tendency to produce sexual excitement.

Third, a tendency to prepare the way for immoral and unlawful sexual acts and so to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.

Now, does the publication known as Esquire offend in any or all of these ways?

5159 First, as to vulgarity. As examples of vulgarity of words which to some minds would also be stimulus to sexual emotion, one might cite as an example:

The first and last verses in the poem "Benedicts, Awake!" in the January, 1943, issue, page 45.

The article: "Those Star and Garter Blues" on page 83 of the same issue. One phrase in this article expresses the general trend of the obscenity in Esquire. It suggests what it doesn't say.

Then, the February issue, 1943, "The Unsinkable Sailor", page 95.

For mere offensive vulgarity see "Dog's Worst Friend", July, 1943, page 141.

5160 Now, in regard to mere vulgarity I might say that a refinement of language and conduct is a valuable acquisition of a personality.

A magazine such as this falling into the hands of adolescents will tend to lead them to use vulgar language and whatever one might think about cursing and swearing, they might object to it as a nuisance, why so it seems to me that Esquire is a publication disseminating this manner of speech

which has a tendency to produce sexual excitement.

As an example of this, one might cite the Varga girl calendar of months, pages 97 to 108 in the January, 1943, Esquire. 5161

Again, the advertisement on page 9, the March issue, 1943, of Thorne Smith's three wittiest novels, is intended to arouse the sexual curiosity of adolescents or the susceptible adult, and stimulate him to seek sexual satisfaction in reading about characters that are, as is said, completely uninhibited in their passionate pranks, and it is said "that no writer of genius has ventured to create such thrillingly improper situations." 5162

Then, a phrase in the article, "The Fall of the Flattering Word", page 68, March, 1943, expressing the specific purpose of many of the pictures in Esquire: "Clothes that reveal and conceal so captivatingly that men will be driven mad with desire."

Now, every issue in 1943 has one or more pictures in which this is attempted.

Now, in regard to the tendency to produce sexual excitement, it would not suffice for somebody to say "I find these pictures perfectly innocent and beautiful." 5163

The question is not whether or not these pictures in the hands of many normal individuals would produce sexual excitement.

Thus it was found in studying the effects of motion pictures, that in estimating the probable effect of motion pictures on a youthful audience, the adult experience doing observation is not an adequate basis since the response of the younger ages is likely to be much more intense in the tragic scenes, and

5164 under the age of sixteen much more intense in the amorous scenes.

Adolescents react much more violently to pictures of nude women and scenes of a sexual character than either little children or adults. Some work has been done on this matter in regard to reading by Diserens and Wood, who found that ten male graduates at the university were unequally affected by literature with a sex connotation, some were definitely affected as revealed by their introspections and by the record of the respiration and of the pulse.

5165 When one looks at the magazine Esquire he cannot escape the conclusion that the chief selling attraction in this periodical is its sexual appeal. It lives by nourishing a sexual craving of more or less susceptible individuals.

It doesn't teach art or science or anything useful to humanity.

Now, thirdly, though this is not required in some of the definitions of obscenity, obscenity has a tendency to prepare the way for immoral and unlawful sexual acts, and so to deprave and corrupt those whose minds are open to such immoral influences and

5166 into whose hands a publication of this character might fall.

In regard to the corrupting tendency of pictures seen, we may say that even passing remarks or incidents in books of good literature, may be the source of immoral and unfortunate development in a susceptible individual.

Thus Francis Thompson from reading DeQuincey's "Confessions of an Opium Eater" started on a career or something that resulted in his becoming a morphine addict.

It would not be wise nor possible to proscribe all literature, but we should proscribe a magazine whose chief selling point is the sexual excitement it arouses, which will stimulate the desire to experience the reality of what was seen in the pictures. 5167

There has been some empirical evidence thrown on the matter by experimental studies. Autobiographical accounts have shown the following:

Moving pictures lead adolescents to imitate love techniques seen on the screen. They suggest the taking of sex liberties not thought of before seeing the picture.

They raise sex excitement in adolescents and lead to taking or allowing liberties on the way home which otherwise would not have been taken or would not have been allowed. 5168

And so, the arousing of sex feelings is quite evident in regard to Esquire.

Esquire on page 10 frequently presents letters from eaders, and one of these, a soldier, tells of how he has got his room all pasted over with Varga girls.

Now, the basis of that is the sexual pleasure that is derived from it, and as I pointed out in various ways, the production of sexual emotions by pictures and readings leads to a desire to sample, and so the magazine may be accused of corrupting the minds of youth. 5169

Q. Dr. Moore, would you consider—

Mr. Bromley: Just a minute. I move to strike out the entire answer as incompetent, immaterial, and ir-

5170 relevant, full of hearsay, and conclusory, and it is improper—

Chairman Myers: It may be subject to that criticism, Mr. Bromley, but let it stay in the record.

By Mr. O'Brien:

Q. Would you consider the matter that you have read in Esquire, Dr. Moore, information of a public character, proper for dissemination throughout the nation? A. Most certainly not.

5171 Q. Would you state in a sentence whether or not you consider these issues of Esquire which you have examined, decent or indecent? A. They are indecent.

Mr. O'Brien: Your witness.

Cross Examination by Mr. Bromley:

Q. You are a Benedictine monk, aren't you? A. Yes, sir (smiling).

Q. Is that funny? A. Not a bit.

Q. Do you know Dr. Clements C. Fry? A. Not personally, no. I may have met him. I meet a great many people

5172 in the meetings and I probably met him sometime. I am not quite sure.

Q. Do you know his reputation? A. Not so well.

Q. What is it? A. I don't know. I don't think he is a member of the American Board. I am not quite sure of that, though.

Q. What about his reputation, do you know? A. I would not be prepared to state anything about his reputation. I won't question the reputation of other psychiatrists in public.

Q. Are you familiar with the American Journal of Psychiatry? A. Yes, sir. 5173

Q. Do you see in the September 1943 issue where there is a review of a book called "Mental Health in College" by Clements C. Fry? A. I haven't read that, no.

Q. Do you take this magazine? A. I do.

Q. Would you read the review, please? A. (After examining review) Well, I glanced over it.

Q. Does that refresh you recollection as to Dr. Fry's reputation? A. Well, it mentions that he is there, he is a psychiatrist, yes.

Q. A perfectly reputable psychiatrist? A. Oh, I wouldn't cast a reflection upon anybody's reputation. 5174

Q. You know that he possesses, by reputation at least, an acute knowledge of youth problems? A. I do; probably he does.

Q. Do you know Dr. Kenneth Tillotson? A. I have heard of him, yes.

Q. What do you know about his reputation? A. I haven't gone into that either.

Q. You don't know anything about him? A. No. I am making no statement of people's reputations.

Q. Now, the purport of your statement that you just finished reading is to condemn the whole magazine Esquire, is it, and each one of the eleven issues? A. Why, yes, I would say that there is something more or less objectionable in each one of the eleven issues that I saw. 5175

Q. Well, I say the purport of your statment that you have just finished making is to condemn the whole magazine and each of the eleven issues? A. I wouldn't say that I condemn everything in each one of the eleven issues, no.

Q. How long did you study the eleven issues? A. Why, I took a couple of days to look them over.

5176 Q. When did you start? A. Oh, about ten days ago.

Q. How much time have you spent altogether looking at them? A. Oh, some hours.

Q. How many? A. Several.

Q. How many would "several" be? A. Why, in point of time it was less than ten; I would say two or three.

Q. You mean two or three hours? A. Two or three hours, something like that.

Q. Are you familiar with the reputation of Sholem Asch? A. No.

Q. Did you ever hear of him? A. No.

5177 Q. Did you ever hear of Theodore Dreiser? A. No.

Q. You never heard of him? A. No.

Q. Did you ever hear of John Dos Passos? A. No.

Q. Never heard of him? A. No.

Q. Did you ever hear of Havelock Ellis? A. Yes.

Q. Did you ever hear of Leon Feuchtwanger? A. No.

Q. Did you ever hear of F. Scott Fitzgerald? A. No.

Q. Did you ever hear of Maxim Gorky? A. Yes.

Q. Did you ever hear of Ernest Hemingway? A. No.

Q. Did you ever hear of D. H. Lawrence? A. No.

Q. Did you ever hear of Thomas Mann? A. The name is a little bit familiar.

5178 Q. You don't know who he is, though? A. No.

Q. Did you ever hear of Maurice Maeterlinck? A. No.

Q. Did you ever hear of Andre Maurois? A. No.

Q. I spell it on account of my pronunciation: M-a-u-r-o-i-s. A. No.

Q. Did you ever hear of Franz Molnar? A. No.

Q. Did you ever hear of Luigi Pirandello? A. No.

Q. Did you ever hear of Jacob Wassermann? A. No.

Q. Did you ever hear of Arnold Zweig? A. No.

Q. Did you ever hear of Thomas Wolfe? A. No.

Q. Did you ever hear of John Steinbeck? A. No. 5179

Q. So the fact that all of these gentlemen whom I have named have been contributors to Esquire would mean nothing to you? A. It would mean very little. I would have to examine what they wrote.

Q. Now, in the January issue did you read the article by Joseph Wechsberg, entitled "School for Saboteurs"? A. I remember the title but I didn't read it.

Q. You didn't read it? A. No.

Q. Did you read the article, "Japan's Mein Kampf"? A. No.

Q. By Curt Riess? A. No. 5180

Q. Did you ever hear of Curt Riess? A. No.

Q. Did you read the article, "West Point's First Captain," by Thom Yates? A. No.

Q. Did you read "The Unholy Horatio Alger," by Stewart Holbrook? A. No.

Q. Did you read "The Future of Air Power," by Robert W. Marks? A. No.

Q. Did you read "31 Lessons for Brass Hats and Bureaucrats," by William B. Ziff? A. No.

Q. Did you ever hear of William B. Ziff? A. No.

Q. What did you read in the January issue? A. I have given you the reference—those references I have given you 5181
there, I have looked into. Now, others I might have glanced through. I did not attempt to read the thing all through because my idea was to find out something, not about every article in it, but my point of view was to find out whether or not some of the things were definitely obscene and that the magazine as a whole gives an impression of obscenity.

Q. Well, your purpose was to see if you couldn't find anything obscene, wasn't it? A. Naturally yes, that is what I was to testify on. I was not testifying on the literary value of the other articles.

5182 Q. So you made no investigation of them whatsoever, did you? A. I would say no. I was looking for obscenity, and if I found nothing I wouldn't have testified, and if I found obscenity, why that was sufficient for me.

Q. It didn't make any difference to you whether the magazine as a whole was good or not? A. If there was enough obscenity to make it objectionable, why, it might have had a number of other things in it but that wouldn't make any difference.

Q. So I take it, in the January issue, at least, you did not read any part of any article, story, or feature of other
5183 consideration? A. I wouldn't say that. If I refer to that in that paper, why, I have done so.

Q. Well, will you pick out for me what you read? Here is the January issue. A. Somebody walked off with my notes.

Q. Well, can't you pick them out without a note about it? A. No.

Q. You can't do it? A. No; my memory—a man's notes—

Mr. O'Brien: Now, if the Board please, I gave to Dr. Moore all of these items with the captions or names of the articles.

Mr. Bromley: He doesn't want that, he wants his notes.

5184 Mr. O'Brien: Just a minute.

The Witness: Well, I glanced over all those captions that he gave me; I glanced through them. I looked at every single one of those.

By Mr. Bromley:

Q. But you couldn't tell us by looking at this copy of the magazine, and others, if you had to, without a note? A. Oh, I might possibly, yes.

Q. Would you mind doing it? 5185

Mr. O'Brien: I think you should have him use his notes to refresh his memory and also to save time.

The Witness: I have a picture.

By Mr. Bromley:

Q. You have a picture? A. Yes.

Q. What page? A. 89 to 90.

Q. 89 to 90? A. No, 84 to 89, I think it is.

Mr. O'Brien: Here are your notes, Father (handing notes to witness). 5186

By Mr. Bromley:

Q. You refer to the picture on page 84? A. Yes.

Q. Between 84 and 89, is that right? A. Yes.

Q. Now, do you find that to be indecent? A. I do, a suggestive attitude, I feel that in adolescents that it would lead to sexual excitement. I feel quite sure it would.

Q. Now, what else can you find in that magazine? Can't you do it without your notes, Father? A. I have a note here on "Benedicts Awake" in the January 1943 issue, page 45. 5187

Q. You are now reading from your notes? A. Yes, sir.

Q. Couldn't you do it without your notes, Father? A. Probably not. And the article, "Those Star and Garter Blues," on page 83 of the same issue.

Q. Again you are reading from your notes, aren't you, Father? A. Yes, sir. These notes are refreshing my memory.

5188 Q. Do you think you could point out anything in the January issue that you don't have in your notes? A. Oh, if I started to study it, yes, I could find some other things, perhaps more things. I didn't put everything in these notes here that I found objectionable.

Q. Did you know that the picture that you selected on page 84 was not complained about by the Post Office? A. That would not be necessary. I might look upon that as obscene on account of its attitude and the general picture. I feel quite certain that in the minds of many adolescents that that would lead to sexual excitement.

5189 Q. Is there any reference to the picture on page 84 in your notes? A. No. I did not attempt to get all things in my notes, but just samples of obscenity. It would have been a long document if I picked out everything.

Mr. Bromley: I would like to have his notes marked for identification.

Mr. O'Brien: Well, I don't know whether he has to put his notes in evidence or not. It depends on whether or not the witness wants to use his notes to refresh his recollection or whether he is willing to have them identified or put into the record.

5190 Chairman Myers: Well, he has used them for testimony. I expect everything that he has got in his notes is in the record by his own statement anyway.

Have you any objection to those notes being in the record?

The Witness: Not the slightest.

Chairman Myers: Let them go in.

Mr. O'Brien: I assume the Doctor will be allowed to use the notes to refresh his memory.

Chairman Myers: Oh, yes. They are just marked for identification. 5191

(The document above referred to was marked Respondent's Exhibit No. 151 for identification.)

By Mr. Bromley:

Q. Now, may I see the notes, Doctor? A. Delighted (handing Exhibit 151 for identification to Mr. Bromley.)

Q. What is your opinion of this joke, Father:

"After two days in the hospital I took a turn for the nurse". 5192 A. Well, it might be suggestive. It is not a joke that you would like to see in polite society. It wouldn't indicate a very great refinement of manners.

Q. Was that your attitude on all the jokes in the "Goldbricking" feature of these eleven issues? A. I wouldn't say, of the jokes, no.

Q. Can you now recall what joke as to which your attitude was different? A. No. I would have to look them over one by one and tell you.

Q. Is there anything in your notes that would help you in that respect? A. I don't think so. I didn't pay very much attention to the jokes. 5193

Mr. O'Brien: Just a minute. I think the witness is entitled to use his his notes according to the ruling of the Board.

Mr. Bromley: Yes. He says there is nothing in them.

Chairman Myers: The witness says there is nothing in them.

Mr. O'Brien: I see.

5194 *By Mr. Bromley:*

Q. Well, in other words, there was nothing about the Army jokes which appear in the magazine that caused you to be concerned, was there? A. I wouldn't say that. I will say I didn't read every copy all the way through, and I am not able to speak about things I did not read, about whether they are obscene or not, but I did find things that were obscene.

Q. In the Army jokes? A. No, I say in the magazine.

Q. I am talking about the Army jokes.

5195 Mr. O'Brien: I suggest the witness should be confronted with the Army jokes.

By Mr. Bromley:

Q. Can you remember any Army joke that you found obscene? A. No, but it doesn't follow that there are none there.

Q. Doesn't it follow that you did not see any that you thought obscene? A. Well, it might be that I didn't read any.

Q. Is that the fact?

5196 Mr. O'Brien: Now, there is no characterization in any Esquire with the title Army jokes. That is just counsel's statement.

Mr. Bromley: That is right.

Mr. O'Brien: I think the jokes to which counsel refers should be shown to the witness.

Mr. Bromley: That is right.

Chairman Myers: That is right.

Mr. Bromley: I refer to the two-page spread called "Goldbricking with Esquire". 5197

By Mr. Bromley:

Q. Do you recall that, Father? That question is a memory test.

Q. Now, were there any jokes in any of the two page spreads that you took objection to? A. I think there were but I would have to look at them to see.

Q. You can't tell now from memory? A. No.

Q. There is nothing in your notes about that? A. No. I only noted some of the things. I didn't put everything in my notes. I thought it was sufficient for me to cite a few examples. 5198

Q. Did you notice this joke:

"She: 'Would you like to see where I was operated on for appendicitis?'

"He: 'No, I hate hospitals.'"

A. I don't remember that.

Q. Would you call that indecent? A. I don't get the point. Perhaps if I got it I would.

Q. Well, you don't call it indecent, then? A. Perhaps because I don't see the point. I noticed several things in there I didn't see the point of, some of the things that have been objected to by the Army I didn't quite see the point. 5199

Q. Some things that have been objected to by the Army? A. By the Post Office, I didn't quite see the point, but perhaps if I had made a more careful study, I would have found out.

Q. You didn't do that? A. You didn't do that?

Q. Did you do anything in that respect? A. No.

5200 Q. Do you see anything wrong with this joke:

"Dear Doctor Diddle: I am a beautiful brunet but I have a serious problem. Every time I take a bath I blush. What shall I do? . . . Twenty.

"Dear Twenty: Before you undress put on a blind-fold."

A. Well, that is not seriously objectionable, no, but it is not what you would exactly call refinement.

Q. You would call it indelicate, would you? A. Yes, I think so, but I wouldn't exclude a thing from the mails on account of that, but if the magazine is just chock-full of these indelicacies and leading adolescents to develop indelica-

5201 cies in speech and conduct, it might be desirable to exclude it from the mail. That is what I would say.

Q. Turn to the February issue, if you please, Father. That is an issue which is just chock-full of indelicacies? A. I don't seem to have cited anything from the February issue.

Q. That means then that you gave that a clean bill of health? A. Not a bit of it.

Q. Not a bit of it? A. No.

Mr. O'Brien: Well, just a moment. I think the witness forgets that he has cited "The Unsinkable Sailor" from the February issue.

5202 The Witness: Was that in there? Yes. "The Unsinkable Sailor" is rather indecent.

By Mr. Bromley:

Q. Is that again an indelicate reference? A. Indelicate and indecent too. It might call up some sexual excitement in the adult. And very indelicate language.

Q. Now, you said that the February issue, as I understand you, was chock-full of these indelicacies or indecencies? A. No, I didn't say that. 5203

Q. You didn't? A. No.

Q. Well, it is not, is it? A. I really don't know, it probably has a good many.

Q. Well, is it chock-full of them? A. What do you mean chock-full?

Q. What do you mean? A. Why, a number of—some fifteen or twenty.

Mr. O'Brien: I object to asking the witness for the definition of a term which I think counsel used. 5204

Chairman Myers: No, the witness used it himself.

By Mr. Bromley:

Q. Now, you did not mean to leave the impression on this Board that any one of these issues was chock-full of indelicacies or indecencies, do you? A. I would like to leave the impression on the Board that any issue has a number of indelicacies and has a number of obscenities. Now, I made no attempt to find out how many but I thought it sufficient to cite samples. I did not know that it would be necessary to get a mathematical proportion. 5205

Q. What you wanted to do was to help the Post Office in convincing this Board— A. No.

Q. You haven't heard me. You would just as soon answer without a question, wouldn't you? A. No.

Mr. O'Brien: Now, I object to that and move that it be stricken. He started to answer.

Chairman Myers: That may go out.

The Witness: Ask your question.

5206 *By Mr. Bromley:*

Q. You are not going to ask me any questions? A. I say, you ask your question; go ahead.

Q. Now, what you want to do is help persuade this Board that this magazine ought to be deprived of its second-class rates? A. Not unless it be found obscene.

Q. But your purpose in your testimony is to persuade this Board that this magazine ought to be deprived of its second-class rates, isn't it? A. My purpose is to declare whether it is obscene or not. I haven't anything to do with
5207 depriving you of the right—of the rate, that is a question of law.

My question is to find out whether, as an expert psychiatrist, looking upon this thing, whether it is obscene.

Q. Haven't you said right along in your statement that you did not think this magazine should go through the mails? A. Yes, that is true; but that is not my immediate purpose. My immediate purpose is to give the definition of obscenity and see whether it applies to it or not.

Q. Well, do you think it should go through the mails or should not? A. No, I don't; but I don't believe my testimony on the matter of going through the mails has any-
5208 thing to do with the issue.

Q. You have looked at the law pretty carefully before you came in here, haven't you? A. Naturally, I wanted to find out what obscenity meant.

Q. You think it would be all right for this magazine to go through the mail at fourth-class rates, but not at the second-class rates do you? A. No, I don't know what you mean by the fourth-class rates or the second-class rates. I am merely confining it to the question of obscenity; that the magazine is obscene.

Q. When you use the word "obscene", as I understand your definition, you include delicacy? A. Yes. That seems to be included in the concept in English and in many of the laws which mention obscenity but do not define it, so in this country and in foreign countries without a definition, in all probability the common concept of obscenity is one which the laws have in mind. 5209

Q. And that would include bad taste too, would it? A. I think it would.

Q. That would include vulgarity too, would it? A. I think so. I mean vulgarity of an obscene character.

Q. So you would say that probably the term included anything that ought not to be accepted into polite society? A. No, I don't think so. I don't think so; that is an incidental issue. The main thing, I believe in the law, is the tendency to produce sexual excitement, not necessarily in my mind or somebody else's mind or someone's mind, but in the mind of adolescents or others into whose hands this magazine might fall. That is true of a large number of cases. 5210

Q. Now, are you familiar with the pictures in Life which have been introduced in this case concerning the birth of a baby, published in 1938? A. Well, why I didn't know I could pass upon Life as obscene or not obscene because I did not assume that I should pass upon Life. 5211

Q. Did you hear the question I asked you? A. I did.

Q. Are you familiar with the pictures? A. I am not.

Q. Will you look at them? A. I would be delighted.

Q. Are they decent or indecent? A. Well now, personally I wouldn't see anything indecent in that and it might be of importance in teaching something about the birth of children, pregnancy and so forth.

Q. You see nothing obscene about the pictures, do you, Father? A. I wouldn't object to that, no.

5212 **Chairman Myers:** What is the number of that Exhibit?

Mr. Harding: It has not been offered in evidence.

Mr. O'Brien: I move to strike out the question and answer then, if it is not in evidence.

Chairman Myers: It goes to the credibility of the witness.

Mr. Bromley: Will you mark for identification the issue of Life for April 11, 1938?

(The document above referred to was marked Respondent's Exhibit No. 152 for identification.)

5213

Mr. Bromley: I offer it in evidence.

Mr. O'Brien: What page is that, Mr. Bromley?

Mr. Bromley: 34.

By Mr. Bromley:

Q. What are the N. O. D. L. lists?

Mr. Cargill: If that is in evidence let us see it.

The Witness: What?

5214

By Mr. Bromley:

Q. I said what are the N. O. D. L. lists? A. N. O. D. L. I don't know.

Q. You never heard of them? A. No.

Q. Did you ever hear of the National Organization of Decent Literature? A. No.

Q. Never did? A. No.

Q. Did you ever hear of The Acolyte? A. Yes.

Q. What is that? A. Well, it is a Catholic paper. It goes around to many of the parishes. 5215

Q. Published by Bishop Noll in Fort Wayne? A. I don't know.

Q. Do you ever read it? A. Very seldom.

Q. I show you Exhibit 17-A for identification and ask you if that refreshes your recollection about the N. O. D. L. list?. A. It does not.

Q. You never saw that or heard of it before? A. No.

Q. Do you believe or don't you that the War Department is protecting the morals of our servicemen?

5216

Mr. O'Brien: Now, I object to that question as totally irrelevant.

Chairman Myers: What was the question?

(Question read.)

Chairman Myers: That is just a question on belief and I think the objection will be sustained.

By Mr. Bromley:

Q. Do you know that the magazine Esquire is being furnished to our soldiers and marines by the War and Navy Departments? A. I didn't know that. I regret it very much. 5217

Q. Did you know that it has—that it is a widespread practice on the part of our servicemen to use these Varga girl pictures to pin up in their barracks and their machines and their planes and their submarines? A. Why, from some of the letters, one of the boys spoke of doing that.

Q. Did you know that that practice—

Mr. O'Brien: I object to the question—just a minute—and the answer: '"Did you know that there is

5218 a widespread practice". I will admit that some people do it but there is no evidence in here that it is a widespread practice.

Chairman Myers. Well, his answer was as to what he knew; that it was only as to one letter that he got.

By Mr. Bromley:

Q. Did you know that this practice of pinning up these girls or letting soldiers have them for pin-up use is one that is encouraged by the services?

5219 Mr. O'Brien: I object to that. There is nothing to show that.

Chairman Myers: Well, that is a little different question from the other one. Objection overruled.

Read the question for him, Mr. Reporter.

(Question read.)

The Witness: I didn't know that.

By Mr. Bromley:

5220 Q. Did you know that men like General MacArthur and Donald Nelson were subscribers to this magazine? A. No. I didn't know that.

Q. Would it surprise you to know that the Army has just ordered 73,000 copies of Esquire to be printed on special thin paper to be shipped overseas to hospitals and bases for our fighting men? A. I didn't know that.

Q. Did you know that the Quartermaster Division has just completed arrangements with the publishers of Esquire to supply a miniature book reproducing cartoons in Esquire

for inclusion in the K ration package sent to the armed forces? A. No. 5221

Q. In various parts of the world? A. No.

Q. Are you familiar with some of the camp papers that are being put out today by the soldiers and sailors in camp? A. Not at all.

Q. Would the fact of the attitude of the services toward this material which has been indicated in my questions affect your opinion, Father? A. No, it wouldn't.

Q. You would deplore rather than approve that? A. I would.

Q. Would you? A. I would, unquestionably. 5222

Q. You would think it was bad for the men? A. Yes.

Q. What is your opinion of this cartoon, please, sir (handing to witness)? A. Well, it is not so bad.

Q. Well, is it indecent, indelicate, immoral? A. Not seriously.

Q. You would have no objection to that, then, would you? A. That alone, no.

Mr. Bromley: I offer it in evidence.

(The document above referred to was marked Respondent's Exhibit No. 153 for identification.)

5223

Mr. Bromley: This is a Marine Corps cartoon showing a marine on a South Pacific island.

Mr. O'Brien: I object to the description of it. It is in evidence and speaks for itself or if it is admitted in evidence.

Chairman Myers: Let Mr. O'Brien see it.

Mr. Bromley: Yes (handing document to Mr. O'Brien).

5224 Mr. O'Brien: I have no objection to the admission of this into evidence, but I object to its description.

Chairman Myers: It may be admitted.

(The document heretofore marked Respondent's Exhibit No. 153 for identification was received in evidence.)

Mr. Bromley: I want to call the Board's attention, if I can get away with it with Mr. O'Brien, to what is printed on the back side of it.

5225 Mr. O'Brien: That was not exhibited to the witness and certainly was not even offered in evidence and neither what was printed on the back side of it.

Mr. Bromley: You just used "backside."

Mr. O'Brien: I am using your term, Mr. Bromley, and I know that you are the soul of decency.

Mr. Bromley: Thank you.

By Mr. Bromley:

Q. What is your opinion of this picture, Father? A. Well, some of these pictures, you know, are a good deal
5226 like this: Suppose that I was asked to give an opinion upon a fellow breaking the speed law and he was rushing to Pennsylvania at 60 miles an hour? I would say that he broke the speed law, and then there would be some of the fellows going a little under the speed law, and there, under the circumstances, I might get mixed up and wouldn't be able to say whether they were breaking the speed law, but I would think that Esquire certainly broke the speed law.

Now, some of those are on the border line and it is hard to say whether they are breaking the speed law or not.

By Mr. Bromley:

5227

Q. Now, would you say that if this thing were being done and that it was being accepted that maybe it was you that was out of step? A. It is not a question of who is out of step; it is a question of whether or not, in my opinion, Esquire in the minds of adolescents reading and seeing it, would arouse them sexually and I think that it would.

Q. Is that your chief objection to it, that it would arouse sexuality? A. Yes, and by their being stimulated to sampling.

Q. And you think that picture which I have just showed you, Respondent's Exhibit 20, would have no such tendency? A. Perhaps it might. One of those border-line things, don't you know.

5228

Q. You find this naked woman a border-line thing, do you? A. A good many shadows there, don't you know.

Q. Was it a question of shadows? A. Possibly, concealed some by the arms.

Q. If you have a naked woman whose erogenous parts are concealed by her arms, the picture is all right? A. Not necessarily.

Q. It is not indecent then, is it? A. Nudity in itself does not constitute obscenity.

Q. It is exposure— A. It is—

5229

Mr. O'Brien: Let him answer.

Mr. Bromley: Oh, I was pressing, too anxious.

The Witness: An individual in a lascivious attitude, lying prone and more or less exposed on a sofa, and so forth, might be much more obscene than a partially exposed picture taken in a bath, don't you know.

5230 *By Mr. Bromley:*

Q. Did you notice any Varga girls on sofas? A. Yes.

Q. You did? A. You showed me one just now. I think it was in the January issue.

Q. You refer to this one, don't you? A. Yes.

Q. You think that is a Varga girl, do you? A. I don't know whether you call it a Varga girl or not. It is one of the girls in Esquire. Perhaps not all the girls in Esquire are Varga girls.

It is an obscene picture, though, whatever you call it.

5231 I won't specify it as a Varga girl.

Q. You mean to change your testimony that it is a Varga girl? A. No, no, no, no. The question is whether it is obscene or not, not whether it is Varga.

Q. My question was, could you point out a Varga girl that was lying on a couch. A. I don't know about that.

Q. What do you say about the decency or indecency of this photograph? A. It is rather indecent, I should say.

Q. That is Respondent's Exhibit 130, a picture from PM. What do you say about the decency or indecency of that nude picture? [Referring to Respondent's Exhibit 23.] A. There is again a question of one of those border-line things, obscured by a whole lot of shadows. It is not exactly a

5232 decent thing.

Q. Is it decent or indecent? A. Border-line.

Q. You wouldn't say which? A. I say it is border-line. Is a man tall or short? Some you can't exactly say. Some you can say they are tall. Esquire is decidedly tall.

Q. But this is a border-line? A. A border-line, I think.

Mr. Bromley: I have been referring to Respondent's Exhibit 23, if the Board please.

By Mr. Bromley:

5233

Q. What do you say about this girl in the bathing suit? A. That is somewhat indecent and suggestive. It leans to the indecent side.

Q. That is Respondent's Exhibit 24.

You recognize that as an advertisement of a bathing suit, don't you? A. Yes; that doesn't sanctify it, though.

Q. What do you say about Exhibit 131, this picture? A. This is rather obscene.

Q. What do you say about Exhibit 135, this picture? A. Well, that is one of those things that occur in life and on the stage. It is not exactly a desirable thing, it is another border-line case.

5234

Q. What do you say about this young lady on the beach, Exhibit 134? A. That is another border-line affair.

Q. Is she [referring to Exhibit 133] a border-line affair? A. A little bit over.

Q. You would consider that indecent? A. A little bit, yes.

Q. The last reference was to Exhibit 133.

I want you to look at this Exhibit 53, being pictures of Margie Hart, the strip teaser, the top one at the top of page 49. Is that decent or indecent? A. Oh, a little bit border-line.

5235

Q. What about the left-hand one at the bottom of page 50? A. A border-line.

Q. The right-hand bottom of page 51? A. Border-line.

Q. When you say "border-line," your opinion is that they are not indecent. Is that right? A. I wouldn't say that. Is a man tall or short?

Q. You got that one off a while ago. A. I am sticking to it.

Q. Are these decent or indecent? A. Border-line.

5236 Q. That doesn't make any sense to me, Father. A. Well, it is good English.

Q. You wouldn't tell us whether it is so close to one or the other side that it might be classified on one side? A. I might be guilty of perjury if I say it is one way when it isn't.

Q. Are there a great many of these pictures that you cannot tell whether they are decent or indecent? A. Quite a number. Some are in Esquire too. But some in Esquire are certainly indecent.

5237 Mr. Bromley: The ones which he cannot classify, if the Board please, are these two nearly naked women at the bottom, Margie Hart, the strip teaser.

Mr. O'Brien: I object to the description. I think the exhibit will speak for itself as to what it is.

Chairman Myers: What exhibit is that?

Mr. Bromley: Exhibit 53.

Mr. O'Brien: I object to the introduction of the text on the back of Exhibit 153, which was not exhibited to the witness, and begins, "The Master Manure or Marine's Dream." I don't think that is proper to put in this record as a cross examination exhibit.

5238 Chairman Myers: It is part of the exhibit.

Mr. Bromley: You mean the Marine Corps has something about manure in it? "Menu" is what I call it.

Mr. O'Brien: There is another word right after it.

Chairman Myers: It is "Menu—or Marine's Dream."

Mr. Bromley: Now, Mr. O'Brien, you have read "Menu", which is a separate word, and "Or", which

is a separate word, as "Manure", haven't you? It is a good summation of your attitude. 5239

Mr. O'Brien: I read it as written here, with a dash between the two words, as it is intended to be read by the person who wrote the text. I am not summing up my attitude on that at all. I will sum it up later for the satisfaction of counsel—or dissatisfaction.

By Mr. Bromley:

Q. In Exhibit 57 I call your attention to pictures on page 55. Are those decent or indecent? A. They are not so bad. 524

Q. Again you can't say which? A. It is a little, perhaps, on the under side rather than the over side.

Q. Are they decent or indecent? A. Oh, I wouldn't call them definitely decent, no.

Q. Would you call them definitely indecent? A. Nor definitely indecent, but perhaps a little less indecent than many you have presented.

Q. If they are less indecent, you mean they are decent, don't you? A. There again on the question of border-line. Some things you are doubtful and can't say you are certain of, and I don't want to go on the witness stand and say I 524 am certain about anything when I am uncertain.

Q. So your opinion on this is that you are uncertain? A. Uncertain.

Q. Does that apply to the next pages of the exhibit, pages 56 and 57? A. Why, I don't see anything indecent about those.

Q. You don't? A. No, except perhaps that the top one there might be. The top one was a little indecent.

5242 Q. You refer to the one where the girl is stretched out on a blanket with just a pair of tights on? A. Yes.

Q. That is indecent? A. A little bit.

Q. Is that the only one of the six which is even a little indecent, in your opinion? A. I should say so.

Q. What about the five pictures on the next page, 58? A. They are also rather indecent.

Mr. Bromley: This is the Suntan spread which I have shown to the Board many times in Life.

Chairman Myers: What exhibit is that?

5243 Mr. Bromley: 57. I put it in the record when I started.

By Mr. Bromley:

Q. And Exhibit 56, being pictures of Carole Landis, what can you say about the upper right-hand one? A. That is a border line again.

Q. You can't tell? A. No.

Q. What do you say about the one at the bottom of the page? A. I would put that towards the border line.

Q. You can't tell about that one either? A. No.

5244 Mr. Bromley: These two are the Carole Landis ones which we had before.

By Mr. Bromley:

Q. What about these three pictures on pages 60 and 61? Are they decent or indecent? A. They are somewhat indecent, I would say, but not seriously so like some of the ones in Esquire.

Q. What about the one on page 62? A. I wouldn't call this indecent. 5245

Mr. O'Brien: I suggest the witness should be cross examined on Esquire and not on Life. He confined his testimony to Esquire.

By Mr. Bromley:

Q. I show you these seven pictures of Carmen d' Antonio in Exhibit 138. What is your opinion with respect to them? A. Not seriously indecent—again these border-line things, don't you know. 5246

Q. You would not have any objection to them being in a magazine of general circulation, would you? A. It would depend on what else was in the magazine, what might be said about them, and various other things.

Q. Are you familiar with Life? A. Not very. I very seldom see it except by accident.

Q. What is your opinion of this picture that I show you, from Exhibit 18 of the respondent, at page 63? A. Another one of those border-line affairs.

Q. Nothing very seriously objectionable about it? A. No.

Q. And is that true of the picture on page 64? A. This picture (indicating)? 5247

Q. Yes. A. Yes, I don't see anything very objectionable about that.

Q. You don't see anything objectionable about that at all, do you? A. Not so very.

Q. What about this picture on 66? A. Not so bad.

Q. What is your opinion about this picture on page 19 of Respondent's Exhibit 139? A. That seems to be rather indecent.

5248 Mr. Bromley: That is Gypsy Rose Lee (exhibiting to Board).

By Mr. Bromley:

Q. What do you think of this picture, the one on the right-hand of page 11? A. This thing (indicating)?

Q. Yes. A. I don't see anything wrong with that.

Q. You see it is a nude woman, don't you? A. Yes, but there is so much over it that you can't see very much. I don't think a man would be very much stimulated by that. I may be wrong but it is my opinion that so much is hidden.

5249 Q. So much is hidden of the nude figure? A. Yes.

Mr. O'Brien: I object to any further cross examination along this line. Counsel has certainly exhibited to the witness, for whatever his undeclared purpose may be, enough to test his judgment or whatever it is.

Chairman Myers: He has his own way of cross examination. I don't know what it is.

Mr. Bromley: Could you tell me, Mr. O'Brien, what the number of this exhibit is?

Mr. O'Brien: Post Office Department's Exhibit 63

5250 is a picture of Joan Leslie.

Mr. Bromley: The last reference was to Post Office Exhibit 63, page 11.

By Mr. Bromley:

Q. What is your opinion as to the decency of this photograph, Respondent's Exhibit 67? A. Rather indecent.

By Mr. Bromley:

5251

Q. What is your opinion as to the spread of pin-up girls in Respondent's Exhibit 136, please? Take the one at the top left, please, decent or indecent? A. Border-line.

Q. Take the rest of them on the left-hand page. A. I don't see anything objectionable in those.

Q. In any of the rest? A. No.

Q. Take the ones on the right-hand page. A. Upper right-hand, perhaps border-line.

Q. Are the rest all right? A. Not so bad.

5252

Mr. Bromley: Border-line, he says (exhibiting to Board.)

By Mr. Bromley:

Q. What is your opinion as to the decency, under your definition, of this excerpt from an article:

"The little island fortress might fall at any time. This announcement would be greeted with laughter and some private would pipe up: 'Well, I'll be a sad son-of-a-bitch. Don't they know we have got Marines on this island?'"

A. We don't use that word in polite society, but I don't think in general that would be so very reprehensible, but 5253
I wouldn't like to see a magazine continue to use such words and so be developed in the minds of adolescents this unrefined manner of speech.

I feel that refined speech is a great acquisition of personality. But when a thing like that appears in a magazine it doesn't do much harm.

Q. Nothing sexually stimulating about that? A. Oh, no. It belongs to the unrefined, indelicate, vulgar element in obscenity.

5254 Q. You don't find anything about the use of the word "son-of-a-bitch" in Esquire as indecent, do you? A. Not exactly indecent, but there is a good deal of vulgar language in Esquire that I think makes it a bit of a nuisance.

Q. How many sons-of-bitches did you find in Esquire, Father—I mean words. A. Well, I can remember one, but I can remember a number of other vulgarities.

Q. Well, I was just taking a step at a time. As a matter of fact, you only found one? A. Only one that I remember.

Q. So you wouldn't say that the magazine, the eleven issues, were chock-full of profanity, would you? A. No, but
5255 indelicate language is very common.

Q. Father, you don't think that any words, words in themselves, are sexually stimulating, do you? A. You mean isolated words?

Q. Yes. A. No, I don't.

Q. Isn't it a fact, then, that the material in Esquire to which you object is the picture material? A. Not entirely, no.

Q. Could you be specific as to what it is textually that you object to? A. The first and last verses of the poem "Benedicts, Awake!", January, 1943 issue; the article "Those Star and Garter Blues", page 83 of the same issue, and
5256 "The Unsinkable Sailor", February, 1943, page 45.

Q. Let's take the last one. Did you read all of "The Unsinkable Sailor"? A. A good deal of it, yes.

Q. Is your objection to the whole of it or just to parts of it? A. Naturally to parts of it.

Q. Do you know what parts? A. The scene where he approaches the girl and the girl is very much shocked.

Q. The lowering of the boom paragraph? A. That was a very objectionable phrase.

Q. Was there anything else in "The Unsinkable Sailor" to which you take exception? A. I would have to read it over again. 5257.

Q. Didn't you make notes about it? A. Not very much.

Q. Could you tell me from your notes where it is to be found? A. Page 95.

Q. Can you indicate from your notes what you object to? A. Well, I think the approach to the girl is quite objectionable.

Q. That is again the lowering of the boom reference? A. Yes, the whole attitude of approaching her and one thing and another. It is objectionable. 5258

Q. Did you read that through the paragraph to see what that phrase "How's chances to lower the boom on you, sister?" meant? A. Yes.

Q. What did it mean? A. It is evidently intended to bring out sexual desire by the excitement of the girl.

Q. Did you read far enough to see what the phrase meant? A. Yes.

Q. What does it mean? A. I think he is asking for sex intercourse with the girl.

Q. Then you didn't read the whole paragraph, did you? A. I think so.

Q. Don't you see that right in the paragraph the phrase is explained? A. Well, that is one of those things which suggests but it doesn't say. 5259

Q. You hadn't read that before; had you? A. Yes.

Q. You had read this reference to the meaning of the phrase? A. Yes, but that was not intended.

Q. How do you know what was intended? A. Why, it was intended to express the idea of asking a girl for sexual intercourse, and the idea there was to put in something to cloud the issue.

5260 Q. Do you know the author of this story? A. No.

Q. You don't know him personally? A. No.

Q. Did you know it was a woman? A. No.

Q. You are not interested in that? A. Women can be obscene as well as men.

Q. Did you know the writer of the story was the wife of the president of the National Maritime Union?

Mr. O'Brien: I object to that. There is no evidence to that effect and I move to strike the question.

Chairman Myers: Oh, yes, there was.

5261 The Witness: I didn't know anything about it.

By Mr. Bromley:

Q. It wouldn't change your opinion? A. No.

Q. Do you know the phrase "Lowering the boom" is a very well understood phrase by sailors?

Mr. O'Brien: Ask what the readers of Esquire understand by it.

The Witness: No, I didn't, but it evidently suggests that meaning and the adolescent will get that meaning from it, just as I did.

5262 *By Mr. Bromley:*

Q. You deal primarily with delinquent children, don't you? A. Not primarily, no.

Q. Well, largely? A. Well, I deal with children who are retarded in school, for instance, and I have a good many normal children with minor problems of behavior. Why?

Q. Is that the only reference in "The Unsinkable Sailor" to which you took exception? A. That was the chief objection.

Q. You said the other one was the "Star and Garter Blues." A. There was a phrase in that which I pointed out, which suggested the general obscenity of Esquire. One phrase in this article I said expresses the general trend of the obscenity in Esquire. It suggests what it doesn't say. 5263

Q. You have not read all of any issue of Esquire, have you? A. No.

Q. Oh, no. A. No.

Q. And yet you feel perfectly competent to say that that phrase "Esquire suggests what it doesn't say" is a proper characterization of the magazine? A. A proper characterization of the pictures and various things which I did read. 5264

Q. But you don't know if it is a proper characterization of the magazine? A. Not of everything in the magazine, certainly not.

Q. Certainly not. Is there anything in that review to which you take exception? A. I picked out that phrase as evidence of the character of the magazine.

Q. Now, people have done that sort of thing to the Bible, haven't they, Father? A. Well, what about that?

Q. Well, it has been very unjust, hasn't it? A. I don't think what I have done to Esquire has been unjust.

Q. Won't you think about the Bible a moment? A. I will be glad to.

Q. The people who did that to the Bible have been unjust to the Bible, haven't they? A. Not what I have done to Esquire. 5265

Q. Won't you answer my question? A. I did.

Q. The people who have done that to the Bible have been very unjust? A. Done what?

Q. Made fun of it and tried to twist it. A. I have not made fun of Esquire and I have not tried to twist Esquire.

Q. People have tried to criticize the Bible by extracting

5266 isolated passages from it, haven't they? A. I have not tried to criticize Esquire unjustly except by extracting anything that was obscene.

Q. People have tried to extract things from the Bible, haven't they? A. Yes.

Q. And have tried to attack the Bible and they have published books and tried to attack the Bible on the basis of those extracts? A. That is right.

Q. And that is unfair? A. That is unfair.

Q. And what else is objectionable in the "Star and Garter" review? A. I would have to read it over again.

5267 Q. Is there anything else in any article or story in any of these eleven issues to which you object? A. Except the things I have presented as evidence, I would have to make another study.

Q. There is nothing either in your mind or your notes now to which you take exception? A. I have given you all that is in the notes, all that is here.

Q. And that is the only material upon which you are willing to present an opinion, isn't it? A. These things are merely upon the question of vulgarity, which I look upon as a minor issue. "The Unsinkable Sailor" and the "Star and Garter." The major thing is other things that tend to produce sexual excitement in the minds of adolescents.

5268 Q. Have you named all of those things? A. Not all of them, but I think enough to show.

Q. And you are willing that your opinion should stand on the basis of the material to which you have called attention? A. Certainly.

Q. And your test which you have used in reaching this conclusion, Father, is stated in your long prepared statement which you read into the record? A. Certainly.

Mr. Bromley: That is all. Wait a minute—

Redirect Examination by Mr. O'Brien:

5269

Q. Dr. Moore, Mr. Bromley, in cross examination has showed you quite a number of pictures and asked you to state whether or not you consider them decent or indecent.

Concerning a considerable number of those pictures you have stated that you consider them border line, on the border line of indecency or otherwise.

What would you say as to the same pictures if they were presented in connection with the text and the make-up of Esquire? A. They might be indecent and give rise to sexual feelings if the text and the context were sufficient.

5270

Q. When you made your examination of Esquire was that an entirely independent examination, independent of any ideas that might be expressed to you by any representative of the Post Office Department? A. Oh, certainly.

Q. And did you spend a sufficient length of time, in your judgment, to acquaint yourself with the matter concerning which you intended to testify? A. Certainly. I didn't attempt to make an exhaustive examination of all the obscenity because I thought that would take too long, but I did try to bring out things that were obscene.

Q. And you didn't attempt to list in the notes which you have read here and referred to, all of the indecent matter which you found in Esquire? A. No.

5271

Q. You didn't list all of the various Varga girls or all the cartoons which you found noted on the copies which were left with you? A. Yes. And failure to do so does not always mean that I don't regard those things as obscene.

Q. For instance, in the June issue, 1943, of Esquire, did you read this paragraph:

5272 "An epitaph.

"Here lies the body of poor old Charlotte
Born a virgin, died a harlot.
For eighteen years she kept her virginity
An all-time record for this vicinity."

Did you note that in your examination?

Mr. Bromley: I object to that as repetition. He referred to it in his direct examination.

Chairman Myers: Well, let him answer it.

5273 The Witness: What is that?

Mr. O'Brien: The bottom of the page and continuing in the next column (indicating).

The Witness: Well, that is rather vulgar.

By Mr. O'Brien:

Q. Do you consider that a belittling of the state of virginity and a cheapening of it? A. It looks that way. In fact, the general trend, I felt, of Esquire, was to depict women as a kind of object for male satisfaction, and I think one might get that idea of women from looking through Esquire.

5274 Q. In this issue of Esquire for February, 1943, at page 65, is the cartoon captioned: "What am I bid for this 100 pounds of sugar?" included in your survey? A. Yes. It is a bit vulgar.

Q. Would you say this is a cheapening of womanhood and decency? A. Yes.

Q. When you referred in cross examination to women lying on couches did you have in mind perhaps some of these Varga girls who are in reclining positions in these various costumes? A. That would have something of a similar effect.

Q. And what do you think the effect would be upon the minds of persons contemplating such pictures? A. On the adolescent those would cause a great deal of sexual excitement without question. I think anybody who would look at the matter honestly would say that the pictures in Esquire would cause sexual excitement in adolescents. 5275

Q. What do you think would be the effect upon an adult who constantly read these issues as a matter of habit? A. As I pointed out, adults are not free at all from sexual excitement. They are only on the average less so than adolescents.

Q. When you used the words "bad taste" in response to some of the questions Mr. Bromley asked you, would you say that expressed— A. I certainly would not. You mean the expression referred to as bad taste? 5276

Q. Does that mean bad taste in morals or decency? A. It depends upon the situation. Sometimes the phrase would simply mean lack of refinement in speech which would be an unfortunate thing in any individual who made habitual use of such language.

Q. As you have examined it and determined for yourself what it is, in the article "The Unsinkable Sailor," do you think the use of the word "sonovabitch" there was conducive to public morals and good behavior? A. No. I deprecate the use of that and various words. 5277

Q. The article which referred to the lowering of the boom and that later added statement that that was supposed to mean, although the girl didn't know it, it was supposed to be an attempt to borrow money, did you think that explanation was honest or just a subterfuge? A. It seemed to me that was a subterfuge.

Q. And up to the point where that was explained or stated, the connotation of the item was definitely indecent. Isn't that so? A. Yes.

5278 Q. Mr. Bromley asked you about whether you knew this was a common expression, well known to sailors. Is it your understanding that the reading of Esquire is confined to sailors? A. Most certainly not.

Q. Is it your impression that the sailors, two million men now in the United States Navy from 18 years of age up, are addicted to the use of that type of language? A. They might very well be, I don't know. Sailors are said to be addicted to the use of undesirable language generally.

Q. Assuming that men do pin up these girls in their quarters or otherwise, would you think that that might improve their morals? A. No, I don't. I think it is one of the
5279 factors in arousing sexual excitement and tending to seek it in unlawful manners, and in that way might contribute to the venereal diseases.

Mr. O'Brien: I have no further questions.

Recross Examination by Mr. Bromley:

Q. Father, as a psychiatrist, you do not believe in verbal imagery, do you? A. What do you mean by that?

Q. Isn't that a term well known to psychiatrists? A. To psychologists. Verbal images certainly take place in the
5280 human mind. Such a thing as sensory, visual, verbal imagery.

Q. Didn't you say that verbal imagery is the refuse of sensationalists who attempt to explain all our mental life in sensory terms? A. Well, though I might have said something of that kind very well, that doesn't mean that I deny the existence of verbal imagery, but only that verbal imagery does not constitute our thought processes. Has that something to do with the problem?

Q. You recognize the quotation from one of your books? A. Probably. It seems a bit familiar. 5281

Q. And the specific book is "Dynamic Psychology," which you wrote in 1924? A. Yes; a long time ago.

Q. Would it make any difference at all to you, or the opinions which you have expressed, to know that a survey by the Crossley Service has indicated that four out of five people of this nation think the Varga girl drawings are decent and not indecent? A. It wouldn't make any difference to me, because my opinion is not based upon the general opinion of adolescents, nor what I know of the general opinion of the public about adolescents, but on what I know of adolescents from my own experience and from experimental work. 5282

Q. Do you know William Allen Neilson of Smith College? A. No.

Q. You never heard of him? A. No.

Q. Was your purpose in the redirect examination to condemn as obscene every Varga girl drawing in every one of the eleven issues? A. Some were more objectionable than others is about all I would say. I would not be able now to say whether I would say of some of them that they were border line, as I have said about others, but some are definitely not.

Q. Then you did not mean to condemn every Varga girl, did you, in the eleven issues, as obscene? A. No, I didn't cite those in my notes. 5283

Q. Then there may be some that you would not characterize as obscene? A. There may be some that are border line. I would have to examine them over again.

Q. Did anyone ever call your attention to the fact that Father Flanagan was an Esquire contributor? A. Well, I have contributed to magazines myself, and I certainly

wouldn't like to be held responsible for everything in the
5284 magazine.

I have contributed to psycho-analytical reviews, and if in some way Father Flanagan contributed to this magazine it would not follow that he approved what was in the magazine. Perhaps he was trying to elevate its tenor.

Q. You don't mean to seriously suggest that either you or Father Flanagan would contribute to an indecent magazine just to get money? A. If what one contributed was decent it might help the magazine a little.

And it might have been in this way. Sometimes a person
5285 sends out an article to somebody who is going to get it published, and that person picks the magazine. Of course, that is sometimes unfortunate.

Q. But, generally speaking, don't you consider the character of the magazine to which you contribute? A. I certainly do.

Q. Isn't that true of most honest, decent men? A. I remember one scientific magazine I refused to contribute to because it introduced politics.

Mr. Bromley: That is all.

By Mr. O'Brien:

5286

Q. Did you know, since counsel brought that up, that Father Flanagan didn't originally write that article or cause it to be written or permit it to be written for Esquire magazine at all? A. I didn't know anything about the article.

Mr. O'Brien: That is all.

Mr. Bromley: That is all.

(Witness excused.)

Recess.

Chairman Myers: Have you any other witnesses?
Mr. O'Brien: I have no other witnesses. 5287
May we have a short recess?
Chairman Myers: We will have a short recess.

(Whereupon, a brief recess was taken.)

Chairman Myers: Come to order, gentlemen.
At this time we will recess until 9:30 tomorrow morning.

(Whereupon, at 4:00 o'clock p. m., the hearing was adjourned until Saturday, November 6, 1943, at 9:30 5288 o'clock a. m.)

5289

HEARING OF NOVEMBER 6, 1943.

PROCEEDINGS RESUMED.

5290

Chairman Myers: Are you ready to proceed?
Mr. Hassell: I am ready, Mr. Chairman.

ARGUMENT BY MR. CALVIN W. HASSELL.

I might say at the outset here that you won't have to hear any long tiresome address by me. I do not intend to go through all the testimony of these witnesses, balance one against the other, or anything of
5291 that sort.

I have just a few ideas here that I want to put forward to the Board as to my views respecting this matter and the things that enter into a decision that you are required to reach.

The first thing to be borne in mind is that this case arises under 39 U. S. Code, 232, which requires that a hearing be held in order to determine whether the second-class privilege be revoked.

The decision in this case does not require any determination as to the criminal liability of the editors and publishers of this publication, nor as to its mailability.

5292 We go from the statute requiring this hearing to the so-called second-class Act, 39 U. S. Code, 226.

That Act starts out: "Except as otherwise provided by law the conditions upon which a publication shall be admitted to second-class are as follows", and then proceeds to recite the conditions, and then we come down to the fourth condition, and that part of the fourth condition which is in issue in this case.

Now, it is otherwise provided by law, namely, by 39 U. S. Code, 224, that "mailable matter of the second-class shall embrace" and so forth.

The Supreme Court, in the Milwaukee Social Democrat versus Burleson case, 255 U. S. 407, decided in 1921, that in order to continue to enjoy the second-class privilege the publication must be devoted to the dissemination of "mailable matter". "Mailable matter" in that case was matter under the Espionage Act, subversive matter. 5293

Now, the query arises why did not Congress write the words of 39 U. S. Code 224 into the fourth condition of the second-class Act, namely, 39 U. S. Code 226?

If this had been done the fourth condition might have read as follows: "It must be originated and published for the dissemination of mailable information of a public character or devoted to mailable literature, the sciences, the arts", and so forth. 5294

But the inclusion of such language in this statute would have been ridiculous. The words "mailable information of a public character" and "mailable literature" do not fit well together.

It follows, I think the conclusion is inevitable—that while the words "information of a public character" necessarily include "mailable matter", regardless of the wording of 39 U. S. Code 224, they also have a broader significance. 5295

These words in the fourth condition relate back to the reason why Congress established the second-class privilege, and why it maintains it.

Congress was actuated in establishing this privilege, the Supreme Court said in Lewis Publishing Company versus Morgan, 229 U. S. 288, 301, by "conceptions of public good to be accomplished."

In the Congressional debate which led to the enactment of the Second Class Act, Mr. Money, of the

5296 House Post Office and Post Roads Committee, said on February 20, 1879, at page 2135 of the Congressional Record, that the publications to be granted the privilege "are the most efficient educators of our people" and "are intended for the dissemination of useful knowledge such as will promote the prosperity and the best interests of the people all over the country."

Chairman Myers: Will you give me the reference again?

Mr. Hassell: February 20, 1879, Congressional
5297 Record, page 2135.

If we apply the words "public good", "efficient educators", and "useful knowledge", to the fourth condition of the second-class Act, we get some light on the phrases "information of a public character or devoted to literature, the sciences, arts, etc."

I submit that there cannot possibly be embraced in these phrases and these words, any intention of Congress to subsidize or to give a special privilege status to coarse, indelicate, bad taste, salacious, indecent, lascivious, prurient, obscene matter.

The second-class privilege for these high purposes
5298 and high objects was and is and has been a settled policy of Congress for three-quarters of a century. During all this time there has been another consistent and settled policy of Congress. That has to do with its settled and well-established policy against the transmission and dissemination of indecency, lasciviousness, obscenity, and filth.

The original anti-obscenity statute was enacted in the great postal reorganization act of June 8, 1872. Since that time it has been repeatedly amended and broadened and Congress has enacted similar laws

with respect to the interstate transmission of obscene matter, the transmission of obscene matter in foreign commerce, and embraced anti-obscenity provisions in the Tariff Acts. 5299

Now, here we have two clearly defined policies of Congress. On the one hand a beneficent policy with respect to the dissemination of "information of a public character" for the "public good". That is at the top of the scale.

At the bottom of the scale you have the clear and settled policy of Congress to keep away from, as far as it was able to accomplish it, the dissemination of lascivious, prurient matter, and matter appealing to the baser motives of man. 5300

Having in mind these two policies, both designed for the same purpose, the public good, let's take a look at the postal obscenity statute.

Counsel for the publisher here would have you regard this statute as only a criminal law. Why would he have you do that? Because he would apply all of the protective strict construction applicable to a criminal statute to the decision to be arrived at in this proceeding. He would require you to unanimously agree that all of the issues involved here and every single piece or item of matter that I called attention to were within the terms of the postal obscenity statute beyond a reasonable doubt, to such an extent that the publishers of this publication could be indicted and convicted in a criminal case. 5301

It is my position that you most certainly do not have to do this. Of course, I don't have to tell you that this is not a criminal case.

This statute, 18 U. S. Code 334, has another very important feature. It is just as plainly a nonmailability statute as it is a criminal statute. As a

matter of fact, as an instrumentality for the protec-
5302 tion of the public against salacious matter, the record shows its non-mailability feature has been far more effective than its criminal feature.

This non-mailability provision provides that matter described in the statute "is hereby declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier".

Even if you were required to determine whether this matter is non-mailable, you would not have to
5303 reach a unanimous verdict or be convinced beyond a reasonable doubt.

In considering the matter involved, you must keep in mind the only purpose of this proceeding and that is whether this publication shall continue to enjoy the badge of merit of the Post Office Department, and whether it is designed "for the public good" as an "efficient educator" and as a disseminator of "useful knowledge".

In other words, whether it is "designed for the dissemination of information of a public character or devoted to literature, the sciences, or arts".

5304 You should not overlook the fact that in addition to bearing the stamp of approval of the Post Office Department, as coming within this part of the fourth condition of the second-class Act, that the publication is in fact, subsidized in a sum in excess of $500,000 a year. In reference to the polls referred to by counsel for the publisher and in the testimony on behalf of the publisher, I might suggest that a Gallup poll might be in order, of the tax-payers of the United States, as to whether they would think it proper that they should be taxed, no matter how small the amount, for the dissemination of this type of matter.

I think this question is an eminently fair one and I believe the answer of the public would be: "Well, if we have got to pay for the carrying of this stuff, just let it stay out." 5305

I have indicated before that you do not have to pass on the mailability of these issues. We all know they passed through the mails.

At this point you may say: "Well, why were they permitted to pass through the mails?" That same question was asked in the Milwaukee Social Democrat case and was undoubtedly considered by the Supreme Court.

There you had, I believe, thirteen issues of the publication that had gone through the mails, but the Supreme Court held that the action of the Postmaster General in revoking the second-class privilege was a proper one by reason of the fact that it was shown that it was the consistent policy of the publication to carry non-mailable matter. 5306

Now, let us take up and look at the history of this publication as disclosed by this record.

You will recall there were three distinct methods shown by the evidence for handling this most troublesome publication.

I use the word "troublesome" advisedly, because this record justifies that and that is the fact. 5307

This record shows that the Department has had trouble with this publication as far back as 1936 or 1937.

First, it was attempted to handle the matter by ruling on the mailability of the individual issues. Several such issues were ruled out and we come to the Fall of 1940 when the November and December issues were held to be non-mailable.

Argument by Mr. Hassell.

In the December issue there was included a two-
5308 page spread of cartoons. You gentlemen will probably remember it. Under each one of the cartoons in this two-page spread there were two lines of dirty, filthy parody on the innocent childhood Christmas jingle, "The Night Before Christmas". I think this is a pretty fair index of the character of this publication.

Since that jingle as it was originally included has not been read I would like to take the time to read it to the Board.

This is what the publisher wanted to get through
5309 illustrated by these cartoons in this two-page spread.

"'Twas the month before Christmas
And all through the flat
There wasn't a sign
Of a cane or a silk hat.
Poor Doris was lounging
In her silken bed
With visions of mayhem
In her pretty head.
When on her pent-house roof
There rose such a clatter
5310 She sprang to her feet
To find what was the matter.
When in stepped a gent
Who was dressed all in fur
And he started at once
Making passes at her.
He drank of her Scotch
And he drank of her charms
And he held her enslaved
In his two manly arms.

Resistance from Doris
Was not very strong 5311
And somehow the moments just drifted along.
Then just as the dawn
Started lighting the sky
He sprang to his feet
And he kissed her good-by
And she heard him exclaim
As he started to leave
'Just rehearsing, my dear,
I'll be back Christmas Eve.' "

I don't have to tell you gentlemen that this little 5312
jingle, "The Night Before Christmas", has been recited to millions of children in this country at their father's and mother's knees on Christmas Eve. And I say that this is a fair index, to my mind, of the character of the matter that this publication has consistently and persistently as an editorial policy, attempted to put over,—attempted to put over, as counsel would state it possibly, with "more frank expression."

You recall the testimony shows that Mr. Gingrich, of the publication; when he heard of the ruling of the Solicitor, made a hurried telephone call and im- 5313
portuned the Solicitor under stress of great financial loss to the publication, that he be permitted to change the words of the verse in order to take out its filthy and indecent connotations.

That was done and that led to the second method of handling Esquire following that incident.

The publisher said, "You have done it in this case—you revised one of the articles for us, why can't you do it hereafter? Why isn't it reasonable that you hereafter advise us before publication?"

5314 Then they came along with other matters, and finally we got in to revising the dummy. Of course, as the matter developed, it was not at all satisfactory. The publisher has shown by this record that he was repeatedly endeavoring to get salacious matter passed. The publisher was not entirely frank with the Department in the handling of the matter.

The dummy was in such shape, very unattractive, largely in black and white, in such great bulk that the physical task of examining it in detail made the possibility of overlooking matters that should have been objected to, more certain.

5315 I am pretty well satisfied that the publisher had that in mind when it induced the Department to go into that.

Of course, it naturally followed that word got out that this dummy was being examined. Other publishers that wanted to get things by came in and said, "You are doing it for Esquire. Can't it be done for us?" And pretty soon we had over sixty questionable publications that we were supposed to examine and give a sort of pre-edit on.

We didn't have the force to do it and it is not surprising that questionable matter got by under

5316 that plan.

That led to the third and final method of handling Esquire, and that is the proceeding we are in now.

On May 21, 1942, a letter was sent by the Solicitor to the publisher of Esquire telling him that the law did not require us to examine matter in advance of its being deposited in the mails, and, in fact, that if he had any doubt as to the character of matter under the postal obscenity statute, in good conscience he should not mail it.

Inherent in the third method of handling Esquire was this thought, intent and purpose: that the Postmaster General should appoint a Board that should have the benefit of a broad view of this publication. 5317

In these other methods of handling Esquire you were more or less required to concentrate on one picture, one article, or one issue of the publication. And under this plan it was felt that the Board to be appointed by the Postmaster General would have the benefit of the broad view, to determine as a matter of broad policy, whether the publication was intended, was designed, for the "dissemination of information of a public character", having in mind the provision of the postal obscenity statute. 5318

On the basis of such a survey, the Board could determine whether the magazine is designed for the "public good" as an "efficient educator", as "a disseminator of useful knowledge." In other words, whether it is "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences or the arts."

In this connection I want to call to your attention this fact. Please note this provision of the second-class Act does not say it should be "originated and published (in part) for the dissemination of information of a public character or (in part) devoted to literature, the sciences or the arts." 5319

If salacious and prurient matter is "disseminated" by the publication in part, and if it is in part "devoted to the dissemination" of such matter as a regular editorial policy, as the testimony of Mr. Gingrich indicates here, if the Varga girls and these other features are part of the editorial policy of this publication, then I submit it comes within this provision of the statute.

5320 It is my position that the other matter in this publication is a vehicle for transmission of this prurient matter, and in this connection please do not overlook the high class advertising. I ask you gentlemen to ask yourselves this question: How many of these advertisers would permit their names to appear in this publication if this vehicular part of the publication were eliminated? If we had Vargas and all this questionable matter, if the whole magazine were devoted to that?

Of course the public would not take it either. That is the psychology of the situation. The public only wants so much of that matter. It can only stand so much of it.

5321 Now, I have indicated before that you are not required to determine the mailability of these issues, any one of them, any part of any one of them or all of them. They have already passed through the mails and they have acquired no respectability by having passed through the mails.

The only legally constituted officer of the United States Government to pass on this matter has already passed on that question. He says that these issues are non-mailable and he had a broad view of the eleven issues.

Now going back for a minute to the non-mailable provision of the obscenity statute. Solicitors of the Post Office Department, and their predecessors, formerly known as the

5322 Assistant Attorneys General of the Post Office Department, have been standing between your homes and my home and the homes of every person in this land and a flood of obscenity for 75 years. I say a flood of obscenity in the mails. That flood is always at the gate trying to push through.

The courts have held that 18 U. S. Code 331 empowers the Postmaster General to exclude matter from the mails. The Postmaster General pursuant to the authority contained in 5 U. S. Code 369, has, by Section 7 of the

Postal Laws and Regulations, delegated to the Solicitor of the Post Office Department the duty of passing upon the mail- 5323
ability of such matter in the mails.

The courts have further, in every single case involving non-mailability rulings by this Department, except in one, approved the action of the Post Office Department. That case was that of Mr. Henry Mencken, who testified here, and his American Mercury, Inc. vs. Kiely, 19 Fed. (2d) 295, in which the Circuit Court of Appeals for the Second Circuit said that the question was moot.

The Court passed on this question in the case of In re Coleman, 131 Federal 151; Anderson vs. Patten, 247 Federal 5324
382 (the District Court for the Southern District of New York).

As to obscenity and as to subversive matter, the case of Gitlow vs. Kiely, 44 Fed. (2d) 227, which was affirmed by the Circuit Court of Appeals for the Second Circuit in 49 Federal (2d) 1077.

Also in Burleson vs. U. S. Ex. Rel. Workingmen's Cooperative Publishing Association case, 274 Federal 749, decided by the Court of Appeals for the District of Columbia, 1921.

The records of this Department show, during 1942 and 1943, that there were a total of 282 convictions under the 5325
criminal provisions of the postal obscenity statute and there were 4,457 rulings by the Solicitor of the Post Office Department to postmasters and postal officials as to the mailability of matter under the statute.

A great deal of this matter ruled on by the Solicitor was stopped before it got started to circulate. It was stopped at the post offices when mailed.

Of course the Solicitor does not claim infallibility. The task is an arduous one, a never-ending one in peace or in war. The flow of salacious and prurient matter is a never-ending one, but I want to call the Board's at-

tention to the fact that the courts have always been open
5326 to every single individual who may think he has been aggrieved by a ruling of the Solicitor. As a matter of fact, now the Postal Regulations have been amended so as to require the postmaster to hold matter for a long enough time to enable the mailer to go into court and apply for relief.

As I stated at the outset, I do not intend to discuss the various and sundry views of the witnesses who appeared here to advise this Board on the question of obscenity. We have a pretty wide range of views; possibly, we might say, ranging all the way from Mrs. Wiley down, shall I say, to the lady who appeared for the publisher from
5327 Great Neck, Long Island, who testified from this witness stand that she considered any factual reproduction by pictures or words as not obscene, as proper for transmission.

She went so far as to say, as I recall, that the French filthy postcards were non-objectionable to her.

When we sift all this matter down, you come right back to where you started. I doubt very much that the opinion of any one of you gentlemen has been changed by this testimony. Each one of you is entitled to hold your own views and maintain your own views as to the salacious character of this matter, as every person who is allowed at large is too.

The Board will recall that counsel has assiduously and
5328 diligently sought through various and sundry publications to find matter to match matter in this publication. We have had truckloads exhibited here from various and sundry publications in a frantic effort to show such matter as are contained in Esquire.

Another thing struck me about that; regardless of all the effort put out in that endeavor, these most able counsel and their assistants have been unable to find anything to

match this publication. Where have they shown you here anything to match any such salacious sex appeal as the Varga girl? I haven't seen it. 5329

They showed some little black and white so-called pin-ups, about 2½ or 3 inches square, in some magazine. It would almost require a large-sized magnifying glass to find out what they were all about.

Here we have in this publication these gate-folds, as they are called, two-page size, color pictures of what has been referred to here as the "glorification of American womanhood." I do not accept that description of it. It does not describe these pictures at all.

The fact that young soldiers do pin them up in their barracks means, and it is a very clear indication to me, that they get some sexual enjoyment from viewing them. 5330

I submit to this Board that the publication Esquire has been a trail-blazer in pandering to the prurient ever since it was established, and thus far it is not equaled by any other publication enjoying this high privilege, this subsidy from the American people.

In all this testimony we have heard here and all these extraneous publications we have had shown to us; I feel that counsel has sought to accustom all of us to these Varga wenches and the other objectionable material in this publication. You can get accustomed to anything if you go over it enough. It makes no impression on you at all. I think that was one of the ideas, but I want this Board to please bear in mind to not lose sight of the fact that the Board is here in this tiresome hearing, to determine one question and one question only: that is, whether this publication is entitled to continue to enjoy the prestige and stamp of approval of the Post Office Department; whether it is entitled to a subsidy from the hard-pressed 5331

5332 taxpayer of over half a million dollars a year; whether it is designed for the "public good" as an "efficient educator" and as a "disseminator of useful knowledge."

In other words, whether by reason of its playing persistently and consistently as an editorial policy, with Varga wenches and the other matter pointed out here, it is originated and published for the dissemination of information of a public character or devoted to literature, the sciences or the arts."

I thank you.

Chairman Myers: Mr. Bromley.

5333

ARGUMENT BY MR. BRUCE BROMLEY.

Mr. Bromley: May it please the Board, at the risk of being charged with unseemly flattery, I desire to say at the outset that the respondent is appreciative and grateful for the unfailing courtesy and untiring patience and the complete fairness which the Board has manifested in the conduct of these hearings.

Mr. Hassell has posed the question at the outset, "Just what is it that we are here for?"

5334 I mean no disrespect when I say I find the statement of his position to be extremely confusing.

I agree with him in his last statement that we are here to determine whether or not we should lose our second-class privileges.

I find myself in some doubt, however, as to his position as to what the ground of the charge is that we are no longer entitled to them.

Let me, therefore, call attention to the citation which is the only pleading that we have in this case and which presumably states accurately and deliberately the ground of the complaint against us. I refer to it because I think the Chairman, if the Board pleases, had an idea that the citation contained two charges, while I had an idea that it contained but one charge. 5335

It seems to me that it contains but one charge because while it is divided into three paragraphs, those paragraphs are introduced with the phrase that we should show cause why our second-class privileges should not be suspended or annulled upon the grounds (a) that the magazine is non-mailable in that the issues—eleven of them—have contained obscene, lewd, and so forth matter, and on the ground further that because of the inclusion of such matter in the publication it has not fulfilled the qualifications of second-class mailing, and upon the further ground that it is not a mailable publication as it in a generally systematic manner publishes non-mailable matter in that in the eleven issues it has included matters such as is cited in paragraph (a). 5336

I should think, fairly construed, that meant only that the charge is limited to obscene matter, and that because the matter was obscene the publication was not originated and published for the dissemination of public information.

However, it makes little difference to me whether my interpretation of that citation be correct or incorrect. It makes little difference to me whether the Post Office Department has enlarged its charge or whether it has not. 5337

I am going to assume now that there are two charges against us; (1) that our magazine has contained obscene matter and, therefore, we should lose our second-class privileges, and (2) that with or without regard to that it doesn't fulfill the fourth condition because it is not devoted to the

dissemination of information of a public character or de-
5338 voted to literature, the sciences, or the arts, because I think the evidence in this case establishes first that the matter is not obscene, and secondly, that the magazine is devoted to the dissemination of information of a public character or to literature, the sciences, and the arts.

I will take the second one first. What is the evidence as to the general character of the magazine? What is the proof here as to whether it regularly publishes information of a public character?

I think I should say first that while Mr. Hassell pointed out to you that the statute does not say that it should be en-
5339 tirely composed of information of a public character, it does not say "solely", or it does not say "partially". It doesn't say anything. It just says "shall be devoted to".

What does that mean? Does it mean entirely, does it mean partially, does it mean most of it or some of it?

Well, as reasonable men, wouldn't we all agree that the reasonable interpretation is that the publication must be substantially devoted? There is no magazine today which is entirely devoted to information of a public character. If cartoons be said to be not of that nature, every magazine from the Saturday Evening Post up and down is partially composed of items of entertainment, like the
5340 funny joke, like the funny cartoon.

The statute not having used the words "entirely devoted to public information" cannot be construed to mean entirely, it seems to me.

That is an unreasonable interpretation.

It must be construed to mean substantially devoted.

If that is sound as a basis for the interpretation of the fourth condition, what is the evidence here? The best evidence is the magazine itself, and two or three times,

notably with the editor, I tried to demonstrate to you, at too much length probably, just what the magazine is composed of. 5341

The best way for the Board to do is to do as I did, starting with the Table of Contents and looking at the articles. It takes very little demonstration and it makes no difference which one of the eleven issues you pick out. You will find that the majority of the articles are devoted to the dissemination of public information and of current information of an exceedingly useful and helpful character, that a considerable part of each issue is devoted to fiction.

Surely fiction is literature, no matter whether one believes it to be of the highest type or not. 5342

And the rest of the magazine is devoted to departments, to personalities, to art, to sports.

So the best evidence, and indeed it seems to me, the most conclusive evidence, is an examination of each issue itself. The result of that examination is to lead irresistibly to complete persuasion that this magazine, like any other comparable magazine, is substantially devoted to the dissemination of information of a public character and to literature or the arts.

Now, we put in evidence, just to add conviction to this easily made demonstration, the Lloyd K. Hall survey. You remember Mr. Hall testified he had been in the business of making this type of editorial content survey since 1936 and he did it not only for Esquire, but for every magazine of any importance in the field, and that he used the same basis in making the survey for Esquire as he did for other magazines, and that it was sold to advertisers and agents at $800 a year, was sold to them and relied on by them. 5343

That survey on pages 1 and 2 groups magazines as weeklies, women's, home, general fashion, farm, and then shows

5344 their contents divided into national affairs, foreign affairs, beauty, amusement, business, children, farming, food and health.

You can look at that table and find out, for instance, how a magazine like Life compares with Esquire, how the Saturday Evening Post compares with Esquire, how each one of these magazines compares in advertising content and, I think it is interesting to note that Life is half advertising while only 35 per cent of our magazine is advertising.

On page 27 you have a break-down as to the complete editorial content of Esquire, starting with national affairs
5345 and going through all the classifications such as fiction, cultural interests, wearing apparel, travel, sports, industry, foreign affairs, and you can find there tabulated carefully and statistically facts like this: that over these eleven issues here analyzed, ten per cent of each issue—ten per cent of each issue—has been devoted to sports, and by looking at the index you will see that the magazine always carries from four to six informative, interesting, and instructive articles about sports by authorities.

And you can go to any field analyzed in the whole survey and find what proportion of the editorial content, percentage-wise, is devoted to that subject, and how that com-
5346 pares with any magazine you can think of, of general circulation in the field.

And not content with the conclusions to be reached by looking at the magazine and this survey, we brought in affirmative testimony.

Fred S. Siebert, Director of the Illinois School of Journalism, testified it was part of his practice and duty to analyze and have his students analyze the editorial content of all magazines of reputation and standing, that he had done it for years with his classes, as to Esquire and other maga-

zines, and he testified as an expert that all of these issues were composed substantially of information of a public character or devoted to literature and the arts. 5347

Professor Smith, the head of the Chicago private school, gave the same testimony.

Not content with that, we called in an outstanding authority, a leader, Reeves Lewenthal, who is President of the American Associated Artists, a recognized authority in that field, and he pointed out, it seems to me with the greatest possible conviction and persuasion, the precise art content of each of these issues, which was considerable in volume, and of a quality which was extraordinarily high.

And, incidentally, you will remember he put his finger on two items complained of by these gentlemen, to-wit, the two colored photographs, "Golden Mould" in the November issue, and "Mood for Red Hair" in the August issue, and Mr. Lewenthal said they were examples of the highest type of photographic art, so high that "Golden Mould" was used by painters to illustrate the extreme excellence of the art of reproducing that type of art. 5348

Now, it is significant, I think, to reflect that not a single witness produced by these gentlemen, not even the witness Father Moore, had any criticism to make of either one of those photographs, although they were cited in the complaint against us by these gentlemen, as obscene. 5349

Not content with demonstrating the high excellence of the art content of the magazine, we called three witnesses to demonstrate the excellence of the sport content, Major Griffith, the director of the Big Ten, Congressman Weiss, and Clark Shaughnessy, the well-known football coach, and also Doctor Jacobs, the college president.

All of them endorsed the magazine and its value and particularly the sports poll, as the outstanding sports item of any magazine.

5350 And then to finish it up we asked Channing Pollock and Henry L. Mencken general questions as to the general literary merit of the magazine and they both said it had a a high literary merit as a matter of generality, and taking the eleven issues as a whole.

Against these witnesses are no Government witnesses who have read any issue as a whole, or who are in a position to state any opinion with respect to the content of any one of the eleven issues.

So I say that, taking Mr. Hassell on any ground that he wants, it is absurd to argue that this magazine is not de-

5351 voted to the dissemination of information of a public character or to information with respect to the arts or literature. It fulfills, as well as any magazine published today, the reasonable requirements of that statutory provision.

And now, I come to what I have always thought was the real question and that is obscenity. And may I say at the outset that I want to refer just briefly again to the question, what is the test which you as a Board shall apply in trying to determine whether a thing is obscene or not.

And I quote from page 12 of our brief, in the middle of the page, where the Court said:

"In order to sustain the prosecution, the court must find

5352 that the tendency of the book as a whole, and, indeed its main purpose, is to excite lustful desire and what has been rather fancifully called 'impure imaginations'. The statute is aimed at pornography, and a pornographic book must be taken to be one where all other incidents and qualities are mere accessories to the primary purpose of stimulating immoral thoughts."

And again, on page 13 from the Court of Appeals of this District, the top of the page, and the first paragraph and a half:

"Probably the fundamental reason why the word obscene 5353
is not susceptible of exact definition is that such intangible moral concepts as it purports to connote, vary in meaning from one period to another. It is customary to see, now, in the daily newspapers and in the magazines, pictures of modeled male and female underwear which might have been shocking to readers of an earlier era. An age accustomed to the elaborate bathing costumes of forty years ago might have considered obscene the present-day beach costume of halters and trunks. But it is also true that the present age might regard those of 1900 as even more obscene.

"With such consideration in mind, the perhaps most use- 5354
ful definition of obscene is that suggested in the case of United States versus Kennerly, i. e. that it indicates 'the present critical point in the compromise between candor and shame at which the community may have arrived here and now.'"

All decisions, all recent decisions, without exception, I believe, have held that the character of a publication is not to be judged by its effect upon any particular class of society, but shall be judged by its effect upon the average human mind.

In other words, as I said in the opening, I believe the law is that the standard as to what the effect is and who is to 5355
be affected, is the reasonable man's standard, the average, ordinary human being.

And at the bottom of page 17 there is a quotation from Judge Learned Hand in the Levine case in the Circuit Court of Appeals, the one which appears in italics at the bottom of the page:

"This earlier doctrine"—that is the Regina versus Hicklin—"necessarily presupposed that the evil against which the statute is directed so much outweighs all interests of art

5356 letters or science, that they must yield to the mere possibility that some prurient person may get a sexual gratification from reading or seeing what to most people is innocent and may be delightful or enlightening. No civilized community not fanatically puritanical would tolerate such an imposition, and we do not believe that the courts that have declared it, would ever have applied it consistently."

Those citations can be multiplied. There are more to the same effect on page 27 and page 28, and I should like particularly to commend to your consideration the footnote on page 51 which was from a case in New York, and which I

5357 think is of great significance here, beginning, "The language of the play"—and that was "Frankie and Johnnie"—you will remember this was a play that was based on that dirty verse, "Frankie and Johnnie", and the play was attacked as obscene. The Court said;

"The language of the play is coarse, vulgar, and profane; the plot cheap and tawdry. As a dramatic composition it serves to degrade the stage where vice is thought by some to lose 'half its evil by losing all its grossness.'

"'That it is "indecent" from every consideration of propriety is entirely clear,' but the court is not a censor of plays and does not attempt to regulate manners. One may

5358 call a spade a spade without offending decency, although modesty may be shocked thereby. The question is not whether the scene is laid in a low dive where refined people are not found or whether the language is that of the bar room rather than the parlor. The question is whether the tendency of the play is to excite lustful and lecherous desire.

"Prostitutes are not so rarely represented on the stage as to arouse the sexual propensities of the spectators whenever they appear.

"The play may be gross and its characters wanting in moral sense. It may depict women who carry on a vicious trade, and their male associates. It cannot be said to suggest, except 'to a prurient imagination,' unchaste or lustful ideas. It does not counsel or invite to vice or voluptuousness. It does not deride virtue. Unless we say that it is obscene to use the language of the street rather than that of the scholar, the play is not obscene under the Penal Law, although it might be so styled by the censorious." 5359

Chairman Myers: Is that from the Court of Appeals of New York?

Mr. Bromley: Yes, sir, the Court of Appeals of New York, 258 New York, yes, sir. 5360

Now, with that legal test in mind, I have undertaken the task of trying to analyze the Government's evidence.

First, I have gone in the first instance on the basis which it seems to me is sound, and that is this. Can we get some statistical idea of just how much out of the two thousand pages in these eleven issues is attacked by the Government? Well, I have taken their citation and their specification and, as I count it, counting each Varga girl picture as a separate item, the Government complains of 90 items in the 2,000 pages—90 separate pictures, cartoons, paragraphs, poems, or articles. 5361

Now, if you look at all of the nine witnesses produced by the Government, you take the testimony of all of the nine witnesses, as I did last night, and read it and analyze it, you will find that of the 90 items 60 were approved by some one or more of the Government witnesses.

Now, contrast that with what seemed to me, during the course of the respondent's testimony, to be a remarkable demonstration, one so remarkable that if the people were other than the distinguished men and women who they were, I

5362 should have said the indication was of good coaching rather than sincerity or honesty.

Yet the fact is that out of our 38 witnesses there wasn't a single item which, either on direct or cross, was criticized as obscene, lascivious, lewd, filthy, or indecent by any one of the respondent's witnesses, ranging as they did from the president of Smith College to Congressman Weiss—well, I can't put it that way—to the most humble of our witnesses.

So I am going to point out to the Board and I am going to assume, and I hope it is fair, that there is nothing left of the charge of obscenity as to any one of these 60 items

5363 where a Government witness half of the time on direct said, "I find nothing objectionable in those 60 items."

I start right off with the testimony of the first witness, Dr. Karpman, who was asked at the very outset as to what he thought about the "juking" reference in "Shor Nuff" at page 6 of the January issue, and he found nothing objectionable in it.

That same observation of the same witness applies to "Dr. Diddle" in the January issue.

So for the "Sultan" cartoon in the February issue.

So for "Home, Sweet Ruby Street" in the February issue.

So for "The Unsinkable Sailor" in the February issue and

5364 those paragraphs about which we had so much testimony and about which the worthy Doctor said he found it only mildly suggestive.

So for the "Sultan" cartoon in the March issue.

So for the April cover where the charge is that the breasts were unduly emphasized.

So for "The Court of Lost Ladies."

Now, there are some of these items like the April cover where there is hardly a scintilla of evidence by anybody that there is any objection to it at all.

"The Court of Lost Ladies" was approved by several of the Government witnesses. 5365

"The Savage Beast Within Us," Dr. Karpman said was vulgar but not so suggestive as to be sexually stimulating.

In the July issue, the "Esky buy product" advertisement was not objected to by the witness Karpman.

That is true for "Mood for Red Hair."

That is even true of this witness for "Paste your face here," who said that it might be suggestive to a small number of abnormals but not to the average individual.

That is true as to "Offensive on the Home Front," including the use of the word "behind" and the slapping of the prostitute reference therein. 5366

That is true of the hula girl tattoo picture which was approved not only by Karpman but by the Reverend Marshall.

That is true of the Pullman joke in "Ad-libbing with Esquire."

It is true about the joke about "How do you spell feet."

It is true about the November Varga girl so far as Dr. Karpman is concerned.

It is true about "Golden Mould," so far as Dr. Karpman is concerned.

It is true about the "Undressing is not against the law, lady" joke in "Gold Bricking," in November, 1943. 5367

Karpman, you remember, said that almost anything can stimulate anybody sexually. He admitted that no charge of obscenity could be made against the "Blue Booties" joke in the November issue, nor against either the air raid warden looking in the skylight or the airplane spotter looking through the binoculars.

He also admitted that that girl in the wedding dress at the lathe, with the label, "Boy, that's patriotism," was not obscene nor was it objectionable.

5368 He also admitted that "The Fall of the Flattering Word," by Gilbert Seldes, had nothing obscene in it.

He felt the same way about the perfume counter cartoon with the two titles, "Baby's Breath" and "Burning Desire," side by side.

He felt the same way about "Dog's Worst Friend."

About Miss Blimpton and the high blood pressure cartoon.

About the two necking cartoons wherein the two young persons were shown necking in the presence of the mother and the cook in the first one and of both the father and the

5369 mother in the second one.

About the appendicitis joke: "No, I hate hospitals."

About the whole spread of "Goldbricking" in November, and in that connection it should not be overlooked that even the Government complains only of a total of six jokes out of about fifty or sixty published under that title of "Goldbricking," being excerpts from Army camp papers.

Karpman did not object to the "Pyknic girl" article nor to the U. S. O. smoking pipe cartoon.

Finally, we find this lead witness, this psychiatrist, did not read all of any issue at any time. He admitted that the current-day advertisement would have about the same effect

5370 on the average person as the Varga girl drawings, and he admitted that the old Varga girl drawings which were approved by the Post Office Department in 1941 and 1942 were the same, in effect, as the ones published in the magazine in 1943, and gave the same testimony with respect to the Sultan cartoons contained in the eleven issues; that is to say, that they were no worse and they were of exactly the same character as the Post Office Department had specifically approved for a year and a half in 1941 and 1942.

Now, Father Cartwright was the second witness. I thought

it was noteworthy that he took occasion under my guidance to denounce the Freudian psychiatrist. 5371

Well, that is just what Doctor Karpman was, a Freudian psychiatrist, a man who finds sex in anything and everything and believes it to be the underlying motivating force in life.

I was amazed to hear Father Cartwright say that he never heard of the N. O. D. L. list. Yet here is a list of proscribed books under a published Code for Clean Living by that Catholic Organization with an office in this city, who had a representative sitting in the back row, according to the newspapers, for days, with an office and a staff in Washington, and yet no witness was produced by the Government to aid us in determining what they thought about us. 5372

Father Cartwright, a Catholic priest, it seemed to me had the temerity to come here and give us testimony, although he knew all the time that he had only looked at the magazines, eleven of them, for one hour at the most: that he had read none of the general articles in any one issue and had read none of the articles complained about even.

It seems to me that his general testimony, that he thought the tendency was obscene, is utterly worthless in the light of that cursory and obviously insufficient examination of the material.

The Reverend Marshall was about the same because he spent about an hour and ten minutes on the same issues. His standards, I believe, were higher than those commonly accepted by the average person in this nation today. 5373

He denounced the newspapers, you remember, for reporting the Errol Flynn law suit out West. He said he found that degrading and tending to lower the moral tone of the community.

5374 He had not read a single article in its entirety. He knew very little about what the magazine contained even as to the material complained of.

He deplored the trend of modern times as detrimental to our nation, even thinking that the modern bathing suit was indecent. I mean no criticism of the gentleman except to say, as the good Bishop later said here, that his standards are those of a Puritan and high, and that this Board should not accept that standard because that standard is that of the most righteous man but not that accepted by the broad community throughout the nation.

5375 Rabbi Metz was the fourth witness. About all I can say about the Rabbi is that he testified that the joke about "No, I hate hospitals" in his opinion was destructive of morals and ethics and prepared the ground for a non-democratic form of government.

Now, I think you can forget all about the Rabbi based on that testimony alone, if that is the kind of standard that that man uses, and, of course, he was angry at me most of the time when he testified. He was motivated for some reason by a deep feeling of animosity although he spent only three hours looking at the magazine, did not read any of the articles complained about, read a few of the jokes and

5376 the cartoons, read about twelve pages altogether in addition to the pictures.

I say that his standard again is out of tune with the times and his testimony is entitled to no weight at all.

Not only did he express this extreme view of this extremely harmless joke that I read to you, but he said that current sophistication is definitely a danger to our way of life.

Now, in spite of that, he approved as entirely decent the camouflaged soldier picture, a joke in the November Army—

joke page, and he approved as entirely decent when I called it to his attention that joke in the same issue at page 95 where the Sergeant finally said: "Oh, it ain't against regulations to undress, lady." 5377

He said on cross examination that while he would want to limit his testimony to jokes and pictures he was quite ready to admit that not all of them, even, were indecent. Like the Protestant Minister Marshall, he thinks that modern bathing suits should be reformed, although he finally agreed that present day *mores* sanctioned their use; nevertheless, he stuck to his opinion that the modern day tendency of women's bathing suits was destructive of morality and symptomatic of a general laxity of our times. 5378

Then, finally, to give you an example of a self-demonstration of how worthless his testimony was in its entirety, he burst out in cross examination with: "Of course, no witness could fairly express an opinion by taking something out of its context".

Now, he volunteered that statement and that opinion without seeming to realize that that is just what he had been doing for an hour or so here, taking things out of their context, like a paragraph in Nathan's theatrical piece, without realizing that Nathan was only stating something to which he was opposed and which he thought should be abolished. 5379

So, I say the good Rabbi can very easily be disregarded.

The next witness was the assistant superintendent of schools in this city, Mr. Holmes, who was the fifth witness; and an administrator now and not a teacher.

He found only two and a half hours' time to look at the eleven issues. I was amazed at the readiness and the ease with which he was able to go over article after article and say, "Of course, that is not only not indecent but it would

5380 be useful in class rooms in public schools to use as a basis for education in current affairs."

And you remember, I think I took him over the whole January issue and he placed the highest stamp of approval, saying not merely that the things were decent but that they were positively useful in his field of youth education in the public schools in this city.

He was frank, I thought, in saying that the reputations of such of our witnesses as Neilson, the former president of Smith College, and Miss Chase, of Vassar, were very good and high, in his opinion, and that he would listen to testi-
5381 mony from both of those people with the greatest respect, because he said, I think, "They would know what they are talking about."

He frankly admitted on cross examination too that while he did not read all of any class of material complained of, many of the jokes were indelicate rather than indecent.

Now, I come to the sixth witness of the Government, the Reverend Rustin, a Methodist pastor, a member of the Board of Education Advisory Committee and student of juvenile delinquency and President of the Federation of Churches in this city.

I confess I was amazed to find any Methodist minister
5382 endorsing the Varga girls without reservation, which I believe he did except for the February and June calendar drawings in the January issue, and as to those he said only "I find them suggestive."

Now, here is a Methodist minister who has a broad experience with juvenile delinquency; who is an advisor to the Board of Education; who is produced by the Government as a witness against this magazine; who comes in and says he finds nothing wrong with any of the Varga girls except two out of the bunch of twelve, and as to them his opinion is merely that they are suggestive.

He very frankly, and I thought with complete honesty and sincerity, said the poem "Benedicts, Awake!" was entirely proper. He found nothing indecent about the hill-billy cartoon about opening up a second front, which so offended Mrs. Wiley. 5383

He found nothing offensive about "The Court of Lost Ladies", the Gilligan article.

He found nothing offensive or indecent about the picture from "The Eve of St. Mark" and the textual reference to 20 percent do and 20 per cent don't.

And, finally, in the March number he found nothing wrong with the advertisement of the Literary Guild.

Again, as in the case of the previous witnesses, his examination of the magazine was very slight and he read nothing in its entirety. 5384

Now, I come to the seventh witness, Mrs. Wiley, of whom I can only say that her standards are exemplified by her inability to characterize even the Annette Kellerman photograph as decent.

She finally said she didn't like the pose of the head or the attitude, but was not prepared to pass judgment as to its decency.

It took this humble lady twelve minutes to study six of the eleven issues and to reach her opinion.

I say that that kind of testimony is not only worthless because of its obvious prejudice and unfairness, but it is worthless and should be disregarded because it represents a type of narrow-minded person whose standards are not those which the law says are the standards to be applied when testing whether a thing is obscene or not. 5385

The eighth witness was Bishop Hughes, again a Methodist. He found nothing objectionable in "Home Sweet Ruby Street". He found nothing objectionable in "Dog's Worst Friend".

5386 He said the August and September Varga girls are not indecent; that they exhibit a considerable amount of skill and that he would not classify any Varga girl drawing as indecent. This from a Methodist Bishop.

He said the fuel oil salesman cartoon on which our friends have placed so much stress, was vulgar only.

He said the colored photograph of the night club by Anton Bruehl, "The Folies Bergere", was vulgar only and not indecent, and he, with complete sincerity, and all the more credit to him, said "I am a Puritan, sir", and I suppose he meant by that that his standards were the standards of a Puritan
5387 and that he had judged by the standards of a Methodist Puritan.

He found nothing to say in condemnation of the Varga girls, which, after all, are the chief things, I believe, the chief things complained of, in this magazine because they are the greatest in number, numbering, as they do, 21 separate items, and so far as the original citation is concerned, they constitute the majority of all the items complained about.

It was only after they started to think about it a while that they extended the items beyond the 32 or so in the first citation to the 90 now objected to.

The Bishop's opinion, and this is something that he readily
5388 admitted, was that he knew nothing about the magazine, but knew enough about its contributors to know that they were people of very high reputation and character.

Finally, the Dominican monk, Father Moore, whose testimony, I think you remember, elicited a gasp of surprise in this room; who never heard of any of that long list of distinguished authors, like Theodore Dreiser, that I read to him, except—of all people—Havelock Ellis. Other than that, he never heard of anybody in that long, distinguished list of authors.

However, the chief thing that condemns that witness' testi- 5389
mony clearly is to be found in his prepared statement where he indicates clearly that he has completely misconceived the test to be applied, because you will remember that, with a show of pride, when I asked him whether he was not quoting from the case of Regina against Hicklin, he said, "Yes, it is right here in my notes," and the test that he set up and the test that he relied on was the test of Regina against Hicklin in part, a test which our brief demonstrates has been rejected by all the courts in this country. "The most favored class" test, which no longer has any validity of any kind, but worse than that, if you examine that prepared statement 5390
of his you see clearly that he comprehends within the term "obscenity and indecency" things which are offensive to delicacy, offensive through bad taste, offensive through vulgarity, offensive to modesty or refinement.

That is his test. That is not the test which the law requires should be applied in this case. That shows that this Catholic gentleman would condemn as indecent something that he thought was impolite. He goes almost to that extreme.

As in the case of every other witness, establishing a false test, he devoted only two or three hours to a study of the material complained of or to a study of the eleven issues in 5391
evidence.

He admitted to me that his purpose was to try to find obscenity, and I take it that he meant by that that obscenity which came within his broad definition.

Even he, however, more extreme than the Puritan Bishop Hughes, said that he found nothing objectionable in the "Dear Dr. Diddle" column about which we have had so much argument and discussion. He said that is not seriously objectionable.

5392 He also, it seemed to me, destroyed the value of his testimony by saying at least twice that things which were perfectly good in themselves and good outside of Esquire became bad when put in Esquire.

Now, he said that, without ever having studied Esquire in its entirety to know what he was talking about.

And just to test him further on whether he was sincere in his opinion or whether he was not, you remember I showed him a good many pictures and that, as to every one of them, no matter how extreme they were, he said, "That is border-line." He didn't want to condemn anything unless he
5393 found it in Esquire, and then he condemned everything in it.

I showed him the Carole Landis pictures in Life, which I think everyone will agree is as extreme as anything in Esquire. He said, "Border-line, border-line."

He admitted repeatedly, as we all know is possible, by taking things out of their context, for a skillful prejudiced person to make out of the Bible an obscene document. That has been done in a published book with which you may be familiar, and I charge that Father Moore has done that unfairly with respect to Esquire and his testimony should be disregarded and should constitute no basis to sustain the Government's charge of obscenity.

5394 Even he said, at page 1761, that he did not mean to condemn every Varga girl drawing, and I hope you noticed, as I did, that he never cited in his notes a single Varga girl drawing as indecent or obscene.

Now, I trust that I have painted the picture of the Government's case and the proof which they might well have brought in the first case against us but which they saw fit to hold back until rebuttal.

What did the respondent do? Produced a total, I believe, of 38 witnesses, not one of whom, as I said, condemned any

item in any one of the eleven issues, either singly or collectively. 5395

What points of view were covered by these 38 witnesses?

Well, first of all, we started off by calling psychiatrists, men in the medical field peculiarly qualified to know most about the youth of our nation, and I think it can be fairly said that we called distinguished, reputable men of ability, fairness, and complete impartiality.

You will remember Dr. Clements C. Fry. You will remember that he had had experience in his profession at Yale, Wesleyan, and with students at Smith, Vassar, and other colleges; and that he was familiar with and was now currently re-studying for the Government some 4,000 case histories and studies of young people. 5396

He wrote the book, "Mental Health in College," and other works.

He said freely in his testimony that in his entire experience he never knew of any patient citing Esquire as a cause of delinquency or corruption or sexual problems or disturbances.

Here is a man who places his stamp of approval on this magazine; a man who at the time he testified and prior thereto immediately was living in a dormitory at Yale University, right along with the students, and presumably eating with them in the Commons every day, presumably having a close association with them; the kind of man who lived with the crew during the racing season and whose contact with college youth was of the most intimate sort; who could not afford to come here and express publicly any opinion about the magazine unless he was convinced that it was sound and to him a right opinion. 5397

He was followed by a Vermonter; by a doctor practicing in Boston, Dr. Tillotson, a consultant to Harvard University and consultant to our Federal Selective Service, who, like Dr. Fry, found nothing indecent or obscene in any issue.

5398 The testimony of Dr. Richard Hoffman was stipulated. He was a general psychiatrist in New York City whose experience covered all classes of people.

Again we point out to you that in this field, the Government had only the testimony of the good Karpman, the net result of whose testimony, it seemed to me, was that there was nothing very serious about the magazine except as to abnormals, and whose attitude was so extreme, it seemed to me, as to destroy his testimony, and I want to refer for a minute to something I did not mention. All this talk that he gave us about voyeurs and peepers and sending fecal matter through the mails, seemed to me to demonstrate a point
5399 of view which was so extreme that his testimony is entitled to no weight, especially when balanced by the three distinguished, impartial gentlemen whose names I have cited.

Now, in the second place, we tried to present a representative view of educators and authorities on youth outside the medical field.

Who could tell more to this Board regarding this problem of obscenity as it affects the education of the children of our land than a man like Professor Osborne of Teachers College, Columbia? Here is a man who had been a camp director, who now teaches teachers and who is an advisory editor
5400 of Parents magazine and who was an advisor to the National Girl Scouts; who was a member of the Parents Education Committee of the New York Federation of Churches and who was a director of the New York City Y. M. C. A.; a man who on occasion has been called in by the United States Attorney in New York to advise on problems of obscenity; a man who, so far as I could tell from his testimony, would not shade his opinion for Esquire, for me, for the Government, or for anybody.

In addition to the evidence we presented to this Board, by stipulation, it is true, the testimony of William Allen Neilson, president emeritus of Smith College and associate editor of the Harvard Classics and the editor-in-chief of Webster's New International Dictionary. 5401

The testimony of Felix Morley, president of Haverford College.

The testimony of H. S. Dimock, dean of George Williams Y. M. C. A. College.

The testimony of Mary Ellen Chase, a professor of English literature at Smith College.

The testimony of Marjorie Nicholson, former dean of Smith College and now at Columbia University. 5402

The testimony of Josephine Gleason, of Vassar College.

The testimony of J. H. Gulick, the head master of Proctor Academy in New Hampshire.

Finally, the testimony of Herbert W. Smith, from the Francis Parker School in Chicago, who is experienced with children of all ages from four to twenty.

Now still from the educational standpoint and still in the field of youth we presented the testimony of Dr. Jacobs of Presbyterian College, and by stipulation the testimony of Major Griffith, the director of the Big Ten, and Clark Shaughnessy, the well-known college coach. 5403

Against these educators the Government produced the Assistant Superintendent of Schools in Washington, a man, not a teacher, who frequently and frankly acknowledged that Chase and Neilson were tops in their profession and were persons whose opinion was entitled to great weight and consideration by the Board; people who in his opinion knew what they were talking about in the field of youth.

In the third place, having covered the field of medicine education, and psychiatry, we called two clergymen, a Jewish

5404 rabbi, Dr. Eiseman, whose experience covers, it seems to me, one of the most susceptible groups of youth, by reason of his long association with the Florence Crittenton League, where are housed delinquents of all classes.

We called also a Presbyterian minister, the Reverend Luchs, from Ohio, with a congregation of Army trainees and young people generally.

Both of these gentlemen, in contrast to the clergymen produced by the Government, had read and studied all of the material objected to, with what seemed to me great care. They showed a familiarity with it which seemed to me rather withstood completely any attempt to cross-examine them 5405 on that basis. They knew what they were talking about and they endorsed every bit of it on the ground that it was not indecent.

Of the Government witnesses, I think I should remind you, of the nine Government witnesses, six as I remember were clergymen, and not one of whom, I repeat again, was willing to condemn all the material, nor not one of whom had read even all of the complained-of material, and all of whom would pick out only a few sentences and pictures and, based on that sampling, talk about the tendency of the magazine.

5406 Now, in the fourth place, we produced two women to show the women's point of view, especially in the field of social work. Mrs. Cook, from New Haven, the executive secretary of the Connecticut State Welfare Association, and the chairman of the Committee on Children and Youth in Wartime of the Connecticut War Council.

You can remember her testimony, and my good friend's simulated embarrassment about questioning her about certain things, and yet of course he must have known, as we all know, that the very fact that she came here meant that

she was prepared, without any embarrassment, to be questioned about anything, whether it be "son-of-a-bitch" or anything else. 5407

Her attitude was that it was not indecent and that she was here and expected to be cross-examined about it, and there was no occasion for that simulated delicacy.

The second woman witness, Mrs. Weissman, of the New York City Committee on Mental Hygiene, and former case supervisor of the Home Relief Division of the Department of Welfare of the City of New York, under Commissioner Hobson; her work brought her in contact with the poorest classes of our people; people on home relief during the depression. 5408

Now, against these two ladies, the Government produced Mrs. Wiley, a woman's equal rights proponent, so narrow in her views that she could not give a clean bill of health to Annette Kellerman's bathing suit. Her views were such that, as I have said, her testimony amounts to nothing.

Well, I think it is fair to say that we were not satisfied with presenting representative cross-sections of public opinion but that we evidenced a desire to show that this magazine could pass the toughest possible test, almost the toughest possible test, the professional test of the New England Watch and Ward Society, so we went to that Society.

I suppose everyone will admit that it is and has been for years the most rigid and unyielding and uncompromising censorship body in this country. 5409

I was amazed in hearing Mr. Croteau testify as to the amount of day-to-day censorship that seems to go on in many New England cities, particularly Boston. I was amazed to hear him say that he spent six nights out of seven every week, week in and week out, visiting night clubs and stage shows and exercising a constant supervisory censorship over what is presented, and a constant supervisory cen-

5410 sorship over the hundreds, or at least I think he said he examined 65 or 70 periodicals a week, he and his staff.

Now there was a man who was an expert in filth and dirt and decency and indecency, by training and occupation. That was his job, to know what was dirty and what was not, because he was the executive director of that Society. He spoke not as an individual, as the Government witnesses, some of them, were careful to say they did.

This fellow came down and said "I speak not as an individual, but with the authority and the express authority of the New England Watch and Ward Society, two members dissenting."

5411

Now, I say that testimony mer s a careful re-reading because if there were any substance to any part of this charge of obscenity or indecency, there would be the place to find out about it, from Louis Croteau.

Now, to make doubly sure that these witnesses really represented what they were supposed to represent—and after all, that was public opinion—that is what we were trying to prove here—to prove that the contents of these magazines were acceptable to the public generally, that we had not exceeded permissible limits in frankness of opinion and expression—but to make doubly sure of that we took what the

5412 Post Office at the time had attacked as the worst thing in the magazine, the twelve Varga girl drawings, and we put them in a group and we fenced them off—we had Crossley, this expert, fence them off in the magazine—you remember he showed how he taped up the magazine leaving exposed only the twelve Varga drawings—and he took them out to make a test of public opinion.

I was impressed with the scientific care and the numbers of indicia of reliability which that test was demonstrated to have by his testimony. It seems to me that we not only

went to this independent authority and presented the problem in the way most calculated to have the strongest impact on a member of the public by showing him the group of twelve altogether, but we stacked the cards against ourselves, purposely it seems to me, because we were careful to avoid a poll of Esquire readers. 5413

Now, I say that because the testimony shows that 18 per cent of our readers are in cities over 100,000. This survey that Crossley took was not limited to cities over 100,000, but went right down to cities of 2,500.

And then, not satisfied with that, and thinking possibly that we might be unfair in this regard—disregarding the farmers, although it is hard to take a farm survey in the short time we had,—he went into the country and took a sampling of the opinion of farmers. 5414

Having collected the results of the interviews, it seems to me we stacked the cards against us—before I come to the result—we stacked the questions against us because we not only said "Lady" or "Gentleman, do you think these pictures are obscene or indecent," but we said "Would you be willing to have a magazine in your home which contained these pictures?"

Now, I can't think of a fairer question to ask, or one more calculated to make a person think about his answer to the first question than the second question: "Would you have this kind of thing in your home?" 5415

Having asked that question along with the question on obscenity; and finally, it seems to me we stacked the cards against us in tabulating the results, because, as Crossley told you, any person who said "I don't think they are obscene, but I don't think my wife would like this one, or I don't think my children ought to see this one," was tabulated as a vote of indecency.

5416 Crossley said that any possible qualification on the answer was tabulated against the decency of the pictures.

Now, I don't know what could be fairer than that.

And what were the results? You remember that 77 per cent as measured by that test, said those pictures were not indecent, and about the same number said they would have no objection to having the magazine containing them in their homes.

You will also remember that due to a fortunate circumstance, which we did not originate and which we did not pay for and which we didn't know very much about before
5417 we got here, our distributor, the conservative Curtis Publishing Company, having been experienced in this kind of thing and having done this kind of thing for years and for its own benefit, and having an expert organization, took a poll of its own. I was surprised when I looked at their poll and it is in evidence, to be quickly confirmed, and I was surprised at the skill and care manifested by what they did as being in every respect comparable to the skill and care of Crossley, whose reputation is much greater and is nation-wide, if not world-wide.

The Curtis survey, it seems to me, in other words, is just as scientific a survey as Crossley's.

5418 Ben Allen, the witness, testified he did it because he wanted to find out for his own benefit, since the Curtis Publishing Company is charged with the responsibility—if there is anything wrong about the magazine they won't distribute it long, you can bet your life. His result was 80 per cent that said the pictures were not obscene. He said three questions were asked: (1) "Are they obscene?" (2) "Would you have them in your home?" (3) "Do you think they are corrupting the morals?"

80 per cent of the people interviewed said they thought the pictures were not indecent. 5419

Now, these two surveys covered a carefully selected sample of over 7,000 people, and Crossley's testimony is that you can tell accurately to within three percentage points from a sampling of that size, what a poll of the 130,000,000 people in this country would turn out to be.

Now, the Board may have wondered—let me turn from those surveys for a minute—the Board may have wondered why we kept on introducing these other magazines. Was our purpose, as counsel has said, to try to show that others are as bad as we are? Not at all. That would not be any defense 5420 He must know that we realized that.

We thought, however, it was one way, and a very complete and convincing way in which we could show the *mores* of the times.

If we got large enough samples from several competing magazines and we found that they reviewed this show "Star and Garter" and talked about erotic dances, that they published the same kinds of photographs of Spanish dancers dancing erotic dances in suggestive poses, with about the same number of clothes on that our pictures disclosed, that that was done regularly and consistently, we felt that that was an indication that public opinion sanctioned that sort of thing, that we were not out of step with the times, that we were in step with the times, and, that if a comparison of what we have done with those other magazines shows that we have not done anything worse, it is material, I believe, to show that what we have done is commonly accepted. 5421

We didn't go to questionable magazines. We have not introduced the Police Gazette, or Laff, or Funny Jokes, or whatever they are. We have tried to go to the most conservative and certainly most reputable magazines that we can think of.

5422 And the reason for the large number was merely to refute the charge which otherwise would have been made against us, that we were taking only isolated instances and it was not fair to point to Life which may have slipped on one or two occasions.

So not only did we produce a fair sampling of competing magazines, but we called witnesses to survey what was current and accepted in periodicals in the field of advertising.

What about these soap ads and stocking ads and underwear ads and bathing suit ads and cigarette ads?

And we called Lee Bristol, of the Bristol-Myers Company,
5423 who spends five million a year in advertising, and Philip Lennen and Robert Orr, of Lennen & Mitchell, an advertising agency. And you heard their testimony as to what degree of exposure or nudity or suggestiveness was currently being used in the advertising field.

And then we put on Ben Allen, of the Curtis Publishing Company, an outstanding circulation man in the magazine field, and tried to have him survey generally, by putting in through him other magazines and other photographs, to show what was currently being done in the magazine field.

And finally, and most significantly it seemed to me at the time, and again on reading his testimony, we brought in
5424 Channing Pollock to explain to you the change in our customs which has taken place over the last half century as he had actually witnessed it, and I cannot forbear calling to your attention the testimony which he gave us with respect to his personal experience with the Shaw play, "Mrs. Warren's Profession".

Here we find that some years ago he, as a member of the first audience of that play, which deals with the life of a prostitute, was thrown out into the street by the police of New York City along with the entire audience in a New

York theater witnessing the New York opening of that play, the lights turned off and the theater closed in the middle of the first act of the play on the ground that it was obscene. And fifteen years later this same witness, Channing Pollock, is again a member of an audience in a New York theater, in which the same play, "Mrs. Warren's Profession", the life of a prostitute, is presented without objection to an audience of clergymen, Mr. Pollock being the only non-clergyman in the house. 5425

Now, the Post Office has complained of our use of language and, it occurred to us who better in the world was there to come and explain to us whether or not the language used in this magazine was obscene and indecent, than Henry L. Mencken, whose monumental work "The American Language" will probably live long after he is dead. 5426

Mr. Mencken cleared every word against which the Post Office Department has complained from "son-of-a-bitch" to "behind" to "backside", and all the rest.

What about the reference to what the Post Office did?

You would think from hearing Mr. Hassell, that we came down here and tricked the Department into censoring our magazine and then acted so dirty about it that they finally had to throw us out because we imposed on them. Well, Mr. Hassell knows that is a general policy that applied to many magazines. They tried it for a while. It was not done just for Esquire. They did not have trouble just with Esquire. They tried it with such magazines as Time and Life and when they changed their policy he said they wrote us a letter saying they couldn't do it any more. That was a general letter. That was sent to everybody. That merely announced that they had changed their policy. The burden of advanced censorship became unworkable and burdensome, as they should have known it would, and they had to give it up. 5427

5428 We were not the cause either of inaugurating or discontinuing that policy. It was not designed for our benefit.

Now, what is the significance, if it has any, of the action which the Post Office Department took on 19 separate occasions, and in writing, to approve this magazine throughout all of 1941 and seven months of 1942?

Well, it seems to me again that its only materiality is that it has some persuasive effect as to what the proper standard to be applied is. It is ridiculous to say that Mr. Miles or any one of his assistants made a mistake and overlooked the Varga drawings, they didn't know what they

5429 were doing, that it got away from them.

The evidence is that Miles sat down here with our editor and rewrote verses, and the evidence is that not once but many times the words of the accompanying verses were changed on the Varga girl drawings. It seemed to me sometimes it made them worse. That's immaterial.

The point is that their attention was directly pointed at these drawings for 19 consecutive months.

Of course, they knew they were there, of course they knew what they were and all about them, and of course they approved them because they felt that they did not exceed current standards of morals.

5430 That is true of the Sultan cartoons. There are in evidence all of the Sultan cartoons which this Department approved. Of course, they didn't overlook them. They knew what was there. And the ones complained of are no worse and no different than the ones which these people specifically approved.

As Mr. Wentzel testified, not a single one of those 19 issues was ever declared non-mailable at any time throughout the whole 19 months.

Now, I say that that in itself is evidence that the Post

Office Department knows what the standards are, and they knew it then and know it now. 5431

And it makes me wonder whether some outside sinister force has not brought about this change, this sudden change, to reverse their position and attack things no worse—indeed, I don't think as bad—as the 19 issues which they specifically approved.

No one knows what current moral standards are better than the Post Office Department. As the Chairman phrased it one day during this hearing:

"As I understand," said he to a witness, "when you refer to *mores* you mean the habits, customs, traditions, institutions and other indefinables that make up conduct in the 5432 life of people in a given time and place."

Now, I say to this Board that is the standard that the Post Office Department through the Solicitor used in approving Esquire for a year and a half. The standards have not become more rigid since that time. They are the same. If anything, they have relaxed a little. Nor has the magazine changed since that time. Only the Post Office has changed, and I think that is a complete demonstration of the lack of merit in the present proceeding.

In his opening, Mr. Hassell's continued reference to the test under the statute, as I understood him, was that to be 5433 mailable second class the matter must be for the public good or concern useful knowledge or be designed for the public good—referring to the Congressional debates.

Now, there is not a case in the books anywhere at any time ever decided, which even suggests that coarse and indelicate matter is non-mailable or which contains any suggestion of the sort which he makes, that only matter which is useful and beneficial is of information of a public character.

Certainly, we know that the courts have decided that in-

5434 formation of a public character need not be limited to current information, because we find at page 22 of the brief a decision of the Court of Appeals in this District, in Payne against the National Railway Publishing Company, holding the publication The Railroad Guide entitled to second-class privileges, the following statement:

"The citizen who desires to have his publication carried in the mails of the United States as second-class matter, and who has fully and fairly complied with all the requirements of the statute in regard thereto, has acquired a positive legal right to have it so carried; and his right will be
5435 enforced by the writ of mandamus, if the Postmaster General arbitrarily or without valid legal reason refuses to receive and transmit such publication. Of course, the Postmaster General and his subordinates are required to use judgment and discretion, and it may sometimes be a matter of much difficulty to identify a publication as one included in the category prescribed by Congress. But their discretion is limited to this question of identification; and it is not competent for them to impose additional requirements beyond those specified in the statute."

It seems to me that is just what Mr. Hassell is trying to induce you to do, to define information of a public character as being useful, helpful, beneficial information.

5436. I think material which entertains is information of a public character, just as much as the current news items carried in a magazine like Time.

Under the words of the statute, under the obvious intent which Congress must have had, magazines like Cosmopolitan, Red Book, while largely devoted to fiction, constantly contain articles that are just entertaining, that are not useful, they don't educate anybody, but they give pleasure in reading. It was never the intention of Congress, looking

at the words they used, it was never reasonably intended to say that only a magazine like Time is intended to second-class privileges. 5437

Now, in conclusion, I expect that this Board will hear that the continued publication of this magazine will have a destructive effect upon every American home of decent people in this country. It may even be suggested that Esquire is undermining democracy itself.

Now, if there were any truth or validity to an argument of that kind, Esquire would not be here, it would be in a criminal court, where if the argument is sound it should be.

Yet, as you know, there are dozens, indeed scores of criminal obscenity statutes throughout the breadth and length of this land. At no time within its ten-year history, and certainly not today, has this magazine ever been prosecuted by any public authority anywhere for obscenity or indecency. 5438

If this argument which I anticipate will be made to you is sound, do you think men like Fry and Tillotson and Pollock and Neilson and Chase would be in the position of defending the magazine?

And if there is anything to the argument that this magazine of sophistication constitutes a threat to our form of government or to morals, don't you think the Solicitor could have found out of this great city in which must reside thousands of men of knowledge, experience, distinction, and ability, some one or two who could have come here and told us about it? 5439

Their failure to do so speaks louder than words.

And yet, I submit to you, that in order to take away our second-class privileges you must find that we have violated a criminal statute. Whether you must apply criminal standards or not makes no difference. Whether you are

5440 entitled to decide it by a fair preponderance of evidence or beyond reasonable doubt, makes no difference. In order to deprive us of our privileges you must find we have violated a criminal statute.

The charges, I respectfully urge, should be dismissed and this Board should report that the publication should not be deprived of its second-class privileges.

Chairman Myers: We will take a five or ten minute recess at this time.

(Whereupon a brief recess was taken.)

5441

Chairman Myers: Proceed, gentlemen.

ARGUMENT BY MR. WILLIAM C. O'BRIEN.

Mr. O'Brien: Mr. Chairman and gentlemen of the Board: If there is anything to be said on behalf of Esquire in this proceeding, I think it has been well and ably said by Mr. Bromley. Nothing has been neglected in his presentation of the defense. It has been most eloquently and thoroughly presented.

5442 I have listened with great attention and with great admiration for his ability in presenting his case. But I fail to see that it provides an excuse or an answer, an excuse for the things that Esquire has done, or an answer to the charges in this case or the evidence in the record.

Now, at the outset, Mr. Bromley, I think, referred to definitions of obscenity. The definition of obscenity in Regina versus Hicklin is still accepted and acceptable in the courts of the United States. In that I think he made an error, probably an unconscious one.

The fact of the matter is that Regina versus Hicklin

is still accepted as the doctrine by the Supreme Court of the United States as shown by Dunlop v. United States, 165 U. S. 486, and since that is the doctrine accepted by the Supreme Court of the United States as the test of obscenity, insofar as the use of the United States mails is concerned, it is binding upon this Board and upon this Department. 5443

It is true that the Circuit Court in New York, and perhaps some other circuit courts and perhaps some other State courts—I don't know all the decisions—may have elected to ignore that doctrine, but that has not been approved by the United States Supreme Court.

Now, gentlemen, you have before you and you have had throughout this hearing the eleven issues of Esquire upon which these charges are based. You have had before you the memorandum setting forth the charges, including the second one with respect to information of a public character, the fourth condition of the second-class statute, that a magazine must be originated for the dissemination—and published—for the dissemination of information of a public character or related to literature, to sciences, or the arts, or some special industry, and that fourth condition also excludes as enterable, second-class matter which is devoted primarily to advertising. 5444

In his testimony which I heard briefly, because I was not in the hearing room all the time, I heard Mr. Gingrich give the history of Esquire magazine and, according to his story, this magazine or some immediate predecessor, was originally originated for the purpose of advertising. And when they found that they could sell it on the newsstands and not in clothing stores, they attempted to give it a character which, forsooth, would enable any self-respecting male to walk in and carry it out under his arm so that he might 5445

not be accused of being a fop or one who thought more
5446 of dress or as much of dress as a woman.

In order to impress that character on the magazine certain matters were introduced of a manly character, and, of course, one of those things which would show that a man is a man, according to the Esquire standard of manliness, is the ribald joke, the indecent cartoon, the almost naked woman's picture, so that any decent man could carry it out under his arm and say "I am not buying this to see what is the latest fashion in ties, but because I am a very male man and am fond of looking at women's pictures and reading ribald jokes."

5447

That leaves the immediate impression that Esquire was really originated for the advertising. It carries a great deal of advertising.

According to the poll and the text, only 35 per cent is advertising.

Now, then, let's come to the text. What is the text around which so much tinsel has been wrapped? What is that text upon which such sanctity has been bestowed by counsel, and by some of his witnesses? Do you find the text to be the whole-souled purpose of that magazine; do you find the text to be the inescapable and inevitable characteristic of that magazine?

5448

I don't. I regard that text as the front. I regard that text much as I used to regard these fronts put up by the gambling houses and liquor dealers in the old days, when a flower shop was a front for a roulette table in the back or whatever went on behind the scenes which was illegal. The real purpose of the establishment was to carry on liquor sales or gambling, and not to sell flowers.

I might say this attempt is to put a public library in front of a copy with dirty cartoons, risque jokes, pictures

which are suitable, I think, according to what I used to see and used to read, for display in back of a bar in a saloon, but not in a literary magazine, not in a magazine devoted to public information; not in a magazine intended to be devoted to information of a public character or related to literature. 5449

I have never seen such things in any other magazine, not even in the Smart Set many years ago when it was noted as a very liberal magazine.

Let's take Esquire for what it shows itself to be, let's take Esquire according to its own symbol, let's take Esquire according to its own characterization.

Who represents Esquire better than Esky? What do you find about Esky on every cover and every situation? A lascivious, leering, lecherous parasite, a dude who spends his time ogling women, not a soldier or a civilian with any useful occupation, but just a mere philanderer according to his own activities as displayed by Esquire. 5450

Esquire typifies the man who does not go to war, the man who stays home and plays around with the women while the soldiers go to war, the man who, according to the covers of Esquire, is engaged in trying to seduce the women who might be interested in soldiers, as you can see from looking at the May issue.

Here is Esky peering over the fence, lecherously ogling a girl who is in the arms of a soldier, and who might be his sweetheart. 5451

We can go to another cartoon of the same character. Esky here is dressed in a sailor suit. Is he engaged in performing the duties of a sailor? Oh, no, no. He is engaged in making these lecherous grimaces at a couple of women who are apparently practically nude. He is engaged in pleasure, not the performance of duty.

Come to August. What do you find? You find Esky,
5452 that symbol of Esquire, entertaining a girl, while the sergeant who apparently is the friend of that girl is looking on in amazement and anger. That's Esquire.

I urge upon the Board, if it has the time to read Esquire from cover to cover, to read the nearly two thousand pages that have been presented here so often. I ask if you can find anywhere where Esquire has spent a single dollar, where Esquire has spent a single nickle on advertising war bonds, for example, since it is such a great patriotric publication.

You would think they would do something for the United
5453 States Government besides asking for a subsidy.

Now, Mr. Bromley has discussed at some length his interpretation of the evidential situation in this hearing. He has referred to numerous witnesses both for Esquire and for the Department.

Mr. Bromley's summing up of the situation is this: all of the witnesses for Esquire completely and unequivocally endorse the magazine as a fine publication.

That is a strange thing. Strange that among so many people there would not be some diversity of opinion. Honest men may differ about things, even about things they like, even about things they are willing to have circulated. Why
5454 are all those witnesses so universally of the same opinion and so completely willing to endorse Esquire as a publication to be disseminated at a second-class rate?

It suggests to me that either their examination to which Mr. Bromley is pointing with great pride, has been superficial, or that they have accepted the suggestion that Esquire is what they say it is.

It is easy to accept suggestions. It is easy to have an article by a well-known writer, whether it be George Jean

Nathan or William Lyon Phelps or Paul Gallico or anyone else, pointed out to you in order to make you believe that Esquire is essentially what it is said to be, what they say it is. 5455

A great deal has been said about the Government witnesses. A great deal has been said which is not correct. A great deal of this testimony has been placed upon the record, as I understand it, and as I listened to the testimony of our witnesses.

I think Mr. Bromley has the feeling that when a witness didn't come out and say "This item is indecent", that he has the right to say he approved it. That isn't fair, that isn't fair at all. 5456

It is true that the Government witnesses did not have the indoctrination nor the time to devote from their regular duties or occupation to read the eleven hundred pages, or whatever it is, as his witnesses seemed to have. These busy men and women who have important jobs in various institutions, private or public, seemed to have a lot of time to take away from their official and usual occupations to read Esquire from cover to cover.

My witnesses did not. They had jobs to do for the public. But they did this. They examined Esquire and those who had but brief opportunity outside the hearing room, as you know, were confronted with the matter on the witness stand. 5457

It is not fair to say that Mrs. Harvey Wiley only saw Esquire for twelve minutes. She talked to me, I would say, for less than twelve minutes. And I was not attempting to cover all these items in twelve minutes. I am not quite as stupid as that.

What I did was to confront these witnesses on the witness stand, who had not had sufficient time to examine the

magazine, with the items concerning which I asked them
5458 and concerning which no arrangement as to their testimony had been made before they took the witness stand, so they formed their ideas of the cartoons presented to them or the text that was read to them honestly and openly before counsel and the Board, and not before they came here.

There was no indoctrination, no prompting or conference in which they agreed that they would say anything but what they honestly believed.

Now, which one of those witnesses said Esquire was fit for public distribution? There was a difference of opinion on certain items, an honest difference of opinion. I expect
5459 that between the three gentlemen sitting on the bench there may be a difference of opinion on items. But they were agreed on this thing, that Esquire as an entity, Esquire as a whole, Esquire as a magazine, is not information of a public character, but as a whole it is improper material to be distributed amongst the youth, as well as the adult people of this nation.

In fact, they agreed Esquire is not a second-class magazine.

Now, if people want to indulge in looking at cartoons or in reading matter which deals with the sexual side of life
5460 in a very detailed and lascivious way, we are not here to interfere with that. If they want to buy it in books or pamphlets, if it can be sold wherever they live, why, let them pay the price for it. But don't ask the taxpayers to subsidize the distribution of this matter through the mail for the enrichment of the publisher.

Congress never intended that.

We are not trying to reform public morals. We are simply examining the legal question, whether it was the intent of Congress that Esquire or any similar magazine, for that

matter, should be entered as second-class matter, that part of its mailing cost should be paid by the taxpayers. 5461

Does it meet the rigid standards, the must standards which are set forth in the second-class privilege act? It is the position, of course, of Government counsel that it does not. It is the position which Mr. Hassell has explained to you and which you already knew, I suppose, from the progress of the case, that Esquire is not a magazine originated and published for the dissemination of information of a public character.

It might as well be written in Chinese. I expect the drop in circulation would not be material if it was written in a foreign language that most of the readers couldn't understand, so long as they kept the captions of the cartoons in English, left the Varga girls to be seen, and so long as risque jokes could be understood in some way. 5462

They might as well have reprinted Chaucer as Theodore Dreiser or Maurice Maeterlinck or any one else, reprinted it in the old English which you can scarcely read today, because the magazine has found it to be a necessary pattern of its publication to put in every issue the same material or the same type of material which has been pointed out to you.

That is the merchantable part of the publication which it finds brings the money in upon which it subsists. 5463

Now, that is not information of a public character.

I heard a great deal about pin-up girls. I think—I know I would agree with Mr. Hassell that men do not pin up this type of matter in their sleeping quarters or elsewhere merely to enhance their idealism of womanhood. I will show you, for example, by contrast what I mean.

I once knew a young man who was very fond of a young lady who lived in a distant city, and he had a picture of

her. He happened to be my room-mate down in Tennessee.

5464 We often had men come in from various schools—he was a student at the State Normal—we have often had boys and men come in and sit around and play flinch and black-jack and talk and have bull sessions. Of course, sex creeps into those and, of course, ribald language creeps in.

This young man, whenever he expected such a thing, would not even leave his sweetheart's picture exposed. Why? Because he idealized womanhood.

That is just the converse of this type of glorification or idealization. That is the kind of pin-up girl that builds a man, that builds his morals, but not this type. Not this

5465 type of woman, stripped down to her almost naked flesh, posed in alluring poses in colors and drawings designed to concentrate the idea on the physical side of woman.

Counsel seemed to be amazed the other day when one of the witnesses denounced the cartoon where the woman is at the lathe and the comment is made "Such patriotism". No honeymoon and so on. The witness said "That isn't marriage necessarily."

He seemed to be surprised. Well, we should not be surprised, gentlemen.

There used to be a saying—I don't know whether it is still current or not—that marriages are made in Heaven.

5466 There used to be an idea, and I think it is still pretty prevalent, that men and women are joined together spiritually as well as physically in marriage and anything that contaminates the spiritual union is as destructive of marriage as any contamination of the physical union. That is also public morals today.

Is Esquire the symbol of the grade of public morals to which the United States subscribes as a whole? I think not.

The whole effort of the defense has been to make you believe that this sort of thing is acceptable to every man, woman and child in the United States except the narrow minded ones of whom, of course, there must be a great minority according to their polls and so forth. 5467

But the fact of the matter is, and you gentlemen know it as well as I do, that public decency is at a much higher level than what they pretend, that public decency is offended even today by some of the bathing suits that they set forth as being an indicia of what we are willing to accept, that public decency is not necessarily reflected by the type of pictures we find in other publications which are declared by them—and I will accept the term—to be reputable. 5468

If I want to read certain magazines or certain newspapers I have to take what they have in them or else do without them. If they insist on putting a picture from a burlesque show in there, I have the election either to say "I won't read that at all, I won't get the current news, I won't read anything," or else I will have to take what they give me. It is like going into a store and buying some food, part of which you don't want but which you have to take. There is wastage in everything and here is wastage in publication.

It is not the standard, it is not the norm, it is not the measure of decency. A lot of it is foisted on people. 5469

A great deal has been made of the fact that the Very Reverend Rabbi Metz found some matter in the Reader's Digest which he thought was obscene. Counsel didn't remind you, but I do. Rabbi Metz says he reads the Reader's Digest. What is he going to do, refuse to read the articles in there because there are some jokes in there that he doesn't have to read? Not at all. He has to put up with a certain amount of what is thrust upon him.

I say that is not the norm or the standard.

5470 Mrs. Harvey Wiley was speaking not only as a woman but I think she typifies the viewpoint of the American mother. She has two sons. Millions of other women in the United States fortunately have sons who have the ability and the physical welfare to serve. Do you think if you were to take a poll of those mothers or the wives of those men, some of whom I know, that they would say that any great loss would be suffered by their husbands or sons by depriving them of pin-up girls or Sultan cartoons or these lascivious jokes?

5471 Imagine a man putting up a glorified American girl in the same atmosphere with "son-of-a-bitch" and "crap" and all the other dirty language you find in here, in the same atmosphere with poems which make a joke about virginity and continence, which indicate that women may be bought and sold.

Oh, yes, gentlemen, the moral articles, the article about burlesque and the article about prostitutes. That was Esquire's attempt to reform something, I suppose. They are going to reform burlesque.

You know what scandal is, gentlemen. A person runs around and says, "I saw so and so doing so and so and it was dirty and it was obscene," and the details are spread 5472 out before you in all their sordidness, and then he throws up both hands and says, "I wouldn't do anything like that. I disapprove of anything like that," and then he goes on to everybody spreading scandal and spreading it and spreading it, and spreading dirt and filth under the guise of disapproving of it.

That is the same type of article as Gallico's article, the same type of stuff.

And in the Night Court scene. Articles could be written

about the Night Court and I am sure articles have been written about the Night Court, which expose the dangers, the sordidness, the horribleness of prostitution, how women are degraded and lowered by it, how the public suffers from it. 5473

But it can be done decently. It doesn't have to be done indecently, and if it is done indecently there is no excuse for it.

The same thing about burlesque.

Now, there is no basis for counsel's contention that you can just disregard the testimony of these Government witnesses. He has not reminded you, of course, of the numerous items which every one of them said were filthy or indecent or vulgar or indelicate or in bad taste, as they interpreted those terms. And of course when they used the term "indelicate" or "in bad taste" they were referring to indelicacy as a matter of discussing sex or bad taste in the matter of discussing or exhibiting sexual matters. 5474

Esquire's reputation has been before Boards in this Post Office Department more than once. In fact, every cheesecake magazine that came in here to defend itself on charges of indecency pointed to Esquire as their patron saint. Many of those publications were found not to contain information of a public character. Many of the publications readily admitted and quit their second-class mailing privileges. All had the same patron saint, Esquire. 5475

Esquire is a more expensive publication, it costs four bits to buy it, fifty cents, if you like, fifty cents to build up the morals of the United States or tear them down, if you please. Fifty cents which I think would contribute more to national welfare if it was spent on two War Stamps.

And we are asked to believe that this publication has the endorsement of congressional approval under the statute.

Suppose, for example, gentlemen of the Board, that there
5476 was no second-class mailing privilege whatever. Suppose that it was and continued to be the policy of Congress to subsidize publications which were devoted to information of a public character, to art, literature, science, and the other things specified in the statutes. Suppose those publications had to go before a committee of Congress every year and show their performance.

Do you think Esquire would get a subsidy from Congress on the basis of what you have seen here? I am confident that it would not. Congress would not approve of any such subsidy and neither does it, in my judgment, as I interpret
5477 the law, approve of the indirect subsidy through the second-class mailing privilege. That is not its intention. That is not the statute which Congress passed.

You have been told before and, if I may, I will repeat it, that the purpose of the statute was to build up the morale of the United States, to build up the Nation as a stronghold, to convey information to the readers of newspapers or science and art, or leading publications, which would make America stronger, more capable of defending itself in building a great economy, a fine social life. This publication does not serve any of those purposes.

The articles in here—well, you read them—just read all
5478 of them.

Some of them you probably could go to sleep reading. Many of them are uninteresting. Many of them are stupid. Many of them are pointless. Many of them are just space fillers.

If you want to examine them, there are a few here and there that you might find of interest to you. There are a few here and there that are good articles, but by and large the whole publication is not of the extraordinarily superior

worth-while educational character that counsel for Esquire would have you believe. 5479

The statute, I was going to say, must provide for matter which is for the welfare of the Nation. Congress could not and would not pass a statute constitutionally, I believe, to subsidize anything which might be against the national interest, and when Congress passes a subsidy law, whether it be for magazines or air mail or ocean mail or anything else, it looks upon that with a great deal of jealousy and with a great deal of care, and expects the Government officials to carry out their duties in that respect.

It imposes upon the Government official a great responsibility. The Postmaster General can neither expand nor restrict the conditions. They made that very obvious in this statement. They put the word "must" in there. The most emphatic language that Congress can use. This publication must be originated and published for the dissemination of information of a public character. 5480

That does not mean that it is going to be originated and published with some information of a public character and the rest of it devoted to material that is unmailable. It must be substantial. It must be completely devoted to the purpose stated by the statute and required by the statute before the Postmaster General has the right to allow it to enjoy the subsidy. 5481

Now, some great stress has been laid upon what might be termed the mistakes of the Post Office Department in the past.

The case of Houghton vs. Payne deals with a problem involving second-class mail. The publishing house published a series of pamphlets every month, some of which I think are still around the Post Office Department. It used to be in the Third Assistant's file. The Riverside

Series of Literature. You could find in there reproductions
5482 and reprints of some of the finest writings of the American poets and the American essayists and the American fiction writers. It was certainly unquestionably devoted to literature, and several Postmasters General permitted that publication to go through the mails as second-class matter, until one came along and said, "No; I don't think this complies with the requirement of the statute. They are merely reprinting booklets and calling them magazines." Several Postmasters General had allowed it to go on, and this one said "No," and the Court said, "Well, this one is
5483 right, and the fact that other men made mistakes, even though contracts had been entered into on the basis of these previous rulings, did not give this publication the right to enjoy the second-class mailing privilege," and it was taken away from them.

Now, there was no question of any indecent matter. There was no question but what the matter was fine, but so jealously did the courts guard the second-class privilege, so carefully, if you like so narrowly did they interpret the statute, that they took away from the Riverside Press its second-class mailing privilege.

This publication certainly can't compare with the River-
5484 side Series. This publication, as I have said again and again and you have heard it for three weeks, is full of cartoons, jokes, and pictures which are certainly not claimed to be literature or art or science.

Now, I have heard something about its morale-building value. There is no doubt about it that the morale of the Nation and the morale of its fighting men are of the utmost importance today and every day as long as the Nation survives, and everything that could be done should be done and will be done, I know, to preserve that morale.

Argument by Mr. O'Brien.

What preserved the morale of the women and children in London when Hitler was dropping bombs on them? Was it a magazine like Esquire? Was it pinning up dirty pictures on the wall? The answer is obvious. 5485

What preserved the morale or destroyed the morale of France? A low moral standard, a low, common lack of patriotism which let that nation go to pieces.

I don't think that Esquire could destroy the morale of the United States, not while there are women like Mrs. Wiley or the other gentlemen who appeared on the stand, as representative of not merely themselves, although we may say they spoke for themselves, but representatives of untold millions in the hinterland that we could not bring here and present to you. 5486

The picture which Esquire, by its sneering and highly loathsome humor, is directed at the chastity of women and marital fidelity, will not build morale, will not add to common decency. That is the kind of thing that breaks down the morals.

When you continue to subsidize Esquire so that it can drag everyone down to that level, Congress never intended to do that; they never intended that that should be characteristic of information of a public character. In fact, the few words that were spoken in the debate showed to the contrary, as I have said often and no doubt tiresomely. 5487

Now, we have had some reference to polls. Polls, gentlemen, are very deceptive things. Need I remind you of the famous Literary Digest poll of a few years ago, which was so fatally defective that I think that was the cause of the demise of the Literary Digest?

Mr. Bromley has cited you in his brief on some occasions, and he has cited you, on page 12, the case of People vs. Viking Press. The first paragraph of that quotation

ends with the citation of People vs. Muller, and the next
5488 sentence—and I lay stress on this:

"The statute is aimed at pornography, and a pornographic book must be taken to be one where all other incidents and qualities are mere accessories to the primary purpose of stimulating immoral thought."

I charge that this is the character of Esquire.

Gentlemen, I am not going to undertake to attack the witnesses for Esquire. You have seen all but those who are stipulated, who did not come here. You heard them cross-examined by Mr. Hassell. I think you are in a fair position to evaluate their testimony.

5489 I am not inclined to nor will I impugn their motives or their truthfulness. That will have to be done by the record if at all.

I don't want to indulge in any mud-slinging although I think there have been many mistakes in judgment on the part of those people. I think those people have presumed to testify about something they did not quite grasp.

Indeed, I have in mind some of the persons who were stipulated. Two or three fine ladies whose characters are beyond reproach, I am sure, who are heads of women's colleges. They are all unmarried, according to their description.

5490 Do you think, gentlemen, that these unmarried ladies, presumably innocent of any idea of any understanding of pornography or what goes on in men's minds with relation to sex, are in a position to tell you anything that you do not know already about Esquire? I don't think so.

But those witnesses are offered of course on the same basis as the men and all the other witnesses.

There was another poll mentioned here, two or three of them. Now, it appears to me that this poll wherein people

are questioned around the country can be defective, and I think just as defective as the Literary Digest poll was. 5491

The interpretation of the answers, as far as I know about it from statements of counsel, could be quite misleading. In other words, if they ask you, "Do you object to Esquire or would you object to having it in the home?" I might say, "No." I might say, "I don't know," unless I said, "My wife wouldn't like it" or "My children wouldn't like it." No doubt that would be a vote in the favorable column.

Now take the other poll, the one where they assumed the different quantities of material in there. The classification of material in those columns are not such that you can apply them to the problem before you. They did not take 5492 any poll or make any examination to determine, for example, in their investigation whether the competing magazines or the other magazines compared set up their text or their cartoons in the same way as Esquire. A picture was a picture and an advertisement was an advertisement and a column or a page of text was editorial matter in their opinion or something else.

Statistics do not prove a great deal except that someone spent a great deal of time figuring something out, and I feel that the statistics that you have here, even if I could accept them, are meaningless.

Now, with respect to the question of whether or not this 5493 publication was originated for the purpose of complying with the statutes. Now, some attempt was made to belittle Dr. Moore's test of obscenity, but we find as a matter of fact that the test of obscenity, which he applied, as I said, is still that of the Supreme Court.

We find here a man who was given a job to make up his own mind, as to whether he thinks this magazine is obscene or not, going to the libraries and informing himself as to

what are the tests and standards of obscenity. He didn't
5494 think he already knew them; he did not presume, like the witnesses I have heard on the other side, that they could make up their own test without reference to any authority.

He went painstakingly and looked at the material so that he might be informed and might form a fair and reasonable judgment about the contents of Esquire before he looked it over, and it is not fair, gentlemen, to say that he did not examine everything. It is not fair to say that because he did not mention some things that he approved it, for he told you very candidly that his notes did not contain all the material he found in there but merely samples of them.

5495 Now, Mr. Croteau, who was a witness for the defense. Mr. Croteau has been held up to you as a rock of testimony which cannot be gainsaid. You can't get around the fact that he is from the Watch and Ward Society. You can't get away from the fact that he devotes his life to reading magazines or books or periodicals for the purpose of determining whether they are obscene or not. We do not.

We can't get away from the fact that he goes to, I don't know how many, four, five, or six burlesque shows or stage presentations every week, to determine whether or not they are obscene. We do not.

5496 I want to tell you what was said to me about Mr. Croteau by someone who was listening to his testimony, and I think it is the most apt criticism I have heard: "Mr. Croteau is so numb mentally and morally from looking at these things that he doesn't even recognize it in a magazine when he sees it."

We heard a great deal about advertising and the investigation that was made with respect to the pictures contained in advertisements, how decent or indecent they might be.

Argument by Mr. O'Brien.

Now, gentlemen, there is something about advertising which should be taken into consideration in that connection. 5497
The very organization who had a witness here, the Curtis Publishing Company, published a book on advertising. I have read it many years ago. It was an excellent text. It has been reprinted and the same doctrine has been set forth in Printers Ink and many other publications. There is something about illustrations in advertising which this witness did not bring out:

An advertisement has an illustration or a line in it and the one primary purpose of it is to draw your eye to that advertisement. When your eye is drawn to the advertisement, the advertisement has to have a second powerful quality in order to be a good one. Your eye must be drawn away from it to the item being advertised. 5498

Now, I will agree that if they are advertising women for sale, with pictures of women such as we find in Esquire, that would be good advertising, but if they are advertising ordinary merchandise the pictures must be of a subsidiary character. It must be subsidiary to the prominence of the thing to which the reader's attention is being drawn, so the standards of pictures in advertising have nothing to do with the standards of pictures and cartoons because the reader or the observer of a cartoon is drawn to what? To the cartoon and nothing else but the women in the cartoon, and not some other thing on which his attention is later to be concentrated. 5499

What parallel is there there? None.

I think, gentlemen, I have said all I have to say except I want to repeat again and I want to leave with you this thought about the case, and I am dealing almost exclusively with this phase: that Congress jealously guards second-class mailing privileges; that it intends and requires that it

shall only be extended to a publication which must fully
5500 qualify in order to enjoy it.

And we have no leeway in granting it where it is not definitely, inescapably earned or where the qualification is not fully met.

That Esquire, whether we think that everything we pointed out is actually indecent or obscene, does not meet the requirements of Congress as set forth in the second-class statute because the publication, as I have said again, and will say now once more, is not and was not originated and published for the dissemination of information of a public character; that it is not at all devoted to literature, the arts,
5501 the sciences, or some special industry; and therefore in my opinion it is not entitled to enjoy the second-class mailing privileges.

Mr. Bromley: May it please the Chairman, I cannot let pass unnoticed the constant reference to the question of subsidy.

Subsidy has no place in this case whatsoever.

No one in this Department knows whether the second-class mailing privilege costs the Government money or whether it does not.

No one knows whether the abolition of the second-class would raise or lower the revenues; and finally, under the
5502 statute, which does not confer a privilege but which accords privileges and rights, if we comply with the conditions we are entitled to the second-class privileges, and the question of what it costs the Government, whether it costs the Government anything, is entirely beyond the scope of inquiry in this case.

Chairman Myers: Do counsel on either side desire to submit anything by way of briefs in addition to the arguments just now made?

Mr. Bromley: Has the Board any desire in the matter, Mr. Chairman? 5503

Chairman Myers: No, it is immaterial to us. We have your brief filed originally and I take it that Mr. Hassell and Mr. O'Brien will present the briefs which they now have at hand and which you have seen, have you not?

Mr. Bromley: The Appendix A I have seen.

Chairman Myers: Yes, and if you desire to let it go at that, that is satisfactory to us. It would mean a saving of time, but it is entirely as you counsel on either side or both sides may wish.

Mr. Bromley: We are satisfied.

Mr. Hassell: Government counsel do not desire to submit 5504 any other brief. If the Board wants to peruse the document that I got up for use in the application cases that have been considered by your somewhat similar Board, I have no objection to it.

Chairman Myers: I think I have a copy in some other case but I would like to have one in this case, however. I would like to have copies of the briefs of both sides, myself.

Mr. Cargill: I would like a copy very much.

Chairman Myers: If you would be good enough to furnish us with one.

Mr. Hassell: I will.

Chairman Myers: That brings the trial to a close. 5505

Mr. Cargill: I would like to take this opportunity to say here that both counsel for the Government and counsel for the respondent in this case have demonstrated their sincerity, and regardless of the outcome or the decision of this Board you have my thanks for the way in which this hearing has been conducted.

(Whereupon at 12:15 o'clock p. m., the hearing was closed.)

Report and Recommendation of Hearing Board.

BEFORE THE

5506 POST OFFICE DEPARTMENT

IN THE MATTER

OF THE

SECOND-CLASS MAILING PRIVILEGES

OF

THE MAGAZINE, ESQUIRE, PUBLISHED BY ESQUIRE, INC.

5507 MEMORANDUM TO THE THIRD ASSISTANT POSTMASTER GENERAL

November 11, 1943.

This proceeding is on a citation to show cause why the second-class entry of mail matter for the magazine Esquire should not be suspended, annulled or revoked on the grounds (a) that it is non-mailable because of having published and contained obscene, lewd and lascivious matter together with matter of a similar or related nature, (b) that it is not originated and published for the dissemination of information of a public character or devoted to literature, the
5508 sciences, arts or some special industry and having a legitimate list of subscribers and (c) that it is not a mailable periodical of the second class of mail matter, as it, in a generally uniform and systematic manner publishes non-mailable matter. An exhibit cites fractional parts of each issue of the magazine from January to November of 1943 inclusive as coming within the scope of the charges.

To this citation the respondent, Esquire Inc., filed an answer denying the charges and setting up affirmative defenses, thus raising questions of both fact and law.

On these issues evidence was introduced.

The Post Office Department put in proof eleven copies of Esquire, January to November 1943 inclusive, containing the matter complained of. These issues had a total of approximately 1972 pages of reading and advertising matter of which about 86 pages were cited as coming within the charges set forth in the notice to show cause. They constitute 90 separate items of complaint. Of these 90 items 60 were approved as not being obscene by some one or more of the Post Office Department's own witnesses. About 1886 pages of these exhibits were not condemned by the Department and both counsel for the Department and some of its witnesses stated that parts thereof were not objectionable, although most the Department's witnesses had not read the matter which had not been referred to in the citation. In fact most of them had not read all of the matter objected to. 5509 5510

The Post Office Department presented nine witnesses, most of whom spoke for their separate personal views and did not attempt to testify as to the mores of the present day.

On its part the respondent presented thirty-eight witnesses to testify in person or by stipulation. These witnesses were distinguished psychiatrists, authors, educators, publicists, advertising business men, advertising agents, art specialists, samplers of public opinion and the like. It was the opinion of all these witnesses that none of the matter complained of was obscene, although in certain instances some of them frankly admitted that specific matter called to their attention was indelicate, vulgar and in bad taste. These opinions were reiterated and clinched on cross examination. A number of these witnesses testified that Esquire disseminated information of a public character and that 5511

it is devoted to literature, science, the arts and special in-
5512 dustries. It was conceded on both sides that it had a legitimate list of subscribers.

Polls, after the method of the Gallup poll, had been taken by the Curtis Publishing Company of Philadelphia and Crossley, Inc. of Princeton, New Jersey as to the Varga girl drawings. The manner of taking these polls and the results were put in evidence in great detail and showed that about 80%, as reported by the Curtis Publishing Company and 77% as reported by Crossley, Inc., of the people of the United States thought that the Varga girl drawings were not obscene and that approximately the same per-
5513 centage were willing to have it come to their homes.

Respondent's witnesses further testified as to the standards of the mores of our time and that the magazine did not violate these standards. In addition a large number of copies of various publications were introduced to show that publications of a similar character are publishing matter similar in content to that published by Esquire and that such publication is general and not a matter of isolated instances.

It was further testified that the armed forces of our country had purchased, through several departments of our government, several hundred thousand copies of Esquire
5514 in specially prepared editions for distribution among our contingents overseas.

There is attached hereto Appendix A covering the specific charges in the citation.

In view of the foregoing, the following majority of the Board finds as follows:

(1) The charge of obscenity in the original and amended citations has not been supported and proved in fact or in law.

(2) The publication has not failed to comply with the 4th condition of section 226 Title 39 of the U. S. Code as to its second class mailing entry. 5515

A separate report from the minority member is attached herewith as Appendix B.

RECOMMENDATION

It is, therefore, respectfully recommended that the proceeding herein be dismissed and that the second class entry of the magazine Esquire be continued in full force and effect. 5516

(Signed) WALTER MYERS
Chairman.

(Signed) F. H. ELLIS
Members of the Board.

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APPENDIX A

It is believed that the board should comment directly on the cited matter in the eleven issues in question.

As to the Varga calendar by months in the January issue and the subsequent open gate Varga pictures in the succeeding issues, it is not believed that the pictures are obscene.

JANUARY ISSUE:

5519 Page 6—"Shor Nuff!"—This is a reproduction on the editorial page of a communication from a reader commenting on a story which appeared in a previous issue. While some of the reference in this letter might be suggestive, in the setting which criticizes a previously published article, it is not believed to be obscene.

Page 45—Verse—"Benedicts, Awake". While unquestionably there are some sex connotation to be derived from the poem, several witnesses testified that it was a very excellent poem and at least one Government witness found no objection to it. It is not believed that it would come within
5520 the category of obscene matter.

Pages 83 to 119—Article "Those Star and Garter Blues". This is a review of a current Broadway play and while the language in some places appears coarse and perhaps indelicate, it is not believed to be obscene in the light of current reporting of an existing play.

Page 123—"Dear Dr. Diddle"—The main objection appeared to be from the questioning by Government attorneys as to the term "Dear Doctor Diddle". While to some minds diddle has a special connotation, it does not necessarily fol-

low that such connotation is mandatory and we do not believe the article obscene. 5521

Page 137—Cartoon "And to think I gave up drawing". The board can see nothing obscene about this cartoon.

FEBRUARY ISSUE:

Page 65—Cartoon "What am I bid for this 100 lbs. of sugar?" Great stress was laid on the fact that the girl being sold looked like an American and suggested selling of girls for immoral purposes. Such deductions, of course, could be made, however, the cartoon is a funny take-off on the current shortage of sugar and depicts the selling customs in a country other than America. It is not believed to be obscene. 5522

Page 77—Cartoon at bottom of page and accompanying text. This is a picture in "Home Sweet Ruby Street", particular objection being made to the cartoon at the bottom of the page. While the cartoon, and perhaps the story is not in good taste, nevertheless it does depict a certain strata of the social life of the community described and is not considered obscene.

Page 95—Story "The Unsinkable Sailor". This is a story of a Merchant Marine, written in rough indelicate language that would be considered decidedly bad taste. However, it is not believed that the article within itself would be termed obscene. 5523

MARCH ISSUE:

Page 9—Advertisement of "Thorne Smith's 3 Wittiest, Most Ribald Novels" and illustration. While the advertisement generally is suggestive, it is not believed to be obscene.

Appendix A Annexed to Report and Recommendation of Hearing Board.

5524 Page 10—"On Putting Esky in A Cap & Gown". This letter comes under the heading of "The Sound and the Fury" which publishes letters from Esquire readers. We do not believe there is anything in the letter to be objected to.

Page 49—Cartoon "I wonder how the Sultan knew this was my birthday?" This is another Sultan cartoon and in its setting it is not believed to be obscene.

Page 68—"The Fall of the Flattering Word". Abstracts from the story of The Fall of the Flattering Word is ob-
5525 jected to—one, that clothes do enhance the sexual attractiveness of women, and the other—the reference to the term "fly front". The board could find no point of obscenity in the article.

Page 107—Cartoon "Seems like somebody's allers clamorin to somebody to open up a second front, don't it?". This is one of a series of hill-billy cartoons and the board can see nothing obscene about it.

APRIL ISSUE:

5526 Front cover—Breasts of female figures overemphasized. The board can find nothing obscene in this.

Page 60—Article—"The Court of Lost Ladies—Despite her Honor's years of earnest striving the ranks of the sisterhood had never diminished, never changed". This is an article written on the happenings of a New York night court. The language is coarse and entirely too descriptive concerning the lives of prostitutes. However, it is more or less factual and in the setting, it is not considered to be obscene.

Appendix A Annexed to Report and Recommendation of Hearing Board.

MAY ISSUE:

5427

Page 32—Article "The Savage Beast in Us—Dispelling the hopes of burlesque entrepreneurs and fears of censors that the strip has sensory appeal". This is an article debunking burlesque. While some of the description, as well as the illustrations, indicate coarseness and indelicacies and might be termed in bad taste, nevertheless, in the setting presented is not believed to be obscene.

Page 48—Cartoon "She looks more like a B-17 than a P-40". While the imagination might derive some sexual connotations from the cartoon, it is not believed that there is anything obscene in it.

5428

Pages 86 and 87—Pictures 29 to 32 and text. These are a lot of silly pictures with a similar type of text. While the pictures and the text may be somewhat suggestive and in bad taste, it is not believed they are obscene.

Page 93—"Broadway for The Boys". This is another review of a current play in New York. The most objection offered was to the picture from the play on Page 92 and the caption to the picture on Page 93. The language is that used in the play, it is very coarse and in bad taste. However, in the setting of a critic's review, we do not believe the picture or the caption is obscene.

5429

JUNE ISSUE:

Page 134—"Libel suits were as wine to that hell-firin' editor, etc." This is an article quoting from an old time Editor from the West. The epitaph is decidedly vulgar and in bad taste, as is the article on the whole. It is depicting

5530 a certain type of being, and in the setting of more or less factual reporting, is not considered to be obscene. However, this is probably one of the two most objectionable articles in the eleven issues.

JULY ISSUE:

Page 10—Article from a reader from Paradise, Pennsylvania, in the "Sound and the Fury." There is nothing obscene contained herein and it is probably cited merely to give some reader's views.

5531

Page 76—Picture "Broadway for the Boys". This is a picture from a musical comedy and it is not considered in any way obscene.

Page 87—Pictures 55 and 56 and text. While the text may have some sexual connotations, considering the setting it is not believed there is anything obscene contained therein.

Page 141—"Dog's Worst Friend". This is an article in decidedly bad taste, but it is not believed to be obscene.

Page 146—Pictures, especially center one, in advertise-
5532 ment "Esky buy-products". While probably offensive to some, it is not believed that the pictures within themselves are obscene from the standpoint of stimulating any sexual desires.

Page 148—Cartoon showing perfume counter. While certain deductions might be made in connecting the two display signs, and might be interpreted as bad taste, it is not believed there is anything obscene contained therein especially when you consider it is in the nature of a cartoon.

Appendix A Annexed to Report and Recommendation of Hearing Board.

AUGUST ISSUE: 5533

Page 10—"Considered Opinion"—Another letter from a reader. This again merely quoting a letter that refers to the May Issue article entitled "Broadway for the Boys" and is not considered obscene.

Page 10—"Prayer for a Paper Shortage". This is nothing more than a silly letter from a reader and is not considered obscene.

Page 30—"Many Wives Too Many". This is a comical take-off on a legitimate book written advocating plural marriages in England. Some of the language might be considered as indelicate or bad taste but in the setting it is not believed to be obscene. 5534

Page 73—Picture. "Mood for Red Hair". On the testimony it is evident that this is a most excellent piece of photography and we do not see where there is anything obscene about it.

Page 89—Picture "Paste Your Face Here". This in the opinion of the Board is the most objectionable item in the entire eleven issues. It is believed that to the average reader the intent derived therefrom would be a nasty take-off on an act of sex perversion. However the Editor has used some care to present the matter in a way that probably would prevent a conviction under the criminal statutes. To the left of the article it is shown "that the reader need only paste his own likeness in the indicated blank space". (Quotation marks supplied.) Further, this is one of a series of three pictures, the first one appearing in the July Issue on page 81 and the other one appearing in the September Issue 5535

5536 on page 73. Of course the July and September Issues are perfectly innocent pictures in every way. The Board does consider that this picture has definite obscene connotations. While the Board believes this to be a most disgusting picture it is not believed that it furnishes sufficient grounds within itself to rescind the second-class privilege to the Publisher when you consider the matter of the entire eleven issues as a whole. The Board does consider, however, that perhaps this one picture is a matter that should be submitted to the United States Attorney for his opinion as to prosecution, although as stated above the Editor has protected himself 5537 both by the text and the issue of the series of three such pictures.

Page 90—Cartoon "She came directly from the wedding". This cartoon seems silly to the Board and we certainly do not think it obscene.

Page 105—Cartoon "Thank God—help at last". While sex connotations might be derived from a study of the cartoon, in the setting we do not believe it to be obscene.

Page 110—Cartoon, "That's Miss Blimpton". The Board 5538 does not find anything obscene in this picture.

Page 127—Cartoon "Hew to the line, Bertha". This is rather a silly take-off on the present shortage of hosiery. However, it is not considered obscene. Testimony called attention to the Editor's note at the bottom of the page, wherein it was stated that Esquire will accept no responsibility for what may happen if male readers fail to tear off the bottom of this page before letting the female dependents see it. This is an example as to how ~~far~~ the mind of

a particular individual may travel when looking for dirt. The Counsel for the Respondent invited attention to a similar Editor's note following all of these style pictures showing in a joking manner that the man might have to spend some money if the female members of the family knew where they could obtain information on these latest fashions. 5539

Page 144—"Offensive on the Home Front". The language used herein is somewhat indelicate and probably in bad taste, but it is not considered to be obscene.

SEPTEMBER ISSUE: 5540

Page 10—"Conservative Suggestions". This is another silly letter from a reader in the "Sound and Fury" page. It is merely cited to show the reader's reaction to the Varga girls and is not obscene.

Page 43—Cartoon "Sold American!" This is another cartoon on the customs of selling women in other countries and in the setting it is not considered obscene.

Page 65—Cartoon "Come back later". This is a take-off on the old milkman joke and while indecent connotations may be taken by the reader, it is not believed in the setting of the cartoon that it is obscene. 5541

Page 66—Cartoon "It's the only time daughter and her young man have for courting". This is a take-off on present day war workers and it is not considered to be obscene.

Page 84—Cartoon "Every night he tells her he's sailing tomorrow". This is a take-off on present day conditions and it will be noted that in this cartoon as in the previous

5542 cartoon it is apparent that the mother of the girl is present. It is not believed there is anything obscene.

Page 86—"Goldbricking with Esquire"—"A sergeant was home on emergency furlough etc." Goldbricking with Esquire is a reproduction of alleged jokes and sayings from army newspapers. On to each item is cited the paper from which it was reprinted. In the setting the Board cannot see anything obscene in the material cited.

Page 87—"She: 'Would you like to see where I was oper-
5543 ated on for appendicitis?' "He: 'No—I hate hospitals.'" The same comment is applicable as to the matter cited directly above on Page 86.

Page 102—Cartoon "Ain't it a damn shame?" No doubt the average reader would get some kind of a sex connotation from this kind of cartoon, however, in the setting it is not believed to be obscene.

OCTOBER ISSUE:

Page 10—"The Case of the Classy Chassis." This is an-
5544 other letter published in the "Sound and Fury", from the readers and is not considered obscene.

Page 37—Cartoon. The Board can find nothing obscene in this.

Page 38—Article "Wise Men Pick 'Pyknic' Girls." This is a take-off on scientific articles depicting the Pyknic and the Leptosome type of girls. It is not believed that the article is obscene in any way.

Appendix A Annexed to Report and Recommendation of Hearing Board.

Page 49—Cartoon. This is a take-off on the fuel situation and while it might be considered in bad taste, it is not considered obscene. 5545

Pages 56 and 128—"Portrait Above the Fireplace". This is a very excellent story and is not believed to be obscene in any way.

Page 93—"Goldbricking With Esquire"—Items 2, 3, and 17. These are jokes published from Army papers, and in the setting it is not believed that there is anything obscene contained therein. 5546

Pages 104 and 105—Story "The Sporting Scene". Some people might consider that the story has some indecent connotations, that some of the language is vulgar—however we do not believe that there is anything obscene in it.

NOVEMBER ISSUE:

Page 52—Cartoon "Such a neighbor—always borrowing." This is another Sultan cartoon, which is a take-off on neighborly borrowing and we do not see anything obscene in it.

Page 60—Pictures and description of Folies Bergere girls. We do not believe that there is anything obscene to this. 5547

Page 66—Cartoon "It's no use, Sarg." We can see nothing obscene in this.

Page 67—Cartoon "At the U.S.O. in New York they just gave us cigarettes!" We do not see anything obscene in this.

Appendix A Annexed to Report and Recommendation of Hearing Board.

5548 Page 73—Picture "Golden Mould." Testimony showed that this was a very high class piece of photography and we do not find anything objectionable about the picture.

Page 77—Article, paragraphs numbered 1, 10, 15 and 21. This is an article criticizing plays which contain suggestive settings and improper language. It is true that in writing the article the writer has used the exact wording and scenes he objects to. The language generally might be considered indelicate and decidedly bad taste. It is not considered, in its setting, to be obscene.

5549

Page 83—Cartoon "My date's at the awkward stage—all hands and no dough." This is a silly cartoon and of course one can imagine anything being intended, but it is not believed to be obscene.

Page 89—Picture. This is a back stage scene from the circus and in its setting, we do not believe that it is obscene.

Pages 94 and 95—"Goldbricking With Esquire". Items 4, 15, 24, 27, 28, 30, 31, 35 and 36. Again we must consider that these are alleged jokes from camp magazines, repro-
5550 duced giving credit to the different publications. The following is comment by items:

Item 4 is probably in bad taste, but considering the setting, it is not believed obscene; Item 15, While obscenity may be in the background, it is in no way apparent in the way the joke is told: Item 24, We do not find anything obscene about this; Item 27, This is an indecent suggestion of exposure, however, considering the setting, we do not believe that it could be classed as obscene; Item 28, While it might be considered suggestive, it is not believed that it is obscene

5551

in the setting; Item 30. This is an old take-off on the young brother and sister and we do not see anything objectionable in it; Item 31. While this may be suggestive in the setting, it cannot be considered obscene; Item 35, Cartoon. This might be considered by some as indelicate but certainly not obscene. Incidentally the Sunday Star recently contained the identical cartoon, in reverse, in the Sunday funny papers and Item 36, Indelicate perhaps, but not considered in its setting as obscene.

APPENDIX B

5552

November 12, 1943.

Memo to the Third Assistant Postmaster General:

This report is to advise you of my conclusion after looking at exhibits, listening to testimony and argument as to why the second-class mailing privilege should or should not be withdrawn from Esquire, Inc., for its monthly publication "Esquire".

The exhibits and transcripts of testimony are here for your perusal and I will only attempt to point out to you the basis for my conclusion by reference thereto and my own comments.

I am not satisfied to exonerate the magazine and give it unqualified approval for the reason that its past history, the eleven issues under consideration, and the particular items complained of either overstep or are of the borderline variety between the decent and the indecent. It is not contended that all matter contained in these issues is borderline, but it is my conviction the dominant factor of the magazine, and upon which it relies to secure its readers, is

5554 its pictorial and other matter that relates in one form or another to so-called jokes, gags and cartoons with double meanings that bear on sex. The feature is in every issue. It is my opinion the publishers are only restricted in their presentations by the fear of the loss of the second-class privilege or conviction in the courts. Were this not true, they would never have voluntarily submitted to that which amounts to censorship, 18 issues of their magazine, and willingly made changes as suggested by the Solicitor for the Post Office Department. No doubt such practice would have

5555 been continued by them had not the Post Office Department become burdened and refused to be continually annoyed. Could it be argued that such voluntary action would be taken by any reputable magazine whose policy was one that stood for decency. I think not.

There can be little doubt that the feature complained of here is its constant presentation of that which borders on and some times oversteps the bounds of decency. Its so-called jokes, gags, drawings, pictures of thinly clad women, and cartoons all have a sexual tinge. Since being placed on its own responsibility, the same general type of matter has been distributed. With this in mind, and I do not see

5556 how we can escape it, attention is directed to page 89 of the August 1943 issue. The presentation made on this page, in my opinion, is obscene. During the course of the hearings, it was carefully pointed out by the respondent that this picture was one of a series of three appearing one each in the July, August and September issues. The respondent would have us believe the picture is so innocent that it was intended only for a little fun so that service men could attach their photograph in the space indicated and send the picture to their parents, etc. To accept such an explanation would be a shock to sound reasoning, yet so

called experts for the respondent stated under oath that they could see nothing obscene in this picture or the wording thereon. My opinion is they disregarded their oath and as I understand some of these witnesses received as much as $500.00 a day for the testimony given, I can only view it in the light of testimony bought and paid for and that it was not without prejudice, for it is almost inconceivable that an expert, skilled and practiced in delving into the innermost secrets and thoughts of both normal and abnormal human beings, could be so simple as to fail to detect the degrading and obscene implications. Neither do I believe the editor, when he exhibited and pointed out the series of three pictures, two of which are innocuous, when he claimed the picture was an innocent one. The editor, Mr. Gingrich, is clever and skilled in the selection of pictures, cartoons and writings which have double meanings. It is my opinion that in the selection of this series of pictures, he was fully aware of the implications thereof and planted the innocuous pictures as a smoke screen for himself when he deliberately included this obscenity.

In my opinion the publication Esquire presses to change the standard of acceptance against the barrier between decency and indecency. If this publication is allowed to use such pictures as contained in the August issue without challenge, it will then become an accustomed practice and will be aped by other borderline publications who look to Esquire as the pace setter.

The fact may be stated that the complained of matter is only a minor part of the many so-called features of this magazine and that the obscenity simmers down to one page in one issue. Granted for argument's sake, however, regardless of that, it is still obscenity to me and one page in a magazine which is part and parcel of that magazine makes

5560 the entire magazine unmailable. I think the August issue should be declared unmailable.

I am also of the opinion this issue of the magazine (August 1943) should be submitted to the United States Attorney for possible prosecution.

From testimony presented, the respondent would have us believe the presentation of the pictures of the "Varga" girl is an attempt to glorify the American woman. I do not believe it. Admittedly, the pictures are not claimed to be art although skillfully executed. They are made a feature
5561 of this magazine because it has been found saleable and profitable and the corporation has capitalized on the advertising thus afforded to the extent that millions of similar pictures are being distributed on calendars, playing cards, etc. In themselves, I do not believe they are obscene. However they, like the general tone of the features complained of, keep sex before the reader.

The question that has troubled me during this hearing is whether the Congress in passing this legislation intended to extend to publishers the benefits of rates at less than cost of handling for the dissemination of matter of doubtful value to the public. The matter complained of, in my
5562 opinion, certainly has no educational value and is not calculated for the good of the general public. It is true 700,000 copies are claimed to be sold each month. I doubt that if the general public, who are not subscribers, would stand for this so-called subsidy if it was put to them in the light that part of their tax money was being given to the owners and stockholders of Esquire to the extent of a half-million dollars a year. I do believe the taxpayers would demand that such matter be excluded from preferential rates and that it be required to pay its own way.

Appendix B Annexed to Report and Recommendation of Hearing Board.

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So far as I know there has been no instance of a court test that would define the authority of the Postmaster General in exercising his administrative judgment as to what constitutes "mailable matter of a public character" *or* etc."

The statute under which we are laboring has been a debatable one since its passage and I have given serious thought to a proposed further provision to amend the present law that would more clearly define the intent of Congress in order to relieve this troublesome condition, but must confess that I have sought in vain for words that would not have a like indefiniteness.

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If the suggestion of this member of the board is accepted and the August 1943 issue of Esquire is declared unmailable on the grounds of obscenity, the second class privilege may be withdrawn in good faith inasmuch as it has failed to issue at stated intervals a mailable issue. I recommend this action be taken. Such action will, without doubt, throw the whole matter into court, and if, as a result, the findings are against the Post Office Department, there will be good reason to present the whole matter to Congress for an expression of their views in the form of legislation.

I realize that the revocation would result in wide publicity and would no doubt bring criticism from the press which is supersensitive to anything that can be twisted into something that has even the appearance of restrictions on the freedom of the press. However, I believe the suggested action is justified in view of the fact the Congress at the time of passing the legislation under which we are now operating did not have before it at that time the type of matter complained of herein.

5565

(Signed) TOM C. CARGILL.
Member of the Board.

ORDER OF THE POSTMASTER GENERAL REVOKING SECOND CLASS PRIVILEGES

5566

December 30, 1943.

ORDER NO. 23459

This is a proceeding under the Act of March 3, 1901 relating to the second-class mailing privileges accorded to the publication "Esquire" which was instituted by an order served upon "Esquire" and its publisher by registered mail on September 12, 1943 to show cause on September 28, 1943 why the second-class mailing privileges enjoyed by "Esquire" should not be suspended, annulled or revoked upon the following grounds:

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"(a) That it is nonmailable within the meaning of 35 Stat. 1129 (18 U. S. C. 334), in that issues dated January, February, March, April, May, June, July, August, and September, 1943, have contained matters described and portrayed as set forth in Exhibit 'A' attached hereto of an obscene, lewd and lascivious character; and other matter of a similar or related nature;

"(b) That because of the inclusion of such matter in the publication it has not fulfilled the qualifications of second-class mailing privileges established by the Fourth condition of 20 Stat. 359 (39 U. S. C. sec. 226);

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"(c) That it is not a mailable newspaper or other mailable periodical publication of the second class of mailable matter as it, in a generally uniform and systematic manner, publishes nonmailable matter in that in issues dated January, February, March, April, May, June, July, August, and September, 1943, it has included matter such as is cited in Paragraph (a) hereof;"

Order of Postmaster General Revoking Second Class Privileges.

5569 An exhibit containing the matter printed in various issues of "Esquire" held to be in violation of the postal statutes accompanied the communication to the publisher.

At the request of counsel for the publication, postponements of the hearing were granted, first to October 12 and later to October 19 on which day the hearing began before a Board of three hearing officers. Testimony was given and exhibits were introduced both in behalf of the respondent and the Solicitor of the Post Office Department. The hearing continued through November 6.

5570 The hearing officers submitted to the Postmaster General their respective recommendations on November 11, 1943, together with the transcript of the proceeding, which included, the testimony, the statements and arguments of the parties, and the exhibits and briefs.

In view of this voluminous record, at the onset it may be well to clarify and state just what is the issue in this proceeding. This is a proceeding involving the use of the second-class mailing privileges. Consequently, there is not involved the question of nonmailability as first, third or fourth-class mail matter nor of the right of freedom of speech, or of the freedom of the press. Nor are we here concerned with the question of whether a criminal prosecu-
5571 tion against the publishers might or might not be sustained by the same or similar evidence.

Proceedings to suspend, annul, or revoke second-class mailing privileges are not criminal proceedings. The questions in issue are not the acts of the owner, publisher or editor. The single issue is the character of the publication, and whether that publication meets the conditions set out by the Congress in respect of its use of the second-class mailing privileges.

This proceeding presents but two questions for consideration:

Order of Postmaster General Revoking Second Class Privileges.

5572 (1) Does the publication fail to comply with the Fourth condition of the Act of March 3, 1879, section 14 (20 Stat. 359; 39 U. S. C. 226) and thus not being originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, is not entitled to second-class mailing privileges.

(2) Is the publication non-mailable within the meaning of the Act of March 4, 1909, section 211 (35 Stat. 1129; 18 U. S. C. 334) and thus being a non-mailable
5573 publication is not entitled to second-class mailing privileges.

In arriving at a determination in this particular type of proceeding it is necessary that the Postmaster General recognize the nature, conditions and result of these unique second-class mail privileges because they have been established and are supported and maintained by the people of the United States.

In nature they are true privileges, specifically called and referred to as such by the postal statutes, and stated by the Supreme Court to be "* * * justified as part of the historic
5574 policy of encouraging by low postal rates the dissemination of current intelligence. It is a frank extension of special favors to publishers because of the special contribution to the public welfare which Congress believes is derived from the newspaper and other periodical press." [1]

Furthermore, to assure that a contribution of that precise character is in fact made, Congress has required that to enjoy these privileges and preferences the publication as a fourth condition "must be originated and published for

1 *Milwaukee Pub. Co. v. Burleson*, 255 U. S. 407, 410.

the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry * * *."[2]

There are good reasons for this jealous regard by Congress of these extraordinary privileges. One fact not unimportant is that as a result of the second-class mail privileges the United States Postal Service is compelled to make up the difference between the postage paid by the publication and the cost to the United States Postal Service to distribute the publication through the mails. This in effect is an indirect subsidy at the hands of the Government. The holder of these privileges thus can use the United States mails to effect delivery of his product to his customers, with the assurance it will receive certain preferential handling and services which accrue to no other class of mail, by the payment of but a fraction of the cost of the service.

In other words, by this special favor granted him, the cost of delivery is paid in part by every single person mailing a letter and by every single person paying Federal taxes.

Examination of the record, briefs, and reports of the hearing officers indicates two diametrically opposed theories of the case as to the Fourth condition. The theory of the publication appears to be that the requirement that a publication "must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry", is so general and "broad as to include everything and exclude nothing" if it be in fact a publication.

If this theory of the case is applied, it means that the Federal government, as a matter of national policy, intends to foster, subsidize, grant affirmative assistance and other

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2 Section 14, Act of March 3, 1879 (20 Stat. 359; 39 U. S. C. 226).

5578 wise approve every kind of periodical publication irrespective of its contribution to the public welfare and the public good. Such a theory not only favors that particular class of mail users with a preferential postage rate and other privileges which no other user of the mail is permitted to have, but requires that the Federal government make up the difference between the amount of postage paid and the cost to the Postal Service to deliver it throughout the United States.

The contrary theory advocated during the proceeding goes
5579 to the other extreme. This theory of the case contemplates the Fourth condition as a continuing requirement that a publication must serve a useful public purpose, educationally or otherwise: that a publication "originated and published for the dissemination of information of a public character" is synonymous with current newspapers and current news magazines; and that "literature, the sciences, arts," means "classic literature", the "fine arts" and the "useful arts".

If this theory is applied, it means that a large number of publications and periodicals of the editorial, fiction and humorous classes, which even though educational, innocent, delightful and entertaining, would not be permitted to use
5580 the second-class mailing privileges because they are neither current newspapers nor are they substantially devoted to literature or art of a classical or high artistic quality.

The three hearing officers recognized and gave the Postmaster General the benefit of their careful considerations of these diametrically opposed theories of the case. But they did not reach a unanimity of conclusion as to interpretation or recommendation.

My attention has been called by arguments of counsel in the record and in the briefs to the decisions and language in many cases, and to the administrative practices and inter-

pretations. I am unable to reconcile them. Neither in them can I find such consistency and uniformity in declaration of principles as to amount to consistent precedent. 5581

Over the years the decisions affecting the matters here in issue and their administration have been inconsistent. From language in court decisions having some analogy to the matters here in issue, opposite conclusions may be reached. From the interpretations and practices of the officials administering this statute over the years, opposite conclusions may be reached. Furthermore, the cases and the administrative interpretations are inconsistent. I am unable to find any case since the enactment of this statute where the courts have had this clear-cut issue before them, nor can I find a case which decides just what the statute means as to second-class mail privileges. 5582

I do not believe that a statute which so vitally, directly, and continually affects so many should remain longer in the realm of doubt or be subject to the vagaries of whatever Postmaster General may then be administering them.

In the first instance, it is for our courts to say what this statute means and what limits and restrictions there are upon the use of the second-class mail privileges. If our courts conclude that the Fourth condition is a series of words without meaning, and that under it the Postmaster General actually cannot and should not revoke or deny second-class mailing privileges to publications such as this, then it is for the Congress to unequivocally and clearly state what if any are the standards to which a publication must conform before Congress will permit it to be given the cheapest rate of postage and contribute government funds to pay its cost of distribution by mail. 5583

If, on the other hand, our courts determine that the Postmaster General has the power and duty to enforce the

5584 plain and common-sense meaning of this statute, and as well, to correct now the long-standing inconsistency and lack of uniformity in administrative interpretation and practice in this type of case, then it is for the Congress in the light of such a decision to determine what restrictions and limitations in the public interest are proper to be placed upon such a power and duty.

Whether the dicta and decisions in somewhat analogous cases, as well as administrative interpretation and practices over the years, have so eaten away at this statute as to 5585 effectively nullify it is a decision for our courts and not for the Postmaster General.

This is essentially a judicial matter of deep significance, and the Postmaster General should not be hesitant in exposing these conditions to the critical public eye. Nor should he be reluctant to determine the matter in such a way that all phases of it may be fully considered and decided by a court of competent jurisdiction where every right and interest of the publication, the government, and the public may be fully protected.

In the absence of specific decision by our courts, and in view of the inconsistency in analogous cases and in administrative interpretations and practices, I am compelled to 5586 resort to the statutes themselves.

The language of the Act of Congress establishing the Fourth condition seems plain and specific. I am unable to distort the plain meaning of plain words.

The plain language of this statute does not assume that a publication must in fact be "obscene" within the intendment of the postal obscenity statutes before it can be found not to be "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry".

Order of Postmaster General Revoking Second Class Privileges.

Writings and pictures may be indecent, vulgar, and risque and still not be obscene in a technical sense. Such writings and pictures may be in that obscure and treacherous borderland zone where the average person hesitates to find them technically obscene, but still may see ample proof that they are morally improper and not for the public welfare and the public good. When such writings or pictures occur in isolated instances their dangerous tendencies and malignant qualities may be considered of lesser importance. 5587

When, however, they become a dominant and systematic feature they most certainly cannot be said to be for the public good, and a publication which uses them in that manner is not making the "special contribution to the public welfare" which Congress intended by the Fourth condition. 5588

A publication to enjoy these unique mail privileges and special preferences is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. It is under a positive duty to contribute to the public good and the public welfare.

The editor of this publication admits that from its origin "our humor and our articles and our fiction all stressed a man alone angle—you might call it a stag party type of treatment",[3] and testified "we called it the smoking room type of humor".[4] He stated that as a part of its editorial policy it runs "cartoons that do feature sex".[5] Its featured pictures are stated to be "frankly published for the entertainment they afford".[6] But when the polls of public opinion submitted by the publication are examined 5589

3 Transcript of proceedings, page 1160.

4 Transcript of proceedings, page 1282.

5 Transcript of proceedings, page 1285.

6 Transcript of proceedings, page 38.

5590 it is found that these pictures were characterized as obscene or indecent by 19 to 22% of the persons interviewed, and that 20 to 26% of the persons polled would object to having them in their homes.[7]

The result of the distribution of such a publication is not without significance. As the publication's editor testified, Esquire "attracted a good number of imitators. There were various magazines which had various other related titles to that of Esquire, but the imitation copied only the superficial aspects, the smoking-room type of humor, much

5591 much grosser than anything we had ever used ourselves." These imitators "would simply trade upon the superficial aspects of Esquire and emphasize what to us were the features that we least wanted to see become cheapened and common".[9] "I wouldn't say coarsened, but they cheapened almost the desirability and value of that kind of material by making it a commonplace, whereas we had thought of it as being a smart and an exclusive type of feature."[10]

Whatever the featured and dominant pictures, prose, verse and systematic innuendos of this publication may be, they surely are not "information of a public character" of "literature, the sciences, arts or some special industry."

5592 I am unable to conclude that this publication complies with the Fourth condition or that Congress did intend or now intends that this publication be entitled to enjoy the second-class mailing privileges. I cannot assume that Congress ever intended to endow this publication with an indirect subsidy and permit it to receive at the hands of the

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7 Respondent's exhibits 90 and 93.

8 Transcript of proceedings, page 1163.

9 Transcript of proceedings, page 1165.

10 Transcript of proceedings, page 1285.

Order of Postmaster General Revoking Second Class Privileges.

government a preference in postal charges of approximately $500,000 per annum.[11]

In order to provide the publication ample opportunity to appeal this order to a court of competent jurisdiction to fully review and settle this matter in which the publication, the Post Office Department, and the general public have such a direct and substantial interest, the order revoking the second-class privileges of the publication will not become effective for 60 days.

Accordingly, the second-class mailing privileges of the publication "Esquire" are hereby revoked, effective February 28, 1944.

(Signed) FRANK C. WALKER
Postmaster General

11 Transcript of proceedings, page 34

Stipulation as to Record.

5596 IT IS HEREBY STIPULATED that the foregoing (three printed volumes, pages 1 to 1865, inclusive) is a true and correct transcript of the proceedings before the Post Office Department "In the Matter of the Second-Class Mailing Privileges of the magazine Esquire."

CRAVATH, SWAINE & MOORE,

By WM. DWIGHT WHITNEY,

Attorneys for Plaintiff.

5597 FRANCIS M. SHEA,
Assistant Attorney General of the United States.

EDWARD M. CURRAN,
United States Attorney in and for the District of Columbia,

BENEDICT S. DEINARD,
Special Assistant to The Attorney General,

Attorneys for Defendant.

Dated, April 3, 1944.

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I.

PLEADINGS AND OTHER PAPERS DESIGNATED.

1867 Filed Feb 15 1944

District Court of the United States for the District of Columbia.

Civil Action No. 22822.

ESQUIRE, INC., Palmolive Bldg., Chicago, Ill. *Plaintiff*,

against

FRANK C. WALKER, as Postmaster General of the United States, *Defendant*

Amended Complaint for Injunction

Plaintiff, for its amended complaint herein, alleges:

1. This is an action of a civil nature, brought to enjoin the enforcement of an order, dated and filed December 30, 1943, made by defendant, as Postmaster General of the United States, revoking the second-class mailing privileges of the publication Esquire, effective February 28, 1944.

2. Plaintiff is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and is a citizen and resident of that state.

3. Defendant Frank C. Walker is, and at all times since September 11, 1940, has been, Postmaster General of the United States and head of the Post Office Department, an executive department of the United States, and on information and belief, as Postmaster General, is a citizen and resident of the City of Washington, District of Columbia.

4. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.

1869 5. The action arises under, and involves the interpretation of, the following acts of Congress: 20 Stat. 359 (39 U. S. C. 226) and 31 Stat. 1107 (39 U. S. C. 232).

6. One of the principal activities of plaintiff since 1933 has been the publication, distribution and sale of the monthly periodical, Esquire Magazine.

7. On December 15, 1933, plaintiff applied for and received second-class mailing privileges for said monthly periodical, and has since that date continued to enjoy said privileges uninterruptedly.

8. During said period plaintiff has expended substantial sums of money in carefully building up among the public a valuable reputation and good will for Esquire Magazine which constitutes a substantial asset of plaintiff's business.

9. The present monthly circulation of Esquire Magazine amounts to approximately 700,000 copies; approximately 400,000 copies are sold generally throughout the United States on newsstands, and approximately 300,000 copies are sent monthly to subscribers through the United States mails as second-class matter at second-class rates.

10. 20 Stat. 359 (39 U. S. C. 226) provides as a condition for enjoyment of second-class mailing privileges, among other things, as follows:

"Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry, and having a legitimate list of subscribers."

11. Esquire Magazine has a legitimate list of subscribers; is originated and published for the dissemination of information of a public character; and is also devoted to literature, the arts, the sciences and in part to the special industry of clothing.

1870 12. Plaintiff's publication, Esquire, satisfies, and at all times mentioned herein has satisfied, all statutory conditions for second-class mailing privileges.

13. 31 Stat. 1107 (39 U. S. C. 232) provides, in substance, that when any publication has been accorded second-class mailing privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested.

14. On information and belief, on September 11, 1943, defendant purporting to act under 31 Stat. 1107 (39 U. S. C. 232) instituted a proceeding and caused to be sent to plaintiff by registered mail a citation requiring plaintiff to show cause on September 28, 1943, why the second-class mailing privileges enjoyed by plaintiff in the mailing of its monthly periodical, Esquire Magazine, should not be suspended, annulled or revoked upon the following grounds:

"(a) That it is nonmailable within the meaning of 35 Stat. 1129 (18 U. S. C. 334), in that issues dated January, February, March, April, May, June, July, August, and September, 1943, have contained matters described and portrayed as set forth in Exhibit 'A' attached hereto of an obscene, lewd and lascivious character; and other matter of a similar or related nature;

"(b) That because of the inclusion of such matter in the publication it has not fulfilled the qualifications of second-class mailing privileges established by the Fourth condition of 20 Stat. 359 (39 U. S. C. sec. 226);

"(c) That it is not a mailable newspaper or other mailable periodical publication of the second class of mailable matter as it, in a generally uniform and systematic manner, publishes nonmailable matter in that in issues dated January, February, March, April, May, June, July, August, and September, 1943, it has included matter such as is cited in Paragraph (a) hereof."

15. On information and belief, defendant purporting to act under 31 Stat. 1107 (39 U. S. C. 232) caused to be sent to plaintiff on October 4, 1943, an amended citation
1871 in said proceeding specifying the same grounds as those mentioned in paragraph 14 hereof, but adding to grounds (a) and (c) the issues of said magazine dated October and November, 1943.

16. On information and belief, thereafter, defendant selected and appointed, a Hearing Board consisting of Fourth Assistant Postmaster General, Walter Myers, Chair-

man; Chief Clerk and Director of Personnel, Frank H. Ellis; and Deputy First Assistant Postmaster General, Tom C. Cargill, to hear argument and take testimony, and to report to defendant its findings, conclusions and recommendations.

17. On October 18, 1943, the plaintiff filed an answer in said proceeding denying the charges set forth in said citations.

18. Hearings were held before said Board upon the issues raised by the aforementioned citations and answer for a period of seventeen days, from October 19, 1943, to November 6, 1943, at which hearings, testimony and exhibits were presented on behalf of plaintiff and the Post Office Department.

19. On information and belief, on or about November 11, 1943, the majority of the Hearing Board rendered its report in writing, in which it found and concluded that

The charge of obscenity in the original and amended citations has not been supported and proved in fact or in law.

The publication has not failed to comply with the 4th condition of section 226 Title 39 of the U. S. Code as to its second class mailing entry.

and accordingly recommended that the proceeding to suspend, revoke or annul the second-class mailing privileges of Esquire Magazine "be dismissed, and that the second-class entry of the magazine Esquire be continued in full force and effect."

1872 20. On information and belief, defendant, notwithstanding the aforesaid report, findings, conclusions and recommendation of the majority of the Hearing Board selected and appointed by him to conduct said proceeding, and in complete disregard thereof, issued an order in said proceeding on December 30, 1943, (Order 23459) revoking the second-class mailing privileges of Esquire Magazine, effective February 28, 1944. A copy of said order is annexed hereto as Exhibit A and made a part hereof.

21. On information and belief, defendant, in issuing said order of December 30, 1943 (Exhibit A), misconstrued 20 Stat. 359 (39 U. S. C. 226) and particularly the Fourth condition thereof; proceeding upon an erroneous construction of the words "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry", in that, among other errors, he determined that the statutory language should be limited to such information of a public character, literature, sciences, arts and special industries as might be considered by him to be for the public good and the public welfare.

22. On information and belief, second-class mailing privileges, pursuant to 20 Stat. 359 (39 U. S. C. 226), have been granted by the Postmasters General of the United States, over a period of many years, to periodicals and magazines of widely different types and descriptions, including some of the same general class, type and character as Esquire Magazine, without any attempted imposition by any Postmaster General of any condition of the character set forth in the order and decision (Exhibit A) of the defendant herein.

The number of periodicals and magazines which have
1873 been accorded such privileges and which are regularly being mailed as second-class matter at second class rates is in excess of 25,000.

23. On information and belief, the construction of 20 Stat. 359 (39 U. S. C. 226) urged by defendant as the purported justification of the aforesaid order of December 30, 1943 (Exhibit A) is directly contrary to the long established and uniform practical construction of said statute by the Postmasters General of the United States since the origin of said statute.

24. On information and belief, defendant, in making the aforesaid order of December 30, 1943 (Exhibit A), acted arbitrarily and capriciously and contrary to the provisions of 20 Stat. 359 (39 U. S. C. 226), for the reasons, among others, that: (1) he did not review the record on the merits

but reached his determination solely for the purpose of compelling a court review of his theory of the meaning of the statute; (2) said order is contrary to the express findings, conclusions, and recommendation of the Hearing Board appointed by defendant for the express purpose of hearing the evidence and making findings, conclusions and a recommendation; (3) said order is not supported by any evidence in the record in said proceeding; (4) said order is based upon a misconstruction of 20 Stat. 359 (39 U. S. C. 226) as more particularly alleged in paragraph 21 hereof; and (5) said order is contrary to the established practice of the Post Office Department and the Postmasters General as more particularly alleged in paragraphs 22 and 23 hereof.

25. On information and belief, defendant's aforesaid order of December 30, 1943 (Exhibit A) violates plaintiff's constitutional rights as guaranteed under the First
1874 and Fifth Amendments to the Constitution of the United States in that (1) the statute (39 U. S. C. 226) as construed by defendant's said order is unconstitutional in that it amounts to an unlawful interference with, and abridgement and denial of, the freedom of the press; (2) defendant's said order arbitrarily discriminates against plaintiff in relation to other periodicals of the same general class, type and character; (3) defendant's said order, by permanently revoking plaintiff's second-class mailing privileges because of an alleged failure of past issues of the magazine to conform with defendant's interpretation of the statute (39 U. S. C. 226), imposes a previous restraint or restriction on any practical future use by plaintiff of the mails which is tantamount to a denial of the right of circulation and therefore constitutes an unlawful interference with, and abridgement and denial of, the freedom of the press; and (4) defendant's said order is invalid and unauthorized in that defendant unlawfully seeks to usurp the powers of the Congress of the United States to determine what shall be carried in the mails as second-class matter by attempting to impose additional requirements for and limi-

tations upon the privilege of second-class mailing. Defendant in effect assumes, without statutory authority and in direct violation of the Bill of Rights, to act as a universal censor of the press and of public morals.

26. The aforesaid order of December 30, 1943 (Exhibit A), threatens the life of plaintiff's magazine Esquire and in any event must seriously diminish the circulation of said magazine both on newsstands and to subscribers with the result that plaintiff will suffer substantial and irreparable loss and damage, for which it has no adequate remedy at law, for the following reasons, among others:

1875 A. The good will and reputation of Esquire Magazine, which plaintiff has carefully built up from its inception in 1933, will be seriously impaired.

B. It is the settled custom among the major distributing companies to refuse to distribute magazines which are not afforded second-class mailing privileges.

C. The present cost to plaintiff of sending Esquire Magazine through the United States mails to its subscribers at second-class rates amounts to approximately $112,800 annually or approximately $9,500 monthly.

D. In order for plaintiff to continue to furnish its subscribers with future copies of Esquire Magazine, it will be required to mail said magazine at fourth-class rates.

E. On information and belief the cost to plaintiff of sending said magazine to its subscribers at fourth-class rates will amount to approximately $624,000 annually, or upwards of $52,000 per month.

F. If plaintiff were to discontinue the subscription contracts to Esquire Magazine, it would be necessary to refund a large amount of money on subscription orders to over 300,000 subscribers.

27. By reason of the foregoing, plaintiff prays that an injunction both *pendente lite* and permanent be granted, as more particularly set forth in the prayers for relief herein, restraining and enjoining defendant from carrying out or

permitting the aforesaid order of December 30, 1943, revoking the second-class mailing privileges of Esquire Magazine to become effective.

1876 Wherefore, plaintiff prays:

1. That a summons issue requiring defendant to make answer to this complaint.

2. That defendant be ordered to file with the Clerk of this Court the entire record and proceedings had before the Post Office Department in connection with the proceeding instituted by the defendant to revoke the second-class mailing privileges of Esquire Magazine.

3. That defendant be ordered to show cause on a date to be fixed by this Court, why an injunction should not be granted, pending the final determination of this cause, restraining and enjoining the defendant, and each of his officers, agents, assistants, including the postmasters throughout the United States, employees, workers and attorneys, and anyone associated with or acting in concert or participation with him, and his successors in office, and each of them, and their officers, agents, assistants, including the postmasters throughout the United States, employees, representatives and attorneys, and anyone associated with or acting in concert or participation with them, from causing or permitting to become effective, and from promulgating, publishing or holding out, or causing or permitting to be promulgated, published or held out, as effective or valid or authorized by law, the purported order revoking the second-class mailing privileges of Esquire Magazine, and from refusing to transmit said magazine through the mail as second-class matter, at second-class rates.

4. That upon final hearing of this cause this Court grant, decree and issue a permanent injunction restraining and enjoining the defendant, and each of his officers, agents, assistants, including the postmasters throughout the

1877 United States, employees, workers and attorneys, and anyone associated with or acting in concert or participation with him, and his successors in office, and each of

them, and their officers, agents, assistants, including the postmasters throughout the United States employees, representatives and attorneys, and anyone acting with, or acting in concert or participation with them, from causing or permitting to become effective, and from promulgating, publishing or holding out, or causing or permitting to be promulgated, published, or held out, as effective or valid or authorized by law, the purported order revoking the second-class mailing privileges of Esquire Magazine, and from refusing to transmit said magazine through the mail as second-class matter, at second-class rates.

5. That upon final hearing this Court declare and order, adjudge and decree that the purported order revoking the second-class mailing privileges of Esquire Magazine issued by defendant under date of December 30, 1943, is invalid and unauthorized in law.

CRAVATH, de GERSDORFF,
SWAINE & WOOD,
15 Broad Street,
New York, N. Y.

616-621 Transportation Building,
Washington, D. C.

and

HUGH LYNCH, JR.,
616-621 Transportation Building,
Washington, D. C.
Attorneys for Plaintiff.

By HUGH LYNCH, JR.

1878 Filed Feb 15 1944

State of Illinois, County of Cook, ss:

Arnold Gingrich, being duly sworn, deposes and says:

That he is vice-president of Esquire, Inc., a foreign corporation, the plaintiff named in the foregoing action and amended complaint; that he has read the foregoing amended complaint and knows the contents thereof, and that the same is true to his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true; that the reason why this verification is made by deponent and not by plaintiff is that plaintiff is a foreign corporation and deponent an officer thereof, to wit, vice-president; that the sources of deponent's knowledge and the grounds of his belief as to the matters stated in said amended complaint to be alleged on information and belief consists of documents in the possession of deponent and plaintiff's attorneys, and conversations had with representatives of plaintiff and its attorneys.

ARNOLD GINGRICH.

Sworn to before me this 11th day of February, 1944.

LORETTA A. DIEBOLD
Notary Public.

[County Clerk's Certificate Attached.]

1880 Filed Feb 15 1944

(EXHIBIT A)

This is a conformed copy. Original filed, December 30, 1943, in Office of Chief Clerk, Post Office Department.

NBW

December 30, 1943.

Order No. 23459

This is a proceeding under the Act of March 3, 1901 relating to the second-class mailing privileges accorded to the publication "Esquire" which was instituted by an order served upon "Esquire" and its publisher by registered mail on September 12, 1943 to show cause on September 28, 1943 why the second-class mailing privileges enjoyed by "Esquire" should not be suspended, annulled or revoked upon the following grounds:

"(a) That it is nonmailable within the meaning of 35 Stat. 1129 (18 U. S. C. 334), in that issues dated January, February, March, April, May, June, July, August, and September, 1943, have contained matters described and portrayed as set forth in Exhibit 'A' attached hereto of an obscene, lewd and lascivious character; and other matter of a similar or related nature;

"(b) That because of the inclusion of such matter in the publication it has not fulfilled the qualifications of second-class mailing privileges established by the Fourth condition of 20 Stat. 359 (39 U. S. C. sec. 226);

"(c) That it is not a mailable newspaper or other mailable periodical publication of the second class of mailable matter as it, in a generally uniform and systematic manner, publishes nonmailable matter in that in issues dated January, February, March, April, May, June, July, August, and September, 1943, it has included matter such as is cited in Paragraph (a) hereof."

An exhibit containing the matter printed in various issues of "Esquire" held to be in violation of the postal
1881 statutes accompanied the communication to the publisher.

At the request of counsel for the publication, postponements of the hearing were granted, first to October 12 and later to October 19 on which day the hearing began before a Board of three hearing officers. Testimony was given and exhibits were introduced both in behalf of the respondent and the Solicitor of the Post Office Department. The hearing continued through November 6.

The hearing officers submitted to the Postmaster General their respective recommendations on November 11, 1943, together with the transcript of the proceeding, which included the testimony, the statements and arguments of the parties and the exhibits and briefs.

In view of this voluminous record, at the onset it may be well to clarify and state just what is the issue in this proceeding. This is a proceeding involving the use of the second-class mailing privileges. Consequently, there is not involved the question of nonmailability as first, third or fourth-class mail matter nor of the right of freedom of speech, or of the freedom of the press. Nor are we here concerned with the question of whether a criminal prosecution against the publishers might or might not be sustained by the same or similar evidence.

Proceedings to suspend, annul, or revoke second-class mailing privileges are not criminal proceedings. The
1882 questions in issue are not the acts of the owner, publisher or editor. The single issue is the character of the publication, and whether that publication meets the conditions set out by the Congress in respect of its use of the second-class mailing privileges.

This proceeding presents but two questions for consideration:

(1) Does the publication fail to comply with the Fourth condition of the Act of March 3, 1879, section 14 (20 Stat.

359; 39 U. S. C. 226) and thus not being originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, is not entitled to second-class mailing privileges.

(2) Is the publication non-mailable within the meaning of the Act of March 4, 1909, section 211 (35 Stat. 1129; 18 U. S. C. 334) and thus being a non-mailable publication is not entitled to second-class mailing privileges.

In arriving at a determination in this particular type of proceeding it is necessary that the Postmaster General recognize the nature, conditions and result of these unique second-class mail privileges because they have been established and are supported and maintained by the peo-
1883 ple of the United States:

In nature they are true privileges, specifically called and referred to as such by the postal statutes, and stated by the Supreme Court to be "* * * justified as part of 'the historic policy of encouraging by low postal rates the dissemination of current intelligence'. It is a frank extension of special favors to publishers because of the special contribution to the public welfare which Congress believes is derived from the newspaper and other periodical press."[1]

Furthermore, to assure that a contribution of that precise character is in fact made, Congress has required that to enjoy these privileges and preferences the publication as a fourth condition "must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry; . . ."[2]

There are good reasons for this jealous regard by Congress of these extraordinary privileges. One fact not unimportant is that as a result of the second-class mail privileges the United States Postal Service is compelled to

[1] Milwaukee Pub. Co. v. Burleson, 255 U. S. 407, 410.

[2] Section 14, Act of March 3, 1879 (20 Stat. 359; 39 U. S. C. 226)

1884 make up the difference between the postage paid by the publication and the cost to the United States Postal Service to distribute the publication through the mails. This in effect is an indirect subsidy at the hands of the Government. The holder of these privileges thus can use the United States mails to effect delivery of his product to his customers, with the assurance it will receive certain preferential handling and services which accrue to no other class of mail, by the payment of but a fraction of the cost of the service.

In other words, by this special favor granted him, the cost of delivery is paid in part by every single person mailing a letter and by every single person paying Federal taxes.

Examination of the record, briefs, and reports of the hearing officers indicates two diametrically opposed theories of the case as to the Fourth condition. The theory of the publication appears to be that the requirement that a publication "must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry", is so general and "broad as to include everything and exclude nothing" if it be in fact a publication.

If this theory of the case is applied, it means that the Federal government, as a matter of national policy, 1885 intends to foster, subsidize, grant affirmative assistance and otherwise approve every kind of periodical publication irrespective of its contribution to the public welfare and the public good. Such a theory not only favors that particular class of mail users with a preferential postage rate and other privileges which no other user of the mail is permitted to have, but requires that the Federal government make up the difference between the amount of postage paid and the cost to the Postal Service to deliver it throughout the United States.

The contrary theory advocated during the proceeding goes to the other extreme. This theory of the case contemplates the Fourth condition as a continuing requirement that a

publication must serve a useful public purpose, educationally or otherwise; that a publication "originated and published for the dissemination of information of a public character" is synonymous with current newspapers and current news magazines; and that "literature, the sciences, arts," means "classic literature", the "fine arts" and the "useful arts".

If this theory is applied, it means that a large number of publications and periodicals of the editorial, fiction and humorous classes, which even though educational, innocent, delightful and entertaining, would not be permitted to use the second-class mailing privileges because they are
1886 substantially devoted to literature or art of a classical or high artistic quality.

The three hearing officers recognized and gave the Postmaster General the benefit of their careful considerations of these diametrically opposed theories of the case. But they did not reach a unanimity of conclusion as to interpretation or recommendation.

My attention has been called by arguments of counsel in the record and in the briefs to the decisions and language in many cases, and to the administrative practices and interpretations. I am unable to reconcile them. Neither in them can I find such consistency and uniformity in declaration of principles as to amount of consistent precedent.

Over the years the decisions affecting the matters here in issue and their administration have been inconsistent. From language in court decisions having some analogy to the matters here in issue, opposite conclusions may be reached. From the interpretations and practices of the officials administering this statute over the years, opposite conclusions may be reached. Furthermore, the cases and the administrative interpretations are inconsistent. I am unable to find any case since the enactment of this statute where the courts have had this clear-cut issue before them, nor can I find a case which decides just what the statute means
1887 as to second-class mail privileges.

I do not believe that a statute which so vitally, directly, and continually affects so many should remain longer in the realm of doubt or be subject to the vagaries of whatever Postmaster General may then be administering them.

In the first instance, it is for our courts to say what this statute means and what limits and restrictions there are upon the use of the second-class mail privileges. If our courts conclude that the Fourth condition is a series of words without meaning, and that under it the Postmaster General actually cannot and should not revoke or deny second-class mailing privileges to publications such as this, then it is for the Congress to unequivocally and clearly state what if any are the standards to which a publication must conform before Congress will permit it to be given the cheapest rate of postage and contribute government funds to pay its cost of distribution by mail.

If, on the other hand, our courts determine that the Postmaster General has the power and duty to enforce the plain and common-sense meaning of this statute, and as well, to correct now the long-standing inconsistency and lack of uniformity in administrative interpretation and practice in this type of case, then it is for the Congress in the light of such a decision to determine what restrictions and limita-
1888 tions in the public interest are proper to be placed upon such a power and duty.

Whether the dicta and decisions in somewhat analogous cases, as well as administrative interpretation and practices over the years, have so eaten away at this statute as to effectively nullify it is a decision for our courts and not for the Postmaster General.

This is essentially a judicial matter of deep significance, and the Postmaster General should not be hesitant in exposing these conditions to the critical public eye. Nor should he be reluctant to determine the matter in such a way that all phases of it may be fully considered and decided by a court of competent jurisdiction where every right and interest of the publication, the government, and the public may be fully protected.

In the absence of specific decision by our courts, and in view of the inconsistency in analogous cases and in administrative interpretations and practices, I am compelled to resort to the statutes themselves.

The language of the Act of Congress establishing the Fourth condition seems plain and specific. I am unable to distort the plain meaning of plain words.

The plain language of this statute does not assume that a publication must in fact be "obscene" within the 1889 intendment of the postal obscenity statutes before it can be found not to be "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry".

Writings and pictures may be indecent, vulgar, and risque and still not be obscene in a technical sense. Such writings and pictures may be in that obscure and treacherous borderland zone where the average person hesitates to find them technically obscene, but still may see ample proof that they are morally improper and not for the public welfare and the public good. When such writings or pictures occur in isolated instances their dangerous tendencies and malignant qualities may be considered of lesser importance.

When, however, they become a dominant and systematic feature they most certainly cannot be said to be for the public good, and a publication which uses them in that manner is not making the "special contribution to the public welfare" which Congress intended by the Fourth condition.

A publication to enjoy these unique mail privileges and special preferences is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. It is under a positive duty to contribute to the public good and the public welfare.

The editor of this publication admits that from its 1890 origin "our humor and our articles and our fiction all stressed a man alone angle—you might call it a

stag party type of treatment",[3] and testified "we called it the smoking room type of humor",[4] He stated that as a part of its editorial policy it runs "cartoons that do feature sex".[5] Its featured pictures are stated to be "frankly published for the entertainment they afford".[6] But when the polls of public opinion submitted by the publication are examined, it is found that these pictures were characterized as obscene or indecent by 19 to 22% of the persons interviewed, and that 20 to 26% of the persons polled would object to having them in their homes.[7]

The result of the distribution of such a publication is not without significance. As the publication's editor testified, Esquire "attracted a good number of imitators. There were various magazines which had various other related titles to that of Esquire, but the imitation copied only the superficial aspects, the smoking-room type of humor, much, much grosser than anything we had ever used ourselves".[8]

These imitators "would simply trade upon the superficial aspects of Esquire and emphasize what to us were the features that we least wanted to see become cheapened and common".[9] "I wouldn't say coarsened, but they cheapened almost the desirability and value of that kind of material by making it a commonplace, whereas we had thought of it as being a smart and an exclusive type of feature".[10]

1891

Whatever the featured and dominant pictures, prose, verse and systematic innuendos of this publication may be, they surely are not "information of a public character", or "literature, the sciences, arts or some special industry",

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3 Transcript of proceedings, page 1627.

4 Transcript of proceedings, page 1794.

5 Transcript of proceedings, page 1798.

6 Transcript of proceedings, page 28.

7 Respondent's exhibits 90 and 93.

8 Transcript of proceedings, page 1631.

9 Transcript of proceedings, page 1634.

10 Transcript of proceedings, page 1797.

I am unable to conclude that this publication complies with the Fourth condition or that Congress did intend or now intends that this publication be entitled to enjoy the second-class mailing privileges. I cannot assume that Congress ever intended to endow this publication with an indirect subsidy and permit it to receive at the hands of the government a preference in postal charges of approximately $500,000 per annum.[11]

In order to provide the publication ample opportunity to appeal this order to a court of competent jurisdiction to fully review and settle this matter in which the publication, the Post Office Department, and the general public have such a direct and substantial interest, the order revoking the second-class privileges of the publication will not become effective for 60 days.

Accordingly, the second-class mailing privileges of the publication "Esquire" are hereby revoked, effective February 28, 1944.

(Signed) FRANK C. WALKER
Postmaster General.

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* * * * * * * * * * *

1893 Filed Feb 8 1944

Stipulation

It is stipulated and agreed by and between the parties to the above entitled cause by their respective attorneys below named:

1. That the plaintiff shall be allowed to continue to mail its publication "Esquire" at Chicago, Illinois, New York, New York, and other Post Offices as second class matter at second class rates until the issues presented in this action are ultimately decided by the highest court which may consider the case.

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11 Transcript of proceedings, page 22.

2. In the event it is ultimately decided by the highest court which may consider the case that the plaintiff is not entitled to mail its said publication at second class rates, the plaintiff agrees that it will pay to the Post Office Department the difference between said second class rates and fourth class rates for the period from February 28, 1944, to the date of such final decision.

3. The record of proceedings had before the Post Office Department Hearing Board, including the exhibits which were offered at said hearing, shall be deemed to be a part of the Answer in this case without physically annexing the same thereto and the said record, including said exhibits, shall be available to plaintiff's counsel at all reasonable times.

CRAVATH, de GERSDORFF,
SWAINE & WOOD

By BRUCE BROMLEY
JOHN F. HARDING

1894

HOGAN & HARTSON

By EDMUND L. JONES
HOWARD BOYD

Attorneys for the Plaintiff.
810 Colorado Building,
Washington, D. C.

FRANCIS M. SHEA
Assistant Attorney General

EDWARD M. CURRAN
United States Attorney in and for the District of Columbia.

Approved:

T. ALAN GOLDSBOROUGH
Justice.

1895 Filed Apr 25 1944

Answer

Comes now the defendant, Frank C. Walker, as Postmaster General of the United States, through his attorneys, and for answer to the amended complaint filed herein says:

1. Defendant admits the allegations contained in paragraph 1.

2. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2.

3. Defendant admits the allegations contained in paragraph 3, except that he denies that he is a citizen of the City of Washington, District of Columbia.

4. Defendant admits the allegations contained in paragraph 4.

5. Paragraph 5 requires no answer.

1896 6. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6.

7. Defendant admits the allegations contained in paragraph 7, excepting that said second-class mailing privilege was revoked by the defendant effective February 28, 1944.

8. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8.

9. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9. Defendant admits that numerous copies of the magazine Esquire were sent through the mails each month at second-class rate of postage.

10. Defendant admits the allegations contained in paragraph 10.

11. Defendant denies the allegations of paragraph 11, except that defendant admits the magazine Esquire has a legitimate list of subscribers.

12. Defendant denies the allegations contained in paragraph 12.

13. Defendant admits the allegations contained in paragraph 13.

14. Defendant admits the allegations contained in paragraph 14.

15. Defendant admits the allegations contained in paragraph 15.

1897 16. Defendant admits the allegations contained in paragraph 16.

17. Defendant admits the allegations contained in paragraph 17.

18. Defendant admits the allegations contained in paragraph 18.

19. Defendant admits the allegations contained in paragraph 19.

20. Defendant denies the allegations contained in paragraph 20, except that he admits that he issued an order dated December 30, 1943, No. 23459, revoking the second-class mailing privilege of the magazine Esquire, effective as of February 28, 1944, as set forth in the copy of said order annexed to the amended complaint as Exhibit "A".

21. Defendant denies the allegations contained in paragraph 21.

22. Defendant denies the allegations contained in paragraph 22, except that he admits that more than 25,000 publications have been accorded second-class mailing privileges and are being regularly mailed as second-class matter at second-class rates.

23. Defendant denies the allegations contained in paragraph 23.

24. Defendant denies the allegations contained in paragraph 24.

25. Defendant denies the allegations contained in paragraph 25.

26. Defendant is without knowledge or information sufficient to form a belief as to the truth of the allega-

1898 tions contained in paragraph 26.

For further defense, the defendant says:

27. That as Postmaster General of the United States he is charged with the duties of administering the postal laws of the United States, including the duty of classifying mail matter into the classes prescribed by Congress, and particularly of determining which publications are entitled to classification as second-class mail within the applicable definition of Congress; whether any particular publication is entitled to such classification and the privileges incident thereto; and whether such classification and privileges, having been previously accorded to any publication should be annulled or revoked.

28. That in the performance of such duties, he caused notice to be sent to plaintiff to show cause why the classification of the magazine Esquire as a second-class mailing publication and the privileges accorded to it under such classification should not be revoked, as alleged in paragraph 14 of the amended complaint.

29. That in accordance with such notice, hearings were held before a board of officials of the Post Office Department, appointed by the defendant for that purpose, as alleged in paragraph 16 of the amended complaint. A large number of witnesses were heard by the Board, and much documentary evidence was submited to it, all of which is shown by the record of such proceedings.

30. That the functions and duties of said Board were to hear and to consider the evidence introduced be-
1899 fore it, and to advise and to recommend to the defendant the action which should be taken in the premises.

31. That at the conclusion of said hearing two members of the Board made a recommendation that the proceeding be dismissed and that the second-class entry of the magazine Esquire be continued in full force and effect. The third member of the Board recommended that the second-class privilege should be withdrawn.

32. That defendant fully considered the evidence presented to said Board and the recommendations made respec-

tively by the minority and majority members of the Board, and after such consideration, determined that the magazine Esquire for a long time past has not been published for the dissemination of information of a public character, nor has it been devoted to literature, the sciences, arts, or any special industry within the meaning of and as required by the fourth specification of Section 226 of Title 39 of the United States Code, and that it is not being published for or devoted to any such purposes or subjects. That in making said determination, defendant was required to and did exercise a judicial or quasi-judicial discretion duly vested in him by Congress; that defendant made said determination in good faith and in the exercise of a reasonable discretion; that said determination involved the decision of questions of fact requiring the exercise of judgment and discretion by defendant; that the said decision was based upon the evidence presented in the hearing; that said decision and determination are therefore conclusive; and that the exercise of his judgment and discretion by defendant is not subject to review or control by the Court.

1900 For further defense, the defendant says:

33. That the plaintiff has throughout the period here in question, to the detriment of the public welfare, and for purposes of its own commercial advantage, systematically included in its publication items of a salacious character, skirting as close to the edge of obscenity as it believed would avoid the loss of mailing privileges, all counter to the promotion of those purposes intended to be served by the second-class mailing privilege. That plaintiff has thereby been guilty of inequitable conduct in the matter with relation to which it seeks affirmative relief, and therefore this Court should decline to exercise its extraordinary powers of injunction in furtherance of plaintiff's improper ends.

34. There is made a part of this answer, the record of the proceedings before the Board of postal officials, with the exhibits attached thereto, in accordance with the provisions

of a stipulation previously entered into between the parties hereto.

Wherefore, defendant prays that the cause be dismissed at plaintiff's costs.

FRANCIS M. SHEA
Assistant Attorney General

EDWARD M. CURRAN
United States Attorney

JOSEPH A. FANELLI
Special Assistant to the Attorney General

BENEDICT S. DEINARD
Special Assistant to the Attorney General
Attorneys for the Defendant

WILLIAM S. WARD
Attorney, Department of Justice
Of Counsel

Service of copy of the foregoing answer acknowledged this 25th day of April, 1944.

HUGH LYNCH, JR.

1901 Filed Jun 7 1944

Pretrial Proceedings

Statement of Nature of Case:

This is a suit to enjoin the Postmaster General from enforcing an order revoking the second class mailing privileges of plaintiff's magazine, Esquire, and to have the court declare said order to be invalid and unauthorized by law. Plaintiff contends defendant has misconstrued the second class mail statute; that his construction would render the statute unconstitutional; and that his determination is not sustained by any evidence.

Defendant denies plaintiff's contentions, and contends that he was vested by statute with administrative discretion to determine whether or not plaintiff's magazine met the requirements of the second class mail statute; that defendant determined it did not meet the requirements of said statute; that said determination was based on substantial evidence and is therefore not subject to review by the courts. Defendant further claims that plaintiff is not entitled to equitable relief because it is without clean hands in that it has skirted as close to the edge of obscenity as it believed would avoid the loss of second class mailing privileges.

Stipulations: By agreement of counsel for the respective parties, present in Court, it is ordered that the subsequent course of this action shall be governed by the following stipulations, unless modified by the Court to prevent manifest injustice:

1. Defendant in this suit does not defend on the contention that plaintiff's magazine is obscene within the meaning of 18 U. S. C. 334, or that it is non-mailable within the provisions of that or any other statute, nor on the ground that plaintiff would not sustain irreparable damage if the order in question was wrongful and invalid.

2. That the copy of the so-called "supplementary recommendation" initialed by counsel is a true copy of a memorandum prepared by Walter Myers, Chairman of the Hearing Board, on or about November 22, 1943, and delivered by him to the office of the defendant, at defendant's suggestion.

3. That counsel for defendant will produce for plaintiff's inspection and at the trial, the files of certain magazines which have been admitted to second class mail privileges during the incumbency of the defendant as Postmaster General, which will be listed by plaintiff's counsel and will not exceed 50 in number.

1902 4. That defendant will produce for plaintiff's inspection and at the trial the available records of the Post Office Department with respect to denial or cancella-

tion of second class mailing privileges to publications on the ground that they did not meet the requirements of the fourth condition of 39 U. S. C. 226.

5. That a certified copy of auditor's statement showing profits, before and after taxes, realized from the magazine, Esquire, for the three fiscal years prior to said order, may be offered in evidence by plaintiff without formal proof as to foundation.

6. That this stipulation shall not prejudice the right of defendant to object to the admissibility in evidence of any of the foregoing items on the ground of materiality or relevancy.

Dated June 7th, 1944.

F. DICKINSON LETTS
Pretrial Justice.

Attorney's authorized to act:
EDWARD M. CURRAN
FRANCIS M. SHEA
Plaintiff.

HOWARD BOYD
Defendant.

II.

PROCEEDINGS DESIGNATED.

1904 Washington, D. C.

Monday, July 10, 1944.

1995 Filed Oct 28 1944

Excerpts from Opening Statements of Mr. Bromley on Behalf of Plaintiff and Mr. Dennard on Behalf of Defendant and Colloquy of Counsel and Court, All in Connection with Proceedings Before District Court.

Mr. Bromley:

There are before Your Honor some pleadings. There is a complaint by the magazine publisher, Esquire, Inc. It

alleges that the Postmaster General has misconstrued the statute, that his action is unlawful according to law, that his interpretation is not only contrary to the plain intent of Congress and all congressional committees who have considered the statute, but also contrary to the decisions of the courts, particularly the Court of Appeals of this District, and it is contrary to the established construction of the statute placed upon it by the Post Office Department for many years.

In its complaint the publisher seeks an injunction to prevent irreparable damage. The answer of the Department is a general denial first.

So therefore the issues to be tried here are: What is the proper construction of the fourth condition of the second-class statute? That is a question of law as to which no evidence is required and which I think should properly be considered upon final argument before Your Honor as a matter of law.

Second, I believe that the Supreme Court has consistently decided that it is important for any trial court to know something about the administrative determination or construction which has been placed upon a statute in question by the department charged with its enforcement.

1996 Thirdly, I suppose the issue is here, as in all injunction suits. Does this threatened injunction threaten irreparable damage to the plaintiff?

That has been stipulated out of the case because, in the pretrial order which I read to Your Honor, the Department has stipulated that it does not defend on the ground that plaintiff will not suffer irreparable damage.

I take it I need offer no proof on the issue of irreparable damage.

The answer of the Department, in addition to pleading a general denial, contains two affirmative defenses, each of which I believe raises only questions of law.

In the first place, the Government pleads that Your Honor has no power to review the order of the Postmaster General since it is alleged his determination involves an exercise of judgment and discretion and is therefore conclusive.

Of course, our answer to that is that the question is one of law and if an administrative official makes a mistake of law, of course any court has the right, the power, and the duty to review his action.

I find it somewhat surprising for the Postmaster General to assert this defense in the face of his repeated assertions in his order that he is making this decision against the magazine in order to compel the courts of this land fully and completely to review his action.

The second affirmative defense is a somewhat unique one in my experience. It pleads that the plaintiff comes into court with unclean hands because it is alleged that our magazine, while not obscene, has skirted close to the edge of obscenity, which the answer pleads is contrary to the purposes of the second-class statute as construed by

1997 Mr. Walker.

This defense is pleaded in spite of the fact, as I have repeatedly said, that the issue of obscenity has been stipulated out of the case and everybody agrees that the magazine is not obscene, is perfectly mailable and clean under the law.

Therefore, in this trial, as I see it, may it please Your Honor, the only item of evidence or proof which we shall seek to offer is on this single issue of what has been the administrative determination of this statute by the Post Office Department.

I think it is important to find out whether they have ever interpreted the statute this way before or not.

The Postmaster General claims the fourth condition of the statute about information and literature is ambiguous. I don't agree with that. It seems to me to be clear. It seems to me to entitle any magazine, so long as it does not

violate any statute and is mailable, no matter whether its contents are trashy or cheap or tawdry or bad literature or good literature, to these privileges, so long and only so long as it does not violate the criminal obscenity statute or the statute against subversive matter.

And there are many criminal statutes which make matter unmailable, such as treason. But, everyone agrees this magazine is mailable and violates no statute whatsoever.

The Court: What is the title and section of the statute in question?

Mr. Bromley: 39 United States Code 224 and 226, sir.

Now, I feel that the Court should have the benefit of the defendant's long-established construction of this
1998 statute, and I propose to show, if permitted by Your Honor, first, that there is a complete absence in its records of any instance where a Postmaster General has ever asserted the power or the right to pass upon the quality of the contents of a mailable magazine in applying this fourth condition. And secondly, I propose to show that this very defendant, Postmaster General Walker, in his Department, during his term of office, has had this very issue raised in the case of such magazines as this one I hold in my hand, the Police Gazette, where one of his hearing boards held that this publication, although a periodical, was so trashy as not to contribute to the public good.

One of his hearing boards found that very fact with respect to this magazine. One of the members of that board, Mr. Walter Myers, dissented. It came up for determination by the Third Assistant, and finally Mr. Walker himself, and he determined that he had no such power, that his magazine, being a periodical and meeting all conditions of the statute, was entitled to all these privileges, no matter what one might think as to the quality of its contents, but it nevertheless was literature; and that even though its pictures do not seem to be of the highest quality, the board found it did not violate the obscenity or any other statute and that it was mailable.

So I want to show by the records of the Post Office Department which I have subpoenaed here—and it won't take too long to do this—that the construction of the statute by Mr. Walker has been directly contrary to the construction he sought to put upon it in the Esquire case.

1999 And I would like to show further to Your Honor that there are now some 25,000 magazines which enjoy these privileges. And I want to show typical cases in which these privileges have been accorded to various types of magazines such as the comic magazines, that some of us try so hard to keep away from our children, little publications of pictures, so-called comic pictures, which are accorded the second-class privileges; the love and romance magazines, detective story magazines, the girl gag magazines, and the joke books are accorded these second-class privileges without any consideration being given to the contents.

This document I hold in my hand, "Exciting Comics," containing nothing but a lot of colored pictures for the amusement of our children, has the second-class privileges.

The Court: Pass it to the Court, please.

Mr. Bromley: Yes, sir. (Book handed to the Court.)

No Postmaster General has ever asserted that Congress intended him to pass upon the question of whether this stuff was worth while or whether it was not. Congress has said in effect in that fourth condition that anything that is a periodical which does not offend our criminal statutes, which is not obscene or treasonable, is entitled to second-class privileges.

There have been many debates about it and it has been studied, because it is an important problem, but everyone has arrived at the conclusion that this Nation could not with safety place in the hands of any one man or group of men the right to determine whether the contents of a magazine otherwise mailable were of such a character as to contribute or not contribute to the public good, and Con-

gress has left the statute as it was, saying that any magazine otherwise mailable which did not offend our obscenity laws was entitled to go through the mail with second-class privileges.

So our contention is that Mr. Walker has committed an error of law, and it is the plain duty of any court before whom this matter comes, to enjoin his effort to bar our magazine.

Our magazine is in all respects comparable to the Saturday Evening Post and Ladies Home Journal. It is a magazine of general circulation and has been issued once each month, it has been issued for more than ten years. It is read by more than a million readers and has been so read for many years. It is a magazine which has a high literary content. (pp. 10-17)*

* * *

Mr. Deinard: * * * * * *

The only contest between the publisher and the Post Office Department resulting in this lawsuit, is over this very simple question: Should the magazine be carried in the mails at second-class rates, or should it be carried at fourth-class rates? In other words, the sole question is the amount of postage which shall be paid by the publisher (p. 20)

* * * * * * * *

By the act of 1879, which is still in effect, substantially unchanged, mail matter was divided and classified into four classes. * * * * * *

Under that classification the first class, as Your Honor no doubt knows, consists of letters, so defined by the statute.

The second class consists of so-called periodical publications; the third class consists of what is known in

* Page references in connection with these excerpts are to stenographic transcript.

2001 the statute as miscellaneous printed matter; and the fourth class consists of merchandise, largely what is commonly known today as parcel post.

Those divisions, although they appear simple upon their face, are not of course of mechanical or automatic classification. It may sometimes be a question of nicety as to whether a particular packet belongs in the second class as a periodical publication, or in the third class as miscellaneous printed matter. It may be a fine question as to whether an article belongs in the first or fourth class.

For that reason authorization for administrative responsibility has been consigned to the Post Office by the Congress, which has for the past 65 years been charged with the responsibility of determining into what class a particular item of mail matter falls, and therefore what postage the sender shall pay for its carriage. (pp. 21-22) * * *

When we get to the qualifying conditions to which a publication must conform in order to secure admission to second class, assuming it is already qualified as a periodical, those are the so-called four conditions for second class to which counsel has referred.

The * * * fourth * * * condition which is here important, is to the effect that it, referring to a periodical publication, must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, the arts, or some special industry, and having a legitimate list of subscribers. (p. 23) * * * * * *

The Court will observe that the fourth condition differs quite radically from the other three. It does not re-

2002 late to the visible or physical characteristics of the periodical. It relates to its underlying purpose. And I point that out at this time because, no matter how cavalierly counsel may brush the fourth condition aside, the debates in Congress, the legislative history of the statute, the observations that were made by official commissions called upon to inquire into this, all clearly demonstrate one very obvious fact. When Congress granted the second-class

privilege, it gave to users of second class what amounts to a tax exemption, what amounts to a bounty, which President Taft in his message to Congress in 1912 referred to, and very properly, as a subvention. (p. 24) * * * * *

That gets back to a fundamental and inescapable fact that this subvention, this virtual tax exemption, was granted to users of the second-class mail not because of the physical characteristics of the mail matter. It had no relation to the cost of transmission of the mail. It was granted because Congress had concluded that it was in the public interest that the transmission which would contribute to public education, the dissemination of worth-while matter of some cultural value and of some educational value, be fostered by Congress.

I say that is one inescapable fact, and it is obvious, in view of the nature of the bounty.

Now, in this case Esquire magazine was cited and, as counsel has already mentioned, the actual proceeding before the Post Office Department was bottomed on two issues in litigation. One was the magazine obscene within the criminal statute which declares it a crime to mail obscene literature and which declares such matter nonmailable and directs the Postmaster not to receive it or carry it through the mails. The second issue was whether or not Esquire was originated and published for the dissemination of information of a public character or devoted to literature, the sciences, the arts, or some special industry within the purview of the fourth section of section 226, which I call to Your Honor's attention, qualifying it for carriage at the nominal rate. (pp. 25-26) * * * * *

The postmaster General * * * concluded * * * that regardless of the question of statutory obscenity, upon which he did not pass, that Esquire did not comply with the requirements of the fourth condition so as to qualify it for the nominal second-class rate. And he did so upon a finding that Esquire, as a systematic feature, or systematic and habitual feature, I believe is the wording of the order, de-

voted itself to girl gag cartoons, the Varga calendar of nude women, and to other items which he declined to regard as matters of public information or information of a public character, and which he declined to believe constituted a contribution to literature or to the arts.

In other words, the Postmaster General's order is bottomed on a finding made by him upon a very extensive record, that the real design of Esquire, its real devotion as contrasted with its professed devotion, does not relate to the benign purposes which Congress had in mind and which are enumerated in the fourth condition.

Therefore the issue that is presented before Your Honor is, I suppose, a narrow one. As counsel has pointed out, there is not a statutory review of the action of the Postmaster General. * * * This is an independent proceeding in equity which calleneges the Postmaster General's order on the ground that it is void, and it is not upon that
2004 ground that this action could be launched or successfully maintained.

Now, the rule with reference to judicial review or reexamination of an administrative order of this type, is a matter with which I know Your Honor is fully familiar. While there may be some variance in the expressions of the courts, there is no doubt about the fact that Your Honor is not setting up the case de novo, Your Honor is not, I am sure, going to undertake to supplement the authority of the Postmaster General.

The question, I take it, that we are going to fry is: Is the Postmaster General's order so without the statutory authorization granted him that it constitutes a complete, willful, arbitrary or fraudulent exercise of administrative power.

In other words, is the record so devoid of support in the law or in the facts that a court can say that no responsible officer could have entered the order here challenged?

Now, that being the scope of the review, it is of course our position that the Postmaster General's order carries

with it a presumption of its correctness, even as to matters of law and their specific application to the construction of the statute, and that the findings of the Postmaster General with respect to the ultimate facts are final and conclusive in this proceeding. Or, at least let us say, are final if there is any evidence in the record to support them. (pp. 27-28)

* * *

Mr. Deinard: The Postmaster General did not say that the statute was ambiguous. Quite the contrary. He said the statute was crystal clear to him. He referred to its clear and common-sense meaning. He also stated in his order, what they all frankly admit, that there has been laxity with respect to the actual enforcement of this statute.

2005

We shall frankly admit that other magazines have been accorded second-class privileges, which under this decision probably should not have second-class privileges. However, we challenge, and I think this is an appropriate time to raise the question, the right of plaintiff to produce here and offer proof as to administrative practice. (p. 33)

* * *

Therefore the ground of our motion to suppress raises precisely the question counsel raised, as to whether or not the Court will allow plaintiff in this case an opportunity to offer testimony as to what action the Post Office Department has taken with respect to other periodicals.

Now, of course, it is our position that no such testimony is competent. That is the reason I call to Your Honor's attention that this is not a judicial review, but an independent proceeding in which the Postmaster General's order is being challenged collaterally on the ground it is void.

There is no doubt under the decisions of the United States Supreme Court, that in any proceeding such as this, the validity of the Postmaster General's order must be determined from the record upon which he acted, and cannot be tested or challenged upon the basis of evidence offered to

the court which was not before the Postmaster General. (pp. 35-36)

* * * *

Mr. Deinard: * * * altogether apart from the question of the jurisdictional matter raised as to the quantity
2006 of the record upon which this court acts, it is our position that what was done in other cases, or rather, what was not done in other cases, is purely collateral and throws no light upon the controversy.

It is quite clear from the decisions of the United States Supreme Court that in no event is proof of administrative so-called contemporaneous construction admissible unless the statute is ambiguous. (p. 37) * * * * * *

Now, obviously, no executive can annul a statutory grant of power to his department by declining to exercise it, and that is the most that counsel's proof, if offered, would show.

And as your Honor's question suggested, the Postmaster General's order on its face shows that the statute has not been regularly enforced. If that is all that counsel wants to show it appears ample from the statement of the Postmaster General which I read to the Court—(p. 38)

* * * *

Mr. Deinard: * * * *

I am perfectly willing to say to the Court that a number of other magazines which counsel thinks are of low quality, are still retaining their second-class privileges. Beyond that I don't know that we can go. * * * * * *

Furthermore, the mere fact that other publications of which counsel does not approve are still receiving second-class rates does not prove by any means that if the order here challenged stands, they are going to continue to receive second-class rates. It is certainly to the honor of the present incumbent of the office that he is willing to challenge practices which he does not regard as within
2007 the intention of Congress, and which his predecessors have, through administrative laxity, lack of person-

nel or whatever it may be, permitted to travel at a bounty figure. (pp. 41-42)

* * *

Mr. Bromley: I proceed under a decision of the United States Supreme Court by way of analogy—there are many of them—but the decision of the Supreme Court in the case of United States v. Chicago and North Shore Railroad Company. There was a question as to whether a certain railroad was an interurban electric railway within the meaning of the section of the Interstate Commerce Act. If it was an interurban electric railway it was exempted from obtaining authority from the Interstate Commerce Commission and the Court had before it, and it is a question of interpreting the statute, whether it applied to this type of railroad, and the Supreme Court said:

"All doubt is removed by the application of the rule that settled administrative construction is entitled to great weight and should not be overturned except for cogent reasons."

It seems to me that if I can show your Honor that over the years this Post Office Department has never done anything else under this fourth condition except to look at the proffered magazine and say, "Is this a periodical or isn't it? If it is it doesn't make any difference what it contains; as a matter of right it is entitled to the second-class rates," and that that is all the Department has ever done. * * * * * *

And I want to show that over the years any piece of paper which has been tendered to this Department
2008 and any reasonable man can look at it and say, "This is a magazine regardless of whether it is filled with this ridiculous trash and these silly jokes; but this is art, that is literature," and if a little document called Halt has a legitimate list of subscribers it is a periodical, I want to show that the Government has never given any consideration such as Mr. Walker now gives to our magazine, to what is in it, and I think it will be of the

greatest help to show that he himself, as well as his predecessors, has admitted the privileges to all sorts of periodicals, and the only test ever applied is the question, "Is it a magazine?"

He himself has had that very question presented to him and he himself has ruled that the statute did not give him that power.

It seems to me to be of the greatest assistance in showing what the Post Office Department has done under this law. (pp. 43-45)

* * * *

The Court: There is therefore a field here as to whether or not the Post Office Department is bound by the previous acts in this series of transactions, and if it is not bound then we don't see how the introduction of these other publications will be material in the case.

Mr. Bromley: I think every court that has had the question before it has felt that the Postmaster is bound by the action of his predecessors to the extent that if he construed a statute—if his predecessors consistently construed a statute in a certain way—that is an important argument for saying, "That is what the statute meant." (p. 47)

* * * *

2009 Mr. Deinard: * * * * * *

Under the decisions of the Supreme Court there is no doubt about the fact that there is nothing in the nature of an estoppel. (p. 48)[1] * * * * * *

Here we have an independent proceeding with a collateral attack upon the order. The question of whether the order is void or not depends upon what evidence was presented to the Postmaster General and if counsel thought that there was any probative value in the record of the admissions of other publications, it was of course his duty to offer that testimony before the hearing board.

[1] The second of two pages of stenographic transcript, both of which are numbered page 48.

We have a complete record here and I don't see that it is competent or admissible, and to refer summarily to what has already been mentioned, I don't see how it can aid the Court.

Let's assume that the Court comes to the conclusion that the Government has been lax. I surely admit that. The Postmaster General admitted it in his order. I will say of record that if this order stands other publications which are now getting the second-class privilege will no longer get it. Upon that admission is there anything else which would be helpful to the Court? (pp. 50-51)

• • •

The Court: At present it would indicate that there would be involved in the Court's ruling a question as to whether or not the trial would be limited to the record as heretofore made in the hearing before the Postmaster General, or whether we would permit counsel to offer some
2010 additional evidence.

We will not limit the hearing exclusively to the record heretofore made, but will within the discretion of the Court admit other evidence, passing upon it as it may be offered. (p. 53)

• • • • • • • • • • •

1905 Thereupon,

J. O. Bouton,

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bromley:

Q. Where do you live, Mr. Bouton? A. Washington, D. C. Do you want the specific address?

Q. You live in Washington? A. Yes, sir.

Q. What is your business, sir? A. I am superintendent of the Division of Newspaper and Periodical Mail under the Third Assistant Postmaster General of the Post Office Department.

Q. Will you speak a little slower and louder, please? A. I am superintendent of the Division of Newspaper and Periodical Mail in the Bureau of the Third Assistant Postmaster General, which is under the jurisdiction of the Postmaster General.

Q. For how long a time have you held that position? A. Since January 1 of this year.

Q. Prior to that time you were with the Post Office Department? A. That is right.

Q. Tell us briefly how long and what the nature
1906 of your duties has been. A. I have been with the Post Office Department 26 years in round numbers. My duties largely have been, that is, mainly, with the Classification Division, which was divided January 1, and they had to do with the classification of mail matter. Specifically and immediately my duties are with respect to newspapers and periodical publications entered as second-class matter in the mails.

Q. Is it a fact that the Department is referred to as the Classification Department? A. The Classification Division of the Third Assistant's Bureau, but now that has been divided into two or three divisions, and it is now the Division of Newspaper and Periodical Mail. When this action was instituted it was the Division of Classification.

Q. And it had been the Division of Classification for many years prior thereto, had it not? A. That is right.

Q. And it was the business of that division to determine which newspapers and periodicals were entitled to second-class privileges. Is that right? A. We gave consideration to that.

Q. That division was the division charged with the duty of determining that question, wasn't it? A. Subject, of course, to the general set-up of the Department.

Q. You mean the Chief of the Department, or,
1907 finally, the Postmaster General had the last word?

A. I suspect that would be right.

Q. But it was the duty of your department, subject to the approval of the Postmaster General, to make that determination, wasn't it? A. That is right.

Q. Isn't it a fact that over the 25 years or so you were there, that your department kept what is called precedent files? A. In general terms, yes, that is right.

Q. And you are familiar with those files, are you not? A. To a large extent.

Q. You have examined them in preparation for your testimony here, have you? A. No, I have not. I happen to know them pretty well. I have not examined them particularly for this.

Q. At any rate you are familiar with them? A. Yes, sir.

Q. And you are familiar with the grounds on which magazines have been ruled out under the fourth condition of the second-class statute, aren't you?

Mr. Deinard: You mean during his incumbency, counsel?

Mr. Bromley: During the 25 years he has been there.

The Witness: Yes, in particular cases, that is

1908 right.

By Mr. Bromley:

Q. Can you show us from your recollection of your Department's practice, or from the files, a single instance where a mailable periodical of general circulation has either had its second-class privileges revoked or refused on the ground of non-compliance with the fourth condition because the quality of its contents did not contribute to the public good and welfare?

Mr. Deinard: May I at this time, Your Honor, have my objection to any further testimony along this line, on the ground it is incompetent, irrelevant, and immaterial, no foundation has been laid, and more particularly that the question before the Court is up solely upon the administrative record, and on the ground there is no ambiguity in the statute which the Court is asked to construe, and no estoppel can run against the Government with respect to administrative interpretation, and there is no showing of any administrative order on any comparable periodical.

The Court: He may answer the question.

Mr. Bromley: Do you remember the question?

The Witness: Will you repeat it?

Mr. Bromley: The reporter will read it with the Court's permission.

(Pending question read as above recorded.)

Mr. Deinard: May I add to that as a ground that
1909 the question in the latter part, which I had not noted, does not correctly relate to the Postmaster General's order and assumes facts not in evidence, that not being a specific ground on which the Postmaster General acted.

The ground was that the magazine was not originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry.

The Court: We have that finding before us.

Mr. Bromley: Have you forgotten the question again, sir?

The Witness: As to the latter part of the question I can show you cases where I can say we have dealt with the fourth condition. But right now I can't recall any that used that particular language.

It might be that it meant the same thing, but right now I don't remember any particular case.

The Court: Counsel, see if you can restate your question in a few sentences or a few words.

By Mr. Bromley:

Q. Isn't it a fact that the Department has never given consideration to the question of whether or not the contents of a magazine contributed to the public good or welfare?

Mr. Deinard: May my objection stand, Your Honor?

The Court: You may have the benefit of your objection.

The Witness: It must have some value, but I
1910 can't say that I have used the same language as you have used there.

By Mr. Bromley:

Q. Isn't it a fact that you have never considered the quality of the contents of the mailable magazine from the standpoint of whether it made a special contribution to the public welfare? A. I have not considered any quality measure. I have considered the fourth condition, however.

Q. Certainly. What your Department does is to seek to identify a proffered magazine as to whether or not it is a periodical? A. Pursuant to an application for its admission.

Q. And you seek to determine whether or not it is a periodical in the commonly accepted sense of the term, don't you? A. That is part of the reasoning, yes, sir.

Q. And you make no investigation to determine the literary merit or the quality of the contents of the magazine, do you? A. Not with respect to the merit, but we do examine it as to whether it falls within that condition.

Q. I am trying to confine your answer to merit. You never make any investigation as to merit or worth-whileness of the material, do you? A. Indirectly we might

1911 in arriving at the design or purpose of the publication. I don't believe I can answer your question yes or no in fairness to the proposition. We examine it to see the design and purpose of the publication.

Q. You mean you examine it to see whether the

1912 information is public or private? A. Not exactly.

Q. That is one thing you have in mind? A. That is one thing.

Q. If there is submitted to you a paper published by my Episcopal Church in Brooklyn, devoted to our church affairs, the Department would not give that second-class would it? A. Wholly to your church affairs?

Q. Wholly to my church affairs. A. Not right off.

Q. Your idea is it is not public information? A. It does not fulfill the fourth condition.

Mr. Deinard: That isn't the exact wording.

By Mr. Bromley:

Q. It is not information of a public character? A. It is not information of a public character. That would probably be the reason.

Q. When you said you gave consideration to the contents of a document, that is what you had in mind? A. That is right, and further the fourth condition.

Q. What other consideration do you give to the quality of the contents of a proffered periodical? A. We don't have a quality standard that this is good literature or bad literature, other than whether it is mailable, but we
1913 have to consider as to whether it is such a periodical publication as comes within the whole statute.

Q. When you say you consider whether it is mailable or not, you mean— A. I didn't mean to say I did. That is the Solicitor's job. I meant to qualify my statement about good or bad. I didn't mean bad as to being unmailable. I meant as to a standard of merit, its worth.

Q. Since you have used the word, you know what "mailable" means, don't you? A. Using the different terms.

Q. There are a lot of criminal statutes which provide that certain kinds of materials like obscene material shall not only constitute crimes, but also provide that such material is not mailable? A. That would be a question for the Solicitor.

Q. When you used the word "mailable", you used it in that sense? A. That is right.

Q. And you say it is not part of your duty to determine whether a proffered acticle is mailable or not? A. We would say that is the type of publication that should go to the Solicitor's department as to ruling on that feature.

Q. So your duty is limited to identifying as to
1914 whether a proferred article is a magazine or not under the second-class— A. That is a fair statement.

Q. And you pay no attention to the quality of its contents except in so far as the question of contents bears upon

identification. Isn't that right? A. I suspect that is about right. I don't say that we weigh the worth of that literature, if that is what you mean.

Q. Now then, isn't it a fact, Mr. Bouton, that there is no evidence in your files which shows that your predecessor did other than follow that course, 'way back to the beginning of the Department? A. I think that is right.

Q. Now, you are familiar with the granting of second-class privileges to various types of magazines, aren't you? A. That is right.

Mr. Bromley: May I have marked for identification, if Your Honor please, what purports to be a magazine called Gags dated July?

The Court: It may be marked.

(The document referred to was marked as Plaintiff's Exhibit No. 1, for identification.)

By Mr. Bromley:

Q. Will you look at Plaintiff's Exhibit No. 1 and tell me whether that is a periodical which has received the second-class privileges under the Second-Class Law and especially under the fourth condition?

1915

Mr. Deinard: We object to that question on the grounds already mentioned and on the ground that the witness, by virtue of the position he occupies cannot commit the Department and his superiors to any view or opinion he might venture, and on the additional ground that it appears that the exhibit marked for identification and tendered to the witness is a July issue, in other words, issued after the proceeding before the Post Office Department was closed and after the Postmaster General's order was made and, therefore, after the commencement of this proceeding and, therefore, could not affect the order of the Postmaster General which is challenged in this proceeding.

The Court: I overrule the objection.

Mr. Bromley: Do you have the question in mind?

The Witness: Yes sir, I have the question in mind.

By Mr. Bromley:

Q. How do you answer it? A. Off the record I would like to say—

Mr. Bromley: (Interposing) I object to any statements off the record. He wants to say something off the record.

The Witness: Ordinarily we don't discuss another person's publication, and to answer this question I would have to —

The Court: What we understood counsel is seeking to elicit is this in part: If that document or that publication that you hold was presented to you for classification as second-class mailing matter, what would you do in determining and passing upon the application and how would you arrive at a determination of the matter?

1916

The Witness: That is what I was going to say, that this particular publication is under study now and, while I don't like to say what the Department is doing —

Mr. Deinard: (Interposing) If it is under investigation or scrutiny now, I suggest this is not an appropriate example to proffer to the witness.

The Court: We think the question contemplates what has been the practice through the time since he has been in there. Go ahead.

The Witness: This publication is under study now. As my recollection from one of many, it is that it has had a second-class entry.

By Mr. Bromley:

Q. When did it get it, sir? A. I was going to finish. This particular publication we have here does not have an entry at this time at the place sought.

Q. At what? A. At the place sought for entry, and that is being given consideration.

This publication has applied for re-entry as second-class matter.

Q. Won't you look at the appropriate place and
1917 see if it does not say it is second-class? A. It has not been entered as second-class at the place sought.

Q. Doesn't that magazine have second-class privileges? A. It is so accepted under the provisions of the laws and regulations pending action on the request for re-entry.

Q. Hasn't it had second-class privileges for many years? A. I wouldn't say for how many years. It has had second-class entry. It is now being considered on a re-entry basis.

Q. Will you look at your file and tell me when it got second-class privileges? A. The file is in the large boxes, I believe.

Q. Will you have somebody get it out and look at it, please?

What is the date, sir?

A. Yes, sir. I find it was entered as second-class matter August 15, 1941.

Q. At that time was the then-current issue submitted to your office for examination? A. The current issue with the application was submitted.

Q. Yes. It was submitted? A. That is right.

Q. And was examined? A. Yes, sir.

1918 Q. Is that issue which was submitted in connection with the application of Gags for second-class privileges in your file? A. I will have to determine.

Q. Will you look? A. Yes, sir, I will. Yes, sir, I believe it is.

Q. It is the issue dated what? A. May 1941.

1919 Mr. Bromley: May I have that marked for identification if Your Honor please, as Plaintiff's Exhibit 2 for identification?

The Court: It will be so marked.

(The document referred to was marked Plaintiff's Exhibit 2 for identification.)

Mr. Bromley: I offer in evidence Plaintiff's Exhibits for identification 1 and 2.

Mr. Deinard: They are objected to on the ground that they are irrelevant, incompetent, and immaterial, no foundation laid, no probative value in the case, and they neither tend to prove or disprove the validity of the Postmaster General's order.

The complaint alleges, and the answer admits, that there are 25,000 publications that are presently admitted to second-class. That doesn't take count of the publications that have not been admitted.

I submit to Your Honor that it is wholly impractical for the Court to conduct an inquisition into the practices of the Post Office Department on a comparative basis.

The Court: We get your theory of the case. They are received.

(Plaintiff's Exhibits 1 and 2 were received in evidence.)

By Mr. Bromley:

Q. Are you familiar with a publication known as Hit? A. I know the name. I would have to have the file before I would know much about it. I know the name.

Q. Do you know whether or not it was admitted to second-class privileges sometime in the past? A. Without looking at the file I think it was, but I would have to have the file on that.

Q. Will you get the file, please? The magazine Hit was granted second-class privileges on September 15, 1943, wasn't it? A. It was reentered as second-class matter on November 15, 1943.

Q. And it was granted as of January 18, 1943, wasn't it? A. Originally entered September 15, 1943, as of January 18, 1943. The reentry was dated — you are speaking of the original entry?

Q. Yes. A. That is right.

Q. What issue was it that was examined by the Post Office Department on the basis of which the second-class

privileges were accorded to the magazine Hit? A. This publication has a considerable story to it.

1921 Q. Can't you answer that question? It was the November issue, wasn't it? A. I can give you that in just a minute.

Q. Wasn't it the November issue? A. Just a minute. November, 1943.

Q. And that issue is in the file, isn't it? A. It should be. I will see. That issue is in the files.

Mr. Bromley: I ask that it be marked as Plaintiff's Exhibit 3 for identification.

The Court: It may be marked.

(The document referred to was marked Plaintiff's Exhibit 3 for identification.)

The Witness: Both of these publications were studied by the Solicitor's Office, I might say.

Mr. Bromley: I offer Plaintiff's Exhibit 3 for identification, in evidence.

Mr. Deinard: We object to the receipt of Plaintiff's Exhibit 3 on the ground that it is incompetent, irrelevant, and immaterial, and no foundation laid.

The Court: That will be overruled for the present.

(Plaintiff's Exhibit No. 3 was received in evidence.)

Mr. Bromley: Will Your Honor take a look at that
1922 exhibit, if you please?

(Exhibit 3 was handed to the Court.)

By Mr. Bromley:

Q. Will you look at your file on the magazine Halt, please? A. I didn't understand you.

Q. Will you look at your file on the magazine Halt? When was the magazine Halt given second-class privileges? It was in January 1942, wasn't it, Mr. Bouton? A. I just wanted to make certain. After study and reference to the Solicitor it was admitted January 1942 as of October 27, 1941.

Q. And this admission to second-class privileges was made after inspection of the January 1942 issue by the Department, wasn't it? A. That is right.

Q. Will you produce the January 1942 issue, please? A. I have it here.

Mr. Bromley: I offer it in evidence as Plaintiff's Exhibit 4, if the Court please.

Mr. Deinard: We object to that as incompetent, irrelevant, and immaterial, if the Court please.

The Court: The objection is overruled.

(The document referred to was marked Plaintiff's Exhibit 4 and received in evidence.)

1923 Mr. Bromley: Will you show it to the Court, please.

(Plaintiff's Exhibit 4 was handed to the Court.)

By Mr. Bromley:

Q. Will you get your file on Hello Buddies, please? Second-class entry was granted to the magazine Hello Buddies as of January 14, 1942, was it not? A. After having been referred to the Solicitor's Office for advice, it was admitted as second-class matter on March 13, 1942, as of January 20, 1942.

Q. And the copy submitted for your examination and examined by the Department, was the April 1942 issue, was it? A. I believe the March 1942 issue, Mr. Bromley.

Q. Will you produce the March 1942 issue, please? A. I have it here.

Mr. Bromley: I offer it in evidence as Plaintiff's Exhibit 5.

Mr. Deinard: To which offer the defendant objects on the ground that the exhibit is incompetent, immaterial, and irrelevant.

The Court: Overruled.

(The document referred to was marked Plaintiff's Exhibit No. 5 and received in evidence.)

By Mr. Bromley:

Q. Will you get your copy of Army and Navy Fun Parade?

1924 The Court: How many of these publications do you desire to offer, counsel?

Mr. Bromley: I should think half a dozen.

The Court: This is five.

Mr. Bromley: It will be four because I have two of one kind. I would like permission to offer about five more, if I may.

The Court: If you have a copy of the plaintiff's publication, we would like to have it also.

Mr. Bromley: Yes, Your Honor. There were eleven issues. I show Your Honor the February 1943 issue. I have all eleven if Your Honor would like them, but they are all substantially the same.

(February 1943 issue of Esquire was handed to the Court.)

Mr. Deinard: May I suggest that you give to the Court the January 1943 issue?

Mr. Bromley: Certainly, any issue you want.

The Court: We will be glad to look at them both.

By Mr. Bromley:

Q. The magazine Army and Navy Fun Parade was granted second-class entry on January 7, 1942, wasn't it? A. That was not the exact title of it then. The title then was Fun Parade, if that has any significance. That publication, under the title Fun Parade, after a ruling on

1925 it by the Solicitor's Office, was entered as second-class matter on January 7, 1942, as of November 19, 1941.

Q. And these privileges were given on the basis of an inspection of the January issue? A. The January issue.

Q. Will you produce it, please? A. 1942. I have it here.

Mr. Bromley: I offer it in evidence as Plaintiff's Exhibit No. 6.

Mr. Deinard: To which the defendant objects as being immaterial, irrelevant, and incompetent.

The Court: Same ruling.

(The document referred to was marked Plaintiff's Exhibit No. 6 and received in evidence.)

By Mr. Bromley:

Q. Will you get your file on Comic Cavalcade? The magazine Comic Cavalcade received second class privileges November 13, 1942, didn't it? A. This publication was entered as second-class matter under date of May 4, 1943, as of November 13, 1942.

Q. On the basis of the issue for the spring of 1943, was it not? A. That is right.

Q. Will you produce it, please? A. I have it here.

1926 Mr. Bromley: I offer it in evidence as Plaintiff's Exhibit No. 7.

Mr. Deinard: To which the defendant objects as incompetent, irrelevant, and immaterial.

The Court: Same ruling.

(The document referred to was marked Plaintiff's Exhibit No. 7 and received in evidence.)

Mr. Bromley: Would Your Honor look at this Exhibit 7, please, for a moment?

By Mr. Bromley:

Q. Plaintiff's Exhibit 7 is what is sometimes referred to as a joke book, is it not? A. I would like to see it again.

Q. You have one before you. A. No, I have not—oh, here it is.

Q. I withdraw that question.

Plaintiff's Exhibit 7 is what is usually referred to as a comic magazine, isn't it? A. A so-called comic, yes, sir.

Q. The Department has uniformly granted second-class privileges to hundreds of such magazines over the past several years?

Mr. Deinard: The defendant objects to that. There
1927 is no foundation laid and it is not the best evidence of the records of the Department.

Mr. Bromley: If I produced those, you wouldn't like that.

The Court: You are making a different objection. You might elaborate a little on that.

Mr. Deinard: At this point counsel is inquiring of the witness on the basis of one sample which has not been testified to as a representative sample. On the basis of that he proposes to ask the witness whether the Department has not uniformly granted second-class entry to comic magazines. That calls for a conclusion of the witness as to records which are not produced, and by virtue of his office he is not authorized to commit the Department as to his personal view of what the official practice of the Department has been.

The Court: We inferred the question to mean as to whether or not the privilege had been continuously granted. If there is any special purpose in the question other than that, we will hear from you on it, counsel.

Mr. Bromley: I meant by the question, sir, to ask if this magazine was not typical of a lot of other comics which had received these privileges. Rather than to go into each one of the comics which received these privileges, I wanted to ask if this was not typical of many, many magazines which have been granted the privilege.

The Court: He may answer.

1928 The Witness: Each magazine must be individually considered, on its own merits, as it comes in. I don't believe I can just say it is typical.

1929 Further, my own position in the matter probably should require a little different answer than "yes" or "no."

Q. Second-class privileges have been extended to many comic magazines, haven't they? A. The so-called comic magazines, some of them have received second-class entry after they have met certain conditions.

Q. Isn't it—

Mr. Deinard: You have not finished, have you?

The Witness: It represents, you might say, an innovation in the presentation of stories. If you want me to expand further—

By Mr. Bromley:

Q. I just want you to tell me— A. They are entered under certain conditions.

Q. Many of them? A. Several of them.

Q. There are dozens of them, aren't there? A. That would include dozens. Maybe a hundred or more. Each one is considered on their own merits.

Q. But they are all about alike in that they have series of comic cartoons? A. Well, they tell a story in pictures and after certain other conditions are met you have to consider that. If you want me to explain a little bit how you 1930 do it—I am answering "yes" or "no" on these questions as to whether they are admitted without giving the reason for it.

Q. Each of these magazines contains not over two pages of textual matter? A. I wouldn't say that.

Q. As a minimum? A. I wouldn't say that. They usually tell their story in pictures.

Q. Do they have textual matter? A. I am coming to that.

Q. Can't you tell me whether or not they have textual matter? A. Indeed they do.

Q. That is what I wanted to know. A. They have a reasonable amount of textual matter.

Q. You also grant second-class privileges to detective magazines, don't you? A. If they meet the conditions, yes, sir.

Q. And you grant them to love and romance magazines, don't you? A. You are using a general term. Those magazines with love stories in them are entered if mailable, yes.

Q. You are familiar with the publication The Police

Gazette, are you not? A. To a certain extent, yes, sir.

1931 Q. Will you get out your file on that publication, please? A. It is National Police Gazette, to make your records exact.

The Court: After the presentation of the next exhibit, counsel, the Court will proceed to recess.

The Witness: I have the file here, counsel.

By Mr. Bromley:

Q. Will you produce, please, the order to show cause dated January 9, 1943? A. I have located it, Mr. Bromley.

Mr. Bromley: I offer it in evidence.

Mr. Deinard: As I understand it, the offer is directed to an order to show cause issued in that proceeding.

Mr. Bromley: Yes.

Mr. Deinard: To which the defendant objects on the ground it is an attempt to inquire collaterally into another and entirely unrelated periodical. This I conceive is on a different basis than exhibiting to Your Honor a type of periodical which is claimed to currently enjoy second class privileges.

Now counsel is attempting to explore the proceedings of the Post Office against another periodical.

The Court: I will hear from counsel on the materiality and relevancy.

Mr. Bromley: I have three instances, may it please Your Honor, in which the Postmaster General's Depart-

1932 ment cited magazines like the Police Gazette on applications for restoration of their second-class privileges, in which the proceeding was brought on the ground that the contents of these magazines did not constitute public information or literature or art.

The matter in each instance was litigated in the Department. The final result of each was that the Postmaster General concluded that the statute did not give him any power with respect to passing upon the contents of the magazine, and after the litigation the magazines were admitted by him to second-class privileges.

This item of evidence having to do with these three magazines constitutes administrative interpretation of the statute by this Department in situations where the precise question was litigated and decided by him. It seems to me that they are examples of administrative interpretation of the greatest value because they were done after careful consideration.

The Court: You offer them as showing administrative practices?

Mr. Bromley: Yes, sir.

The Court: I don't think the Court would be bound by them, but I don't think it would prevent the Postmaster General from acting differently after further consideration. Even the Supreme Court can change its theory, you know.

Mr. Bromley: And it sometimes does.

1933 The Court: I believe we will let you offer them.

Mr. Bromley: May the order to show cause, then, be marked as Plaintiff's Exhibit No. 8?

The Witness: Shall I leave it in the file?

Mr. Bromley: Leave it in the file. I don't think we need disturb your file, sir.

The Court: It may be marked.

(The document referred to was marked as Plaintiff's Exhibit No. 8, for identification.)

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1934 Washington, D. C.

Tuesday, July 11, 1944.

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1935 Mr. Bromley: Although I think it was received in evidence, the record does not show that Plaintiff's Exhibit 8, the Order To Show Cause, of June 9, 1943, was received. I therefore now offer it in evidence.

Mr. Deinard: I assume that the record shows our objection—or does it, Mr. Bromley? If not, I should like the record to show that we object on the grounds already indi-

cated, that the order is incompetent, irrelevant, and immaterial.

The Court: It will be received.

(Plaintiff's Exhibit No. 8 was received in evidence.)

By Mr. Bromley:

Q. Will you produce from your file, Mr. Bouton, the majority opinion of the Hearing Board in the Police Gazette case, dated August 2, 1943? A. Did you read the date, Mr. Bromley?

Q. August 2, 1943? A. I have it.

1936 Mr. Bromley: I offer it in evidence as Plaintiff's Exhibit No. 9.

Mr. Deinard: Now, I don't want to tire Your Honor with objections, but I should like to point out in support of our objection that this is incompetent, irrelevant, and immaterial, that this stands on a different basis than the items of periodicals which counsel was permitted to offer yesterday, I assume as illustrative matter. This relates to recommendations of a Hearing Board appointed to consider an application for reentry of the National Police Gazette. That hearing was held under a different provision than the hearing held by the Postmaster General in this case.

You see, the statute which we mentioned, section 252 of the Code, provides in substance that before a permit for second-class matter is revoked, that there must be a hearing. It does not prescribe the form of hearing, but by the departmental rules of practice the Postmaster General has prescribed the form of hearing, which was followed in this case, namely, a Hearing Board which listens to the testimony and returns the transcript, together with recommendations. There is no statutory provision for a hearing upon applications for second-class entry, nor for hearing upon application for reentry after cancellation.

Those hearings are governed by the provision of

1937 a regulation which is known as section 531 of the Postal Laws and Regulations, which provides that:

"When an application for the entry of a publication as second-class matter is made after its second-class privilege under a previous entry has been revoked, upon citation and a hearing held pursuant to the provisions of section 536, the applicant, after offering for mailing four consecutive issues of his publication, shall be given an opportunity to be heard at a public hearing before a board of postal officials designated by the Postmaster General upon the question of whether his application shall be granted, and the Third Assistant Postmaster General shall follow the recommendation of the Hearing Board in considering the application."

Now, that provision is unique in two respects. First of all—well, may I withdraw that statement?

For the present purposes the proceeding is entirely different from the proceeding here, because here an order was made by the Postmaster General and it is his action that is being challenged. The action which was to follow the hearing before the Hearing Board in the National Police Gazette case was an order of the Third Assistant Postmaster General.

Now, all that, I take it, counsel can hope to gain by offering these reports is to indicate what various individual opinions of various people may have been upon this subject. It certainly does not represent any official action by the Department, not even by the Third Assistant Postmaster General, and even if it represented the opinion of the Third Assistant Postmaster General, how could that in any way reflect the official opinion of the Department or the opinion of the Postmaster General?

1938

Now, I take it that if this Court were acting in an appellate capacity over the decision of a trial court, the Court would not receive in evidence or care to inform itself as to all of the decisions and opinions of the trial court in other cases. That is the most that we have here, because it is purely a collateral undertaking; but it is not only a collateral suit, it also involves the decision or judgment of

another official, not the official whose action is being challenged here.

Now, I suggest the objection not because we have any desire to keep from the Court what the various opinions of various Postmasters General or their subordinates may be, but simply because we feel it will confuse the record and do no one any good.

The Court: Does counsel want to be heard on the matter?

Mr. Bromley: May it please Your Honor, this chain of proof, of which this document is merely one step, will show official and final action taken by the Post Office Department, and one of the documents in there I think will show that the Third Assistant, under the law entrusted with mak-
1939 ing the decision, put this up to the Postmaster General himself, so important was it considered.

So that I think it is clearly admissible, first as an official action of the Post Office Department, and second as a matter which went to the Postmaster General himself. The action of the Department in determining this matter involved a construction of the fourth condition of the second class mailing statute, the very section before us, and I think this file will show that the construction placed upon the statute was not that alone of the Third Assistant but was approved by the Postmaster General himself. I don't think that makes any particular difference, since it was the Department's action.

Mr. Deinard: Well, perhaps counsel has other information than I have, but do you claim that in this connection, with respect to the National Police Gazette, that any order or decision was entered by the Postmaster General?

Mr. Bromley: I claim that the Third Assistant wrote a memorandum to the Postmaster General recommending the course of action which was thereafter taken.

Mr. Deinard: Well, but that is not responsive. So far as I know—this is my information and I believe it is correct—that in the matter under consideration the order that was entered was an order of the Third Assistant Postmaster General, to whom is committed the duty—

The Court: As we understand you, it is on an
1940 application of reinstatement rather than exclusion of a publication.

Mr. Deinard: That is correct. I mean, the Postmaster General takes no action in such a proceeding, and took no action in this case. I understand counsel to claim that there was some informal discussion, but I am sure that counsel does not claim that there was any official action taken by the defendant in that case.

The Court: Because of the very far-reaching effect of the action of the Postmaster General if his action was finally sustained, we are inclined to leave the gates fairly wide open so as to consider everything that might have a bearing upon the case, even though in this particular instance we do not see any probative value in the matter, unless it be to show that the Department over which the Postmaster General presides does conduct a quasi-judicial hearing and that he has treated with the Police Gazette, which is a magazine, we will say, of a similar character. Although it may have been excluded, his Department has extended to it a second hearing and presumably reinstated it.

Now, by way of analogy and argument, at least, that might indicate to the Court that there has been a fixed policy of the Postal Department that might be overruled by the Court or by the Postmaster himself. The Postmaster has the right to reverse himself and, therefore, strictly speaking
it would not be necessarily relevant or carry with
1941 it any great probative force. But before any position of long standing is overturned we feel that there should be a full hearing.

Mr. Bromley: May it be marked then as Plaintiff's Exhibit No. 9, please?

(The document referred to was marked Plaintiff's Exhibit No. 9 and received in evidence.)

By Mr. Bromley:

Q. Now, will you produce from your file the two minority opinions filed by Fourth Assistant Postmaster General Myers, a member of the Hearing Board in this matter? A. In this same case?

Q. In the same case. A. I have it.

Q. And will you give me the date of the earliest one, please? A. I don't think it bears a date.

Q. Will you produce the first one in your file, please, and I offer it in evidence as Plaintiff's Exhibit 10. A. They are annexed together here.

Q. Are they in one document? A. No, two separate documents.

Mr. Bromley: I offer the first one as Plaintiff's
1942 Exhibit 10.

Mr. Deinard: Might we have the same objection to that, Your Honor?

The Court: It will be admitted for the reasons stated.

(The document referred to was marked Plaintiff's Exhibit No. 10 and received in evidence.)

Mr. Bromley: And I offer the next one, which I believe is dated August 4, 1943, as Plaintiff's Exhibit 11.

Mr. Deinard: Same objection.

The Court: Same ruling.

(The document referred to was marked Plaintiff's Exhibit No. 11 and received in evidence.)

By Mr. Bromley:

Q. In connection with this matter there is in your file, isn't there, Mr. Bouton, a memorandum from the Third Assistant Postmaster General, Mr. Black, to the Postmaster General himself, dated August 5, 1943? A. There is.

Q. Will you produce it, please? A. Yes.

Mr. Bromley: I offer it in evidence as Plaintiff's Exhibit 12.

Mr. Deinard: I wonder if I might see that, Your Honor. I don't think I have ever seen that document.

The Court: Yes.

Mr. Deinard: Might I inquire of the witness, Your Honor, as a basis for an objection?

The Court: Yes.

By Mr. Deinard:

Q. Mr. Bouton, as I understand it, you have given counsel access to these files? A. That is right.

Q. And what you have produced here is the official file of the Department? A. Yes, sir.

Q. Now, with respect to this memorandum which has been called to your attention, of August 5, 1943, I will ask you whether or not that is all purely departmental memoranda, that is, a memorandum purely for departmental purposes, which was never issued as an order, published or given to the applicant in any way?

Mr. Bromley: I object to that question as immaterial; the document speaks for itself.

The Court: It would so appear to the Court.

Mr. Deinard: Let me ask you this:

By Mr. Deinard:

Q. From an examination of your files, does that memorandum to which counsel has called your attention constitute either a part of the recommendations of the members of the Hearing Board or a part of the order of the Third Assistant Postmaster General?

Mr. Bromley: I think that is immaterial. Again, it speaks for itself.

The Court: I think so, but we will permit him to answer the question.

The Witness: It is neither.

Mr. Deinard: Well, I wish to add to our objection that this is purely a private, confidential, departmental communication between the Third Assistant Postmaster General and the Postmaster General, does not constitute either a part of the recommendations of the Hearing Board or of the Third Assistant's order, and therefore is wholly incompetent.

The Court: We do not see how the Postmaster would be bound by any correspondence of his Department and we don't know just how the paper is relevant. We will hear from counsel.

Mr. Bromley: This is a memorandum from the Third Assistant Postmaster General who, under the law, is entrusted with making the decision as to whether this publication should have second-class privileges or not. After he got the majority opinion and the minority opinion of his Hearing Board disagreeing on the interpretation of the fourth condition, and before he determined the matter himself, he put it up to Mr. Walker, the Postmaster
1945 General, explained the whole thing to him, what the question was, so important was it, and following the submission of his memorandum, an official memorandum, in the file, to the Postmaster General, this publication was given second-class privileges.

Mr. Deinard: Well, if counsel proposes to follow this by showing that there was an order, direction, or instruction in the file elsewhere from the defendant here, the Postmaster General, to his subordinate, then I can see that this would be preliminary to a point which would be relevant, but I gathered from him that he is offering this simply as an isolated instrument indicating that the Third Assistant Postmaster General called it to the attention of his superior.

The Court: We would be inclined to admit not only the findings of the Postmaster General but also the opinion of the board that heard the controversy. If that is a part of this, you may offer it.

Mr. Bromley: I believe it to be, sir. I therefore offer Exhibit 12.

Mr. Deinard: I object to it on the ground that the record shows the contrary from the answer of the witness.

The Court: All right. We will let it be admitted and if we find it has no relevancy, why, we will strike it.

(The document referred to was marked Plaintiff's Exhibit 12 and received in evidence.)

By Mr. Bromley:

Q. Mr. Bouton, subsequent to the date of Exhibit
1946 12, and on August 24, 1943, an order was entered granting second-class privileges to the magazine National Police Gazette, was it not? A. It was.

Q. And do you have in your file a copy of the issue of the National Police Gazette which was examined by the Department as a part of its action in granting second-class privileges to that magazine? A. I might say that a number of issues were examined before that was entered.

Q. Can you tell us what issues were examined? A. It would take quite some time to trace those down here.

Q. Can you produce one issue that was examined? A. I can produce the August 1943 issue, yes, sir.

Q. You have in your hand the August 1943 issue? A. I have it.

Q. Isn't it a fact that the order granting second-class privileges or entry to this magazine recites that the August 1943 issue was examined by the Department? A. It does. It indicates other issues were examined too.

Mr. Bromley: I offer the August 1943 issue of
1947 the National Police Gazette in evidence.

Mr. Deinard: Objected to as incompetent, irrelevant, and immaterial.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 13 and received in evidence.)

By Mr. Bromley:

Q. Will you produce your file on the magazine Hobo News, please? A. Yes.

Q. Will you produce, please, an order to show cause in the Hobo News file, dated June 12, 1943? A. I have it.

Mr. Bromley: I offer it in evidence as Plaintiff's Exhibit 14.

Mr. Deinard: Same objection.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 14 and received in evidence.)

By Mr. Bromley:

Q. Will you produce the majority opinion of the Hearing Board in the Hobo News case, dated July 10, 1943, please? A. July 10, 1943.

Q. July 10. A. I have it.

1948 Q. There is endorsed at the foot of that opinion the dissent by the dissenting member, is there not? A. There is.

Mr. Bromley: I offer the document dated July 10, 1943, as Plaintiff's Exhibit 15.

Mr. Deinard: Same objection.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 15 and received in evidence.)

By Mr. Bromley:

Q. There is in the file a memorandum from the Third Assistant Postmaster General to Postmaster General Walker, dated July 15, 1943, isn't there? A. From the Acting Third Assistant Postmaster General, dated July 15, 1943.

Mr. Bromley: I offer it in evidence as Plaintiff's Exhibit 16.

Mr. Deinard: And to that exhibit we make the same objection as to Plaintiff's Exhibit 12, on the ground that not only is the exhibit incompetent, irrelevant, and immaterial for the reasons suggested in the response to the offer of sample magazines, but also on the ground that it is incompetent because it constitutes merely an internal administrative document and does not purport to be either a part of the recommendations of the Hearing Board nor a part of the order entered by the Third Assistant Postmaster General.

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The Court: Mr. Attorney General, we are not saying that you are not right in your objection. We are in a measure carrying all this along in order to pass on the case. You see, in this case the magazine is, you might say, on trial for its life, and in a case of that kind we feel the case should be left open in order to bring forward for the Court's inspection anything that in the mind of counsel, counsel equipped and learned in the law, desires the Court to consider, and we are going to be liberal in leaving the gates open.

Mr. Bromley: May that be marked as Plaintiff's Exhibit 16, please?

(The document referred to was marked Plaintiff's Exhibit No. 16 and received in evidence.)

By Mr. Bromley:

Q. Will you produce, please, a handwritten memorandum dated July 20, 1943? A. I believe I will have to have a little further explanation. From whom?

Q. I refer to a memorandum which you have before you, in the handwriting of Assistant Solicitor Hassell, to "Judge." You see that? A. I can't identify the handwriting but I think I have here what you have in mind.

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Q. Who is "Judge" referred to in that? A. I couldn't say.

Q. Don't you know, Mr. Bouton, that that is Vincent Miles, the Solocitor of the Post Office Department? A. That is my opinion.

Q. And who is "the boss" referred to in the memorandum? A. I don't know.

Q. Don't you know that that is Postmaster General Walker?

Mr. Deinard: Just a moment. I submit, Your Honor, that this goes beyond the realm of fair examination, to ask this witness to guess as to nicknames used by a third person in a memorandum not addressed to him.

The Court: The witness is supposed to be from the enemy's camp. We feel that the objection should be sustained.

By Mr. Bromley:

Q. Can you identify the handwriting as that of Assistant Solicitor Hassell? A. No, sir, I cannot.

Q. Didn't you just say a minute ago that you could? A. No, I believe I said I couldn't.

Q. What initials appear in the memorandum?

1951 A. I can make out two of them. It looks like it is "C. H.".

Q. What are Hassell's initials? A. I don't know his full initials.

Q. Don't you know? A. I believe it is "C. A. H.".

Q. "C. A. H."? A. Yes, but I don't know definitely.

Mr. Bromley: I offer this memorandum in evidence.

Mr. Deinard: Might I see it, Your Honor?

The Court: Yes.

Mr. Deinard: Might I ask him a question, if the Court please?

The Court: Go ahead.

By Mr. Deinard:

Q. Mr. Bouton, this little slip of paper to which counsel called your attention refers to Solicitor—I take it that this is stationery from the Solicitor's Office, is it? A. That is what I would judge, yes.

Q. Are you a member of the Solicitor's Office? A. I am not.

Q. Do you have any connection with the Solicitor's Office? A. None whatever.

Q. Are any members of the Solicitor's Office re-
1952 sponsible to you administratively? A. No, sir.

Q. Or you to them? A. No, sir.

Mr. Deinard: I object to this on the ground that it is incompetent, irrelevant, immaterial, and no foundation laid.

The Court: Is it the little penciled memorandum in red pencil?

Mr. Bromley: Yes, Your Honor.

The Court: I sustain the objection.

Mr. Bromley: Now I ask counsel for the Government to concede that this is a memorandum in Mr. Hassell's handwriting which was sent to the Postmaster General. I call his attention to the fact that there sits on his left Mr. O'Brien, of the Solicitor's Office, who is entirely familiar with all the facts.

Mr. Deinard: I am sorry, Your Honor, I have never seen this little slip of paper before. It certainly in my opinion does not rise to the dignity of an official memorandum. I am unable to accommodate counsel by agreeing who is the writer of it because I haven't the remotest notion.

The Court: If the paper were actually signed by the official counsel supposes was the author of it, then how would it be relevant?

Mr. Bromley: Merely to show that the action of
1953 the Post Office Department was called specifically to the attention of the Postmaster General who approved it.

The Court: It goes no further than to show that he had counsel in passing upon the controversy?

Mr. Bromley: I think it goes one step further, sir, and shows that counsel referred the matter to him and that he knew about it.

Mr. Deinard: Mr. Bromley, does that memorandum purport to state that he has seen the Postmaster General? I think you are misinformed.

Mr. Bromley: No. All it says is that Mr. Walker wants to see the letter before it goes out.

Mr. Deinard: You don't claim that that is proof of the fact that the document ever was submitted to the Postmaster General or seen by him?

Mr. Bromley: I can only take one step at a time. I am asking first whether this memorandum was not written by Mr. Hassell.

Mr. Deinard: I am sorry, I just don't know.

The Court: Unless you can enlighten the Court as to some probative value that is of a relevant character, we don't believe it relevant. In other words, we don't just see your reason for offering it. You might tell us a little further. We will ask you to stop here and tell us why this is a pertinent matter and enters into the controversy.

Mr. Bromley: Yes, sir. In order to do that I
1954 would like the file, please.

May it please Your Honor, Exhibit No. 14 is an order to show cause, issued by the Post Office Department to this magazine, the Hobo News, notifying it that it will be granted a hearing in connection with its application to be admitted to second-class privileges, and the order to show cause says to the Hobo News the Post Office Department is citing you to a hearing to show cause why your application should not be denied on the ground that the Hobo News is not originated and published for the dissemination of information of a public character or devoted to literature, the sciences, or the arts.

So there was a hearing on this publication under the fourth condition. Now, Exhibit No. 15 is the majority opinion of the Hearing Board, and that majority—

The Court: Now, counsel, we are going to ask you to discuss with us a little further this phase of it. You are going further into the details of a trial because it is one that we

understand you to consider of a similar character. Don't you think that the limit to which you should go in those cases is to show that there was such a case and that the ruling was of such and such a character, without going into either the evidence or the argument that was presented on that case?

Mr. Bromley: Yes, sir, and I have very carefully limited myself in my offer of evidence to the citation which
1955 initiated the proceeding, the majority and minority opinions, and then the final action of the Postmaster General. And all I offered this little slip of paper for was to show that the file disclosed that this was not a routine matter that somebody else did for Mr. Walker but was called to his personal attention.

The Court: Would you consider the Postmaster General in a sense responsible for the conduct of his Department?

Mr. Bromley: I certainly do, sir.

The Court: Yes. Then why should we try to trace responsibility to him?

Mr. Bromley: Well, I did it, Your Honor, because my learned friend has taken the position that Mr. Walker ought not to be bound by the acts of his Third Assistant because maybe he didn't know about it, and I thought it was a pretty good thing to show that the fact was that not only would the law presume that he ought to know about it but that he actually knew.

Mr. Deinard: Well, I never suggested, Your Honor, and I wouldn't suggest to the Court that the Postmaster General is not responsible for the conduct of his office, and that is not what I suggested in my objection. What I suggested was that you cannot challenge the opinions expressed by the defendant in this case on a theory that he has been guilty of inconsistency by showing what some subordinate has done. I have never claimed that he is not respon-
1956 sible for the conduct of the Department and does not assume departmental responsibility for the decisions that were made on all publications. Of course I do.

The Court: You might take the position that any board,

any group of officers in a large firm, when they took under consideration a legal question and debated it and disagreed and finally reached a decision, that decision would represent their action and the composite knowledge of that firm, but we cannot see why you should go behind that decision and discuss how the different members of that firm deliberated.

Mr. Bromley: All right, sir.

By Mr. Bromley:

Q. Mr. Bouton, the fact is that second-class entry was granted to this magazine on August 24, 1943, isn't it? A. May I have the file? Admission was granted under date of August 24, 1943.

Q. And does the order granting the privileges show that some specific issue was submitted and examined by the Department? A. It shows that quite a number of issues were presented and examined.

Q. Will you pick out one of the issues recited in the order, which was examined by the Department? A. It refers specifically here to two: August 1, 1943, and September 27, 1943.

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Q. Will you take the September issue, please? A. September 27, 1943, issue.

Q. Yes, sir. A. I have it.

Mr. Bromley: Before I leave the subject of the handwritten memorandum, I ask Your Honor's permission to have that little memorandum of July 20, 1943, marked Exhibit 17 for identification.

The Court: Very well.

(The memorandum referred to was marked Plaintiff's Exhibit No. 17 for identification.)

Mr. Bromley: Now I offer in evidence the issue of Hobo News of September 27, 1943, as Plaintiff's Exhibit 18.

Mr. Deinard: Objected to as incompetent, irrelevant, and immaterial.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 18 and received in evidence.)

Mr. Bromley: Will you produce your memorandum of July 19, 1943, please?

The Witness: I have it. It is my own personal—for my own personal information.

By Mr. Bromley:

Q. In your handwriting? A. No, sir.

1958 Q. Typed up? A. Typed.

Q. Dictated by you? A. Yes, sir.

Q. Signed by you? A. No, sir.

Q. It bears your initials? A. It does.

Mr. Bromley: I ask that it be marked for identification as Exhibit No. 19.

(The document referred to was marked Plaintiff's Exhibit No. 19 for identification.)

By Mr. Bromley:

Q. That is a contemporaneous record of a conference that you had with Assistant Solicitor Hassell and others, isn't it? A. No, sir. Not with Mr. Hassell. This is a personal, confidential memorandum for my own information, pursuant to conversation with Mr. Wentzel, who was then Superintendent of the Division of Classification.

Q. May I see it a moment, please? A. Yes (hand-

1959 ing paper to counsel).

Mr. Bromley: I offer this memorandum in evidence as Plaintiff's Exhibit 19.

Mr. Deinard: Might I inquire, Your Honor?

The Court: Yes.

By Mr. Deinard:

Q. This memorandum, Mr. Bouton, refers to Mr. North, who appears to be unidentified. Who is he? A. Could I see it again, Mr. Deinard?

Q. Yes (handing paper to witness).

The Court: I ask counsel to state the purpose for which the tender is made.

Mr. Bromley: This memorandum shows that the Department agreed upon an administrative interpretation of the statute and came to the conclusion that it was none of its function under the statute to pass upon the quality of the contents of the magazine or anything to do with the fourth condition whatsoever. It confirms that interpretation of the Department after a conference which this man attended. It also shows that Exhibit 16, the memorandum from the Third Assistant Postmaster General, Mr. North, was delivered to Postmaster General Walker.

The Court: Assuming, then, that at a formal hearing that such was the opinion, is there anything to prevent the Postmaster General from changing his opinion if he
1960 sees fit? We realize that the precedent is persuasive—and you say that is the reason it is offered?

Mr. Bromley: That is the only reason, yes, sir.

The Court: All right.

By Mr. Deinard:

Q. Mr. Bouton, as I understand it, this matter of the Hobo News was referred to a hearing board, and I think counsel has already had you identify the majority and minority recommendations of that hearing board? A. Yes, sir.

Q. And then, as I understand it, the recommendations of the Hearing Board were submitted to the Third Assistant Postmaster General who made an order, is that correct? A. Let me see it.

That is correct.

Q. Did you participate in the deliberations of the members of the Hearing Board? A. No, sir, I did not.

Q. You were not a member of the Hearing Board? A. No, sir.

Q. So that, as I understand it, you had no official connection with the action that was taken by the Hearing Board? A. No, sir.

Q. Well, now here in this memorandum which counsel has called to your attention, you refer to some conversations purportedly had between Mr. North and Mr. Wentzel on July 17. I want to ask you whether those purported conversations were held in your presence or not. A. They were not.

Q. So that this is simply, as I understand it, some report that was conveyed to you as to deliberations between other people? A. That is right, and just for my own information.

Q. I don't care what it was for. Is that a correct statement? A. That is right.

Q. That is a report of deliberations at which you were not present? A. That is right.

Q. With respect to the delivery of a memorandum to the Postmaster General. Were you present at the time of that purported delivery? A. No, sir.

Q. This action is based upon some hearsay report? A. Yes.

Q. You report, again, what you were told by Mr. Wentzel with respect to a purported conversation between the Postmaster General and Mr. O'Brien. Were you present at any such conference? A. I was not.

Q. Were you present at any conference with Mr. Hassell? I call your attention to some report here as to Mr. Hassell's views. Is that based on any conference you had with Mr. Hassell? A. No, sir.

Mr. Deinard: I add to the objection, and I should like to submit the document to the Court, that it is wholly hearsay, and is not an official document, and is, therefore, incompetent.

The Court: We think, counsel, that when there are negotiations between parties before they reach a contract, that after they reach the contract the negotiations are deleted and eliminated from the record. This paper offered purports to be a memorandum for the case of the Hobo News. It doesn't appear to be the official act or finding of the Postmaster General or of any board acting under him. We think we will sustain the objection.

By Mr. Bromley:

Q. Will you produce your file on the magazine Laff? A. I have it.

Q. Will you produce the order to show cause, dated June 9, 1943, please? A. I have it.

Mr. Bromley: I offer it in evidence as Plaintiff's
1963 Exhibit 20.

Mr. Deinard: May I have the same objection as to the similar exhibits?

The Court: Very well.

(The document referred to was marked Plaintiff's Exhibit No. 20 and received in evidence.)

By Mr. Bromley:

Q. Will you produce the document of August 19, 1943, containing the majority and minority opinions of the Hearing Board in the Laff case? A. What was the date you had there?

Q. August 19, 1943. A. I have a copy of such report.

Mr. Bromley: I offer in evidence the majority opinion dated August 19, 1943, as Exhibit 21.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 21 and received in evidence.)

Mr. Bromley: I offer in evidence the minority report as Plaintiff's Exhibit No. 22.

Mr. Deinard: Same objection.

The Witness: A carbon copy of such report is here.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 22 and received in evidence.)

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By Mr. Bromley:

Q. Mr. Bouton, second-class privileges were granted thereafter to this magazine Laff as of November 6, 1942, isn't that so? A. That is right.

The Court: May I inquire at this moment, counsel, what the nature of the charge against the magazine was—that it was obscene, or was it based on the same character of charge now before the Court, that is, that it was receiving the benefit of second-class mail matter when it was and should have been relegated to some other class?

Mr. Bromley: Yes, sir; the latter. It was charged that it did not satisfy the fourth condition and it was not made up of information and literature.

The Court: All right.

By Mr. Bromley:

Q. Now, on the basis of the examination of what issue or issues were second-class privileges extended to the magazine Laff as of November 6, 1942? A. All the issues published subsequent to August 28, 1943.

Q. And one of such issues was the October 1943 issue, was it not? A. That is right.

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Q. Will you produce it, please? A. Yes (handing magazine to counsel).

Mr. Bromley: I offer it in evidence as Plaintiff's Exhibit 23.

Mr. Deinard: Same objection.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 23 and received in evidence.)

By Mr. Bromley:

Q. Will you get out your file on New Love magazine, please? A. Yes.

Q. Will you produce the issue of August 1943 of the New Love magazine, please? A. Yes, sir.

Q. Was that magazine granted second-class entry? A. It was.

Q. It was granted second-class entry as of March 5, 1943, was it not? A. Yes, sir.

Q. And this action was taken on July 27, 1943, wasn't it? A. Yes, sir.

Q. The issue examined was the issue of August
1966 1943, was it not? A. I believe a number of issues were examined in this case. That was one of them.

Mr. Bromley: I offer the issue of August 1943 of New Love magazine in evidence.

Mr. Deinard: Same objection.

The Court: It may be admitted.

(The document referred to was marked Plaintiff's Exhibit No. 24 and received in evidence.)

By Mr. Bromley:

Q. Will you get your file, please, on Real Detective?

Mr. Deinard: Might I suggest, Your Honor, that counsel seems already to have passed his tenth illustrative sample. I had thought that he was going to exercise the self-restraint suggested by the Court and stop at that point.

Mr. Bromley: Well, I will stop there. Perhaps I have trespassed on Your Honor's ruling. I will stop there and withdraw the last question.

The Court: We were going to inquire as to the number of these former rulings that counsel desired to introduce. We assumed that you had reached perhaps a stopping place.

The Witness: What is the title on that?

Mr. Bromley: Never mind it.

By Mr. Bromley:

Q. Mr. Bouton, will you produce for me—I will
1967 withdraw that.

Mr. Bromley: I offer in evidence a document consisting of 12 pages, entitled, "Supplementary recommendation to the Postmaster General in the Esquire case," submitted by the Fourth Assistant Postmaster General, Walter Myers, and ask my friend to concede that this document is a true copy of that recommendation.

Mr. Deinard: This involves a matter, if the Court please, which Mr. Harding, counsel for plaintiff, and the Solicitor for the Post Office, and I have discussed before, and I suppose this is an appropriate time to bring it to Your Honor's attention.

This document which counsel has handed me is a true copy, according to my understanding, of a memorandum from Mr. Walter Myers, who appears as the dissenter in the Hearing Boards on Laff and some of the other publications which counsel has already introduced.

Mr. Bromley: He is the chairman and part of the majority in the Esquire case, and it is an official document of his.

Mr. Deinard: Just a moment. I was about to get to that, Mr. Bromley, if you will give me an opportunity.

Mr. Bromley: Excuse me.

Mr. Deinard: I was calling to Your Honor's attention that this is the same Mr. Myers as appears as a dissenter
1968 in the last document introduced, as one of the concurring members in this case, and in the record in this case the plaintiff has tendered, and properly, the two reports and recommendations of the Hearing Board, that is, the so-called majority report signed by two, and the second report signed by the third.

Now, we have made no objection to the inclusion of those two items in the transcript, although properly speaking I don't believe that they constitute a part of the record, since they were purely advisory to the Postmaster General, and it is the Postmaster General's order which is here challenged,

but we thought that since that might throw some light on the controversy and might be of help to the Court, we wouldn't object to the inclusion.

The Court: What is the paper that is offered at the present time?

Mr. Deinard: This document that is now being offered is a document by way of a—some sort of an informal recommendation with respect to legislation that was later submitted by Mr. Myers individually to the defendant.

Now, sometime in April, I believe it was, counsel, having been advised that there was such a document, communicated with the Solocitor of the Post Office Department and asked for a copy of it. The Solicitor on April 24 wrote to Mr. Harding and informed him that this document was not requested by the Postmaster General as an additional

1969 recommendation in connection with the Esquire case, it was not submitted by the chairman of the Hearing Board to be considered as part of the Esquire record, and it was not read by the Postmaster General before he rendered his decision in the Esquire case. It was submitted strictly as a Post Office administrative subject.

Thereupon the Solicitor of the Post Office said that if counsel wanted to see it he would be glad to show it to him; and subsequently it was sent to him. And on May 4 Mr. Harding wrote the Solicitor, thanked him for his letter, and then said that he was surprised at the contents of the letter, because his understanding was that this was exactly as its title indicates, a supplementary recommendation in the Esquire case. Then he asked for a copy of it.

Mr. Miles wrote him again and stated again, "The facts are exactly as I outlined to you in my letter of April 24."

The Court: Let me see the paper.

Mr. Deinard: Yes (handing paper to Court).

Then later on, if the Court please, on behalf of the Department of Justice we wrote to counsel and called his attention to the fact that we could not agree that it should be made a part of the record in the above case in view of our

information that it was not submitted as part of the record in the Post Office Department nor considered by the Postmaster General.

Now, in the face of that counsel went ahead and
1970 printed the recommendation as part of their brief.

Now, as long as it does not purport to be a part of the official record in the Esquire case, we have no objection to their having supplied it to the Court for what persuasive effect it may have as the individual views of Mr. Myers, but we have made it quite clear to counsel that we will not consent to its being offered as part of the Esquire record in view of our information from the Solicitor of the Department and from others to the effect that it was never submitted as a part of this case, that it was never seen by the Postmaster General until long after the order was entered in this case.

Now, that is my information. Counsel has known that for thirty or more days, and under the circumstances if counsel wants to offer it, I think he is required to lay a foundation for it by showing that it is part of the Esquire record.

Mr. Bromley: Now, if the Court please, there is something in the pretrial order about this document.

May I see the pretrial order? The stenographer has taken mine from me and I don't have it.

The Court: Yes.

Mr. Bromley: Now, at the end of this memo-
1971 randum there is a consideration of the fourth condition.

This document was a part of the official record submitted to the Postmaster General at his request prior to his decision. I regret to say that it was concealed from us; we never knew there was such a document at the time we settled the record in this case. We thereafter found out about it and we felt it should be included properly as a part of the record just the same as the majority or minority opinion. It was in fact an additional opinion by the Chairman and member of the majority of the board.

We therefore have been seeking to get it into the record and at the time of the pre-trial hearing we got a stipulation that this so-called supplementary document is a true copy of the memorandum prepared by the Chairman of the Hearing Board on or about November 22, 1943, and delivered by his office to the Postmaster General at the suggestion of the Postmaster General and that, of course, was before the decision.

Therefore it seems to me that it should have been included at the outset as a part of the official record and it should have been disclosed to us. We found out about it long after the record was certified and settled, and somewhat incidentally. It should have been included at the outset and ought to go in the record now.

Mr. Deinard: The pre-trial stipulation is to the effect that this is a true and correct copy of the certain document. Counsel has known ever since the controversy started in April that the Solicitor of the Post Office Department and the Postmaster General himself have stated this was not a part of the official record in the Esquire case, that it was never seen by the Postmaster General until after he entered his order.

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That is the information which has been conveyed officially to me.

In the light of that I say that if counsel wants to prove that it is a part of the Esquire record let him go ahead and prove it.

Now, may I call your Honor's attention to the fact that when the three members of the Hearing Board considered their respective recommendations they had exhausted their function. I don't know how presumptively one member of the Hearing Board can ex parte modify or supplement a report which he had jointly signed with his associates.

This does not purport to represent the views of his associates. It is in the nature of a personal recommendation affecting legislation, from Mr. Myers to Mr. Walker.

Mr. Bromley: But you have stipulated it was submitted at Mr. Walker's request.

Mr. Deinard: But not as a part of the record in the Esquire case. We have always been perfectly clear with Mr. Harding on that point. If you want to prove that this is a part of the executive record in the Esquire case, I
1973 invite you to go ahead and prove it.

Mr. Bromley: The first paragraph of the exhibit shows that.

The Court: The Court has casually examined the paper. We found among its many paragraphs one such as this:

"Obscenity is a thing of no exact definition. It is a variable that depends upon the standards of a given time and place."

Lower down it quotes at length a decision of Judge Learned Hand on the subject of obscenity.

Now, as we understand this case, the Postmaster General did not base his action upon a finding that the publication in particular was obscene, and that being true it occurs to the Court that the paper has no possible value.

Mr. Bromley: I should call your Honor's attention to the fact that the last part of the paper has to do with the fourth condition and not with obscenity. Your Honor may be quite right about the first part, but starting near the end there is a full discussion of law about this fourth condition.

The Court: I am going to suggest to counsel you may tender the paper to the Court as you would a brief, but we don't think it is a part of the record.

Mr. Bromley: May I have it marked for identification, please, as an exhibit?

The Court: It may be marked.

(The document referred to was
1974 marked as Plaintiff's Exhibit No. 25, for identification.)

The Court: We will suspend for a few minutes at this time and take a five-minute recess.

(Thereupon, a short recess was taken, after which the trial was resumed.)

The Court: You may proceed.

Mr. Bromley: That is all.

CROSS-EXAMINATION

By Mr. Deinard:

Q. Mr. Bouton, up until January 1st of this year, as I understand it your position was as an assistant in the Classification Division. A. Yes.

Q. So that it was not until after the order of the Postmaster General involved in this case was made that you were elevated to the position of head of that division? A. Head of the Division of Newspaper and Periodical Mail.

Q. Yes. A. That is right.

Q. Then, at the time with which we are concerned, prior to January 1, 1944, as I understand it you were a subordinate of Mr. Wentzel. A. Yes, sir.

Q. And what was Mr. Wentzel's official position?

1975 A. Superintendent of the Division of Classification.

Q. And was Mr. Wentzel in turn a subordinate of the Third Assistant Postmaster General? A. Yes.

Q. And he, of course, was a subordinate of the Postmaster General? A. That is right.

Q. And will you state to the Court whether or not that was the chain of administrative responsibility, that is, you being responsible to Mr. Wentzel, he in turn to the Third Assistant Postmaster General, and he in turn to the defendant? A. That is right.

Q. Now, will you just tell us whether you yourself made a final decision or determination, or took any action on behalf of the Department in any of the cases which counsel has called your attention to? A. No, sir.

Q. In the ordinary routine administration of the Department, was the first preliminary examination of the publication applying for second-class entry made by you or someone on your staff? A. Someone on my staff.

Q. Then, with respect to that preliminary examination, will you tell us whether or not in the usual admin-

1976 istrative course of the Department's business you reported your preliminary view to your superior? A. That is right.

Q. And did he in turn report it to his superior? A. That would be the chain, yes, sir.

Q. And with respect to the statements that you made to counsel as to what you did with respect to these publications, you did not intend to indicate, did you, that it represented the official views of the Department or reflected the official action taken by the Department? A. No, indeed.

Q. Now, with respect to applications for original entry to second class, as I understand it in the usual routine of the Department the order is made by the Third Assistant Postmaster General? A. That is right.

Q. And in the event of his absence or disqualification is such an order made by the Acting Third Asistant Postmaster General? A. That is right.

Q. As I understand it, in the normal case no hearing board acts upon such an application, does it? A. That is right.

Q. In the event of the cancellation of second-class entry and a subsequent reapplication by a publisher, the
1977 Postal Regulations provide, do they not, for a hearing board? A. They do.

Q. As I understand it that is not by statute but by regulation adopted by the Postmaster General. A. Yes.

Q. And in the event of a citation to annul, revoke or suspend second-class privileges, the statute makes provision for a hearing, does it not? A. It does.

Q. And by Department rule of practice adopted by the Postmaster General such hearings are conducted, are they not, before hearing officers appointed by the Postmaster General? A. Yes, sir.

Q. And it was under that Departmental rule of practice, was it not, that the hearings in this case were conducted? A. That is right.

Q. Have you ever sat as a hearing officer in any of these cases? A. Not on the hearing board, no, sir.

Q. Well, will you answer my question, then? Have you ever sat as a hearing officer in any application to suspend or revoke or annul second-class entry? A. No.

Q. You do not then claim that any opinions you have given to counsel in response to his questions reflect the

1978 views of any hearing officers who have sat in any of these cases? A. No, indeed.

Q. And with respect to the reports or recommendations of hearing officers in a proceeding to annul a second-class entry, to whom are they submitted originally in the ordinary administrative routine of the Department? A. What was the first part of that?

(Thereupon, the pending question was read by the reporter.)

A. To the Postmaster General.

Q. Now, in making your preliminary inspection of a publication which is offered for second class, do you first of all consider whether or not it is a periodical as contrasted with, for example, a book or a circular? A. Yes, we do.

Q. Do you also consider, assuming that it is a periodical, whether or not it conforms to the requirements of the fourth condition? A. Yes, we do.

Q. Do you also consider whether it conforms to the physical characteristics set out in the first three conditions? A. Yes, we do.

Q. So that assuming that a publication is a periodical in the sense of continuity or periodicity of contents, that does not exhaust the matter so far as your administrative examination is concerned, does it? A. No.

Q. There still remains the question as to whether

1979 or not it is originated and published for the dissemination of information of a public character or devoted to literature, the sciences, arts and some special industry? A. Yes.

Q. Now, you are familiar with the fact, are you not, that Esquire circulated through the mails as second-class matter for some years prior to this proceeding? A. Yes.

Q. Now, I call your attention in this case to a portion of the Postmaster General's order which is contained on pages 1863 and 1864 of the record, more particularly the following:

"The editor of this publication"—he is referring to Esquire—"admits that from its origin 'our humor and our articles and our fiction all stressed a man alone angle—you might call it a stag party type of treatment', and testified, 'we called it the smoking room type of humor.' He stated that as a part of its editorial policy it runs 'cartoons that do feature sex.' Its featured pictures are stated to be 'frankly published for the entertainment they afford.'"

Now then, omitting a portion with which I am not now concerned, and going to the next paragraph:

"The result of the distribution of such a publication is not without significance. As the publication's editor testified, Esquire 'attracted a good number of imitators. There were various magazines which had various other related titles to that of Esquire, but the imitation copied only the superficial aspects, the smoking room type of humor, much, much grosser than anything we had ever used ourselves.'

"These imitators 'would simply trade upon the superficial aspects of Esquire and emphasize what to us were the features that we least wanted to see become cheapened and common.' I wouldn't say coarsened, but they cheapened almost the desirability and value of that kind of material by making it a commonplace, whereas we had thought of it as being a smart and an exclusive type of feature.'"

Now, Mr. Bouton, I call your attention to those statements in the Postmaster General's order and want to ask you with reference to the publications about which counsel has inquired, but omitting the comic books and omitting the National Police Gazette.

Will you tell us whether or not those periodicals are among the class of imitators of Esquire that have sprung up in the last few years?

Mr. Bromley: I object to that as incompetent and calling for a conclusion not properly the subject of testimony. The documents are in evidence and they speak for themselves.

The Court: I sustain the objection.

By Mr. Deinard:

Q. I ask you, Mr. Bouton, whether the magazines
1981 which counsel has called to your attention, Gags, Hit, Halt, Hello Buddies, Laff, are new to the publication field in the last few years.

Mr. Bromley: The same objection. I think that calls for a conclusion. The magazines speak for themselves.

The Court: He may answer this question.

The Witness: I think they are.

By Mr. Deinard:

Q. And I will ask you whether there were any prototypes of such magazines, that is, magazines of the same general content and style—

Mr. Bromley: I object to that as—

Mr. Deinard: I have not finished yet, Mr. Bromley.

Mr. Bromley: I beg your pardon.

The Court: I overrule the objection.

By Mr. Deinard:

Q. —in general circulation prior to the circulation of Esquire.

Mr. Bromley: I object to that as improper.

The Court: We think counsel here might be permitted to state that they are of like character in general makeup and field served.

Mr. Deinard: I would like to submit my question with the qualification which your Honor has suggested.

By Mr. Deinard:

Q. Will you tell us whether they are or are not
1982 of general like character with respect to their dominant features as Esquire, and I am leaving out of

account the comic books and Police Gazette. A. Yes, they are.

Q. Will you tell us whether or not they have as a group arisen since Esquire came into general circulation? A. Yes.

Q. Now, I take it that as appears from some of the matter which has been introduced, that there has been controversy in the Department over the period of the last few years about these magazines. A. Yes, there has.

Q. And, as I understand it, you do not claim that your own personal views are necessarily reflected by any of the action that has been taken either by the hearing boards or by the officials of the Department? A. That is right.

Q. And, as I understand it, you do not claim to be able to testify as to what the official views of those officials may have been. A. That is right.

Q. You did not participate in any way in the proceedings which eventuated in the Postmaster General's order in this case, did you? A. The Esquire case?

Q. Yes. A. No, sir.

Q. Now, you were asked with respect to whether
1983 the Department has given consideration to the question of whether or not the contents of the magazine contributed to the public good and welfare.

Mr. Bromley: Could I have the question read back? I was inattentive. I didn't hear that.

(Thereupon, the pending question was read by the reporter.)

By Mr. Deinard:

Q. And the transcript shows that you answered "It must have some value, but I can't say that I have used the same language as you have used there."

You did not purport, did you, to reflect the official policy view of the Department in your answer? A. No, I did not.

Q. Has the question of determining the official policy of the Department as to such publications ever been submitted to you? A. It has not.

Q. To revert for the moment to the chain of administrative responsibility, has there ever been a delegation of any official responsibility to you in any of these matters? A. There has not.

Q. So far as you know, has there ever been an official delegation to your superior, Mr. Wentzel? A. There has not.

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Q. Then you were asked the following question:

"Isn't it a fact that you have never considered the quality of the contents of the mailable magazine from the standpoint of whether it made a special contribution to the public welfare," and your answer is as it appears from the transcript as follows:

"I have not considered any quality measure. I have considered the fourth condition, however."

Can you amplify that statement for us and tell us upon your preliminary consideration of applications for second-class entry, whether or not you made an effort to determine whether a magazine was originated and published for the dissemination of public information, for example? A. Yes, we did.

Q. And was that likewise true with respect to the alternative provision as to its devotion to literature, and so forth? A. It is.

Q. Then you were asked this question:

"What your Department does is to seek to identify a proffered magazine as to whether or not it is a periodical."

And your answer appears as follows:

"Pursuant to an application for its admission."

You did not intend by that answer, did you, to indicate that when the Department determines that a publication is a periodical, that it has exhausted its administrative responsibility? A. No.

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Q. Assuming that it is a periodical, you still have to inquire, do you not, into its compliance with the four conditions required of such publications for second-class entry? A. We do.

Q. Now, will you just tell the Court approximately how many applications for second-class mailing privileges are made each year to the Department? A. Between 2000 and 2500 applications.

Q. Most of them, I take it, are routine affairs? A. Yes.

Q. Will you state whether or not applications for second-class entry have been denied by the Department from time to time on various grounds? A. They have.

Q. And will you tell us whether or not such denials have been in certain cases grounded upon non-compliance with the fourth condition?

Mr. Bromley: I object to that on the ground that the best evidence is the file.

The Court: I don't think the answer would be especially prejudical. He may answer.

The Witness: They have.

By Mr. Deinard:

Q. Now, with respect to mailability, that is, whether or not a publication violates any of the criminal statutes
1986. relating to mailable matter, that as I understand it is a matter which has been committed under Postal Regulations to the Solicitor of the Department. Is that right? A. That is right.

Q. Then, it is not a matter which is passed upon by the Classification Division? A. It is not.

Q. I assume that if the question of mailability is brought to your attention you initiate an inquiry by forwarding the item to the Solicitor? A. We do.

Q. And that completes your function in that type of case, does it not? A. It does.

Q. And when you were asked by counsel whether or not your duty was limited to identifying whether a proffered article is a magazine or not under the second class, and you answered that that was a fair statement, did you have in mind the various operations that we have referred to which are necessarily involved in an administrative determina-

tion of whether a publication is a periodical and
1987 whether it complies with the four conditions?
A. Yes, I did.

Q. Now, you answered counsel yesterday with respect to one or more of these magazines, that they are under study now. Will you tell me whether or not you referred to further administrative determination to determine whether or not the publications should retain their second-class privileges? A. That is what I meant.

Mr. Deinard: That is all.

REDIRECT EXAMINATION

By Mr. Bromley:

Q. These studies that you have just spoken of did not begin until after the Esquire case was started, did they? A. This particular study did not begin until after the Esquire case.

Q. The study you referred to in your answer to Mr. Deinard's question did not begin until after the Esquire case, did it? A. That is right.

Q. Now, whatever action you have taken as a member of the Department was reviewed by your superior officers, was it not? A. It was.

Q. And in the cases in which you have acted in
1988 granting second-class privileges your action was approved, was it not? A. They were.

Q. Have you any idea how old the National Police Gazette is, Mr. Bouton? A. It is quite old. I don't know the exact years.

Q. Quite old. It goes back sixty years or more? A. I don't think with that exact title. But anyhow, the publication does go back many years.

Q. Well, it is more than fifty years old, isn't it? A. Yes, sir.

Mr. Bromley: That is all.

RECROSS EXAMINATION

By Mr. Deinard:

Q. Mr. Bouton, when counsel asks you about your action in granting second class privileges, I don't understand that you mean to convey an impression to us that you ever enter an order or take any action either granting or denying a second class privilege, do you? A. No, I do not.

Q. All you administratively can do is to submit a recommendation to your immediate superior. Is that right? A. That is right.

Q. Now, with respect to the National Police Gazette, do you happen to know whether or not that magazine originally started as a policeman's journal? A. That is my recollection, yes, sir.

Q. And I understand that your statement with respect to its age is not intended to indicate that the character of the magazine has remained the same over these many years. A. That is right.

Q. Its ownership changed, did it not, at various times? A. It did.

Q. And the character of the journal has changed? A. It has.

Mr. Deinard: That is all.

Mr. Bromley: That is all.

(Witness excused.)

Mr. Bromley: The plaintiff rests.

The Court: I might inquire in what form may the finding of the Postmaster-General and the record made before his Department be considered as a part of the record in the case. Has it been attached to any pleading or attached to any exhibit or in what form is it before the Court?

Mr. Deinard: It is my understanding, Your Honor, that it is appropriately a part of the record in this case because it is the administrative record into which the Court is inquiring.

In the answer submitted by the defendant in paragraph 34 appears this allegation:

"There is made a part of this answer the record of the proceedings before the Board of Postal Officials with the exhibits attached thereto in accordance with the
1990 provisions of the stipulation previously entered into between the parties hereto," and there was a stipulation in this proceeding which was, I believe, approved by one of the judges of this court which recites that — I am reading from paragraph 3 —

"The record of proceedings had before the Post Office Department hearing board, including the exhibits which were offered at said hearing, shall be deemed to be a part of the answer in this case without physically annexing the same thereto, and the said record including such exhibits shall be available to plaintiff's counsel at all reasonable times."

Of course, a large part of the record is concerned with the litigation of the issue of obscenity which was tendered in the original citation, but since the order is not based upon that ground, since we don't defend on that ground, and since the pre-trial stipulation eliminated it, I assume that part of the record is really irrelevant in this proceeding.

What I want to make clear is that while we concede, and there is not doubt in our mind but what the record is appropriately before the Court, we do not agree that all the testimony in that record is relevant in this proceeding. Quite the contrary.

The Court: In the event of making up a record for appeal some question, of course, might come before the
1991 Court as to whether or not all of this should go up, but that will be a bridge to be crossed when reached.

Mr. Deinard: Yes. I assume by this procedure that the record is not in evidence in the sense that it is being offered in evidence before this Court, but I suppose it is historically the complete record of the administrative proceeding which this Court is examining.

Mr. Bromley: In view of my friend's last statement, may it please your Honor, I now offer in evidence the three

printed volumes of the record before the Post Office Department which have heretofore been filed with the Clerk in this matter.

I did not think there was any question, since he made it a part of his record, and we stipulated, that it was a part of the record.

The Court: We think they are a part of the answer in such a way that they are a part of the record of this hearing.

Mr. Bromley: Yes, sir.

The Court: There being no question about it it is not necessary for you to offer them.

Mr. Deinard: Your Honor, if the Court would ordinarily recess at this time I wonder if we might have until the reconvening of the Court to determine whether or not there is any further testimony. I think not. I think we will rest.

The Court: The Court would like to say to counsel that in this case we would like a thorough discussion of
1992 the question by counsel on both sides, and we will give you reasonable time in which to present it.

We also wish to take occasion to thank counsel for the manner in which this case has been presented. Oftentimes we have cases presented when counsel are beside themselves and forget that there is another side to the controversy. Sometimes we have counsel who are inexperienced in court room practice although learned in law.

We have not had that in this case. It has been well presented by both the plaintiff and the Government.

We might have, if counsel is prepared to proceed, one argument before lunch if that argument will not cover more than 25 minutes. If it will cover more than that we will recess and take up the argument after lunch.

Mr. Bromley: I assume that since this is the trial of an action that it is up to the Government to make its closing argument first since I opened first.

Mr. Deinard: What is that?

Mr. Bromley: The ordinary practice in the trial of an equity suit is for the plaintiff to open and the plaintiff to

close. That is, while I made the first speech at the outset I get the opportunity to make the last speech at the close, and you make the first speech at the close.

The Court: That is the usual practice.

1993 Mr. Deinard: I defer to Mr. Bromley's hairs, which are grayer than mine and his greater experience in equity proceedings, and I am willing to go ahead first.

In fact, I shall be delighted to have the first crack at the matter.

I didn't want the Court, however, to overlook the fact that I have not as yet formally rested and, as I suggested before, if it would not inconvenience the Court at all I would like to have the option to defer my formal resting until after lunch.

The Court: You may have that option and if you think of something further you wish to include in the record, all right.

The Court will recess until one-thirty.

(Thereupon, at 12:05 o'clock p. m., a recess was taken until 1:30 o'clock p. m. of the same day.)

1994 AFTERNOON SESSION

(The proceedings were resumed at 1:30 o'clock p. m. following the noon recess.)

The Court: Does the Government have further evidence?

Mr. Deinard: No, Your Honor, but before resting I should like to be permitted to move the Court individually as to each of the exhibits offered by the plaintiff and received in evidence, to strike them from the record on the ground that they are incompetent, irrelevant, and immaterial, that they are an inquiry into collateral matters not related to this proceeding, have no probative value, that the matters are not included within the administrative record which is before the Court, that there is no ambiguity in the provisions of the Classification Act with which we are concerned, and more particularly section 226, which would

warrant proof of so-called contemporaneous construction, that no estoppel runs against the Government because of the errors or omissions, if any, of the defendant's predecessors, and I should like, if the Court would accept the motion in that form, to make the motion separately as to each exhibit, so as to eliminate the necessity of repeating it some 24 times.

The Court: You may so treat it. The Court will carry the motion along and dispose of it along with the merits of the case.

Mr. Deinard: The defendant rests.

III.

ADDITIONAL PAPERS.

Opinion of Judge Davidson.

Filed Jul 15 1944

The Postmaster General of the United States revoked the second-class mailing permit of the plaintiff. It seeks to enjoin the enforcement of the order so made. The question is, was the action of the Postmaster General authorized by law? By order of the highest court a rule was long ago announced: "The conclusion of a head of an executive department upon a matter of fact within his jurisdiction will not be disturbed by courts unless clearly wrong." (Burleson case, 255 U. S. 407). A lengthy hearing was given the plaintiff by the Postmaster General and his chosen aides, the record of which is before us, embracing some 1,865 printed pages. At the conclusion of such hearing, the Postmaster General stated the ground for the action now complained of. This statement was in part as follows:

2012 "Order No. 23459

This is a proceeding under the act of March 3, 1901 relating to the second-class mailing privileges accorded to the publication "Esquire" and its publisher.

In view of this voluminous record, at the onset it may be well to clarify and state just what is the issue in this proceeding. This is a proceeding involving the use of the second-class mailing privileges. Consequently, there is not involved the question of nonmailability as first, third or fourth-class mail matter nor of the right of freedom of speech, or of the freedom of the press. * * * *

Does the publication fail to comply with the Fourth condition of the Act of March 3, 1879, section 14 (20 Stat. 359; 39 U. S. C. 226) and thus not being originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry, is not entitled to second-class mailing privileges. * * * *

This is essentially a judicial matter of deep significance and the Postmaster General should not be hesitant in exposing these conditions to the critical public eye. Nor should he be reluctant to determine the matter in such a way that all phases of it may be fully considered and decided by a court of competent jurisdiction where every right and interest of the publication, the government, and the public may be fully protected. * * * *

Writings and pictures may be indecent, vulgar, and risque and still not be obscene in a technical sense. Such writings and pictures may be in that obscure and treacherous
2043 borderland zone where the average person hesitates to find them technically obscene, but still may see ample proof that they are morally improper and not for the public welfare and the public good. When such writings and pictures occur in isolated instances their dangerous tendencies and malignant qualities may be considered of lesser importance.

When, however, they become a dominate and systematic feature they most certainly cannot be said to be for the public good, and a publication which uses them in that manner is not making the "special contribution to the public welfare" which Congress intended by the Fourth condition. * * * *

The editor of this publication admits that from its origin "our humor and our articles and our fiction all stressed a man alone angle—you might call it a stag party type of treatment", (3) and testified "we called it the smoking room type of humor". (4) He stated that as part of its editorial policy it runs "cartoons that do feature sex". (5) Its featured pictures are stated to be "frankly published for the entertainment they afford". * * * *

I cannot assume that Congress ever intended to endow this publication with an indirect subsidy and permit it to receive at the hands of the government a preference in postal charges of approximately $500,000 per annum. (11) * * * *"

The Postmaster General is by law charged with the duty of dividing his mail matter into four classes. The law as it now is was written many years ago.

2014 "Sec. 7. That mailable matter shall be divided into four classes:

"First. Written matter;

"Second. Periodical publications;

"Third. Miscellaneous printed matter;

"Fourth. Merchandise."

Matter of second class is thus described:

"Sec. 10. That mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year, and are within the conditions named in sections twelve and fourteen.

"Sec. 12. That matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject: Provided, That nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same."

"Sec. 14. That the conditions upon which a publication shall be admitted to the second class are as follows:

"First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively.

"Second. It must be issued from a known office of publication.

"Third. It must be formed of printed paper sheets, without board, cloth, leather or other substantial binding, such as distinguish printed books for preservation from periodical publications.

"Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry, and having a legitimate list of subscribers." (194 U. S. 93, now comprising Sections 221, 224, 225 and 226, Title 39, U. S. C.)

Since the law creates the duty of classification and
2015 provides that the mail should be placed in four piles, as it were, the defendant must determine to which group a parcel belongs. This determination constitutes him into a fact finding agency and his act is of a quasi judicial character. It will be seen that Section 225 indeed provides that second class mail may be examined at the office to see if it is subject to a high rate of postage. This means more than examining the bundle or the wrapper. It means an examination of the contents of the printed matter. Thus, in the Riverside case, 194 U. S. 88, styled Houghton v. Payne, a publisher conceived the idea of sending out to his readers in magazine form the cream of literature. The front page of the magazine met all the conditions of second class mail entitling it on the face of it to the cheap rate accorded such second class mail. The magazine, however, was within itself a complete book. Books are third class mail and although the magazine had been published for a long period, the Postmaster General held that he was not entitled to the cheap rate of second class mail. Again, in

what we might call the Music Masters' case, styled Bates & Guild Co. v. Payne, 194 U. S. 106; the publisher conceived the idea of supplying its readers with choice selections of music and doing so in a magazine to be entered as second class mail. It was entitled "Masters in Music". It was issued in 1903. The first issue was devoted to Mozart and contained his portrait and a brief biography, then an essay, followed by thirty-two pages of music. Its front page and its date of issuance was to take the appearance, and make, in fact, a periodical, so far as its regular appearance 2016 was concerned, but it was, in fact, a book of music.

The Postmaster General ruled that it was not entitled to the cheap rate of second class mail, but should be classed as books, and therefore, receive the postal rating of third class mail. The test for the second class mail privilege is: The periodical "must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry." By the word periodical is meant that it must be like a newspaper printed at given periods of not less than four times a year.

What was contemplated by the law giving the Postmaster General as his chart and guide in accepting publications for second class mail? The publication must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry. There is perhaps no better way to arrive at a man's thoughts than to put oneself in the place of that man to envision as far as possible the things that he saw and the emotions that he felt. What was in the mind of Congress in sending out newspapers and magazines as second class mail matter at a small fraction of the cost of transportation and delivery? Congress had a purpose. And what was the character of the literature that was to receive the benefit of this special treatment? In 1879 the nation was in the midst of what may be known as the Victorian era, not only of the pious, home-making Victoria,

but we were in the shadow of Jefferson, and under the then living influences of men like Lincoln, Lee and William McGuffey. Lincoln had said, "I am not bound to win, but I am bound to be true". Lee had said to his son and to the boys at Washington-Lee University, "Duty is the most sublime word of the English language". These men of '79 who sat in the halls of Congress were boys in the fifty's. They may have listened to William McGuffey, filling the chair of moral philosophy in the University of Virginia. This, he did for more than a quarter of a century. If their training only extended to the common school, they found there the series of readers by William McGuffey—First, Second, Third, Fourth, Fifth and Sixth Readers. The first was but a primer for a boy of tender years, but the fifth and sixth embraced the most beautiful classics. For a period of sixty years or more, the American youth, or we may safely say millions of them, learned at the feet of William McGuffey. In the primer, about every fourth lesson, was one that taught the child how to live. He must not lie, and there followed the story of Washington and the cherry tree. He must be honest and just, and there followed the story of the broken window and the silver dollar. He must revere and respect his parents and there followed the story of the jeweler who would lose a deal of great profit rather than awake his father from the joy and comfort of his evening siesta. These environments created a standard of ethics and morals which ruled the America of our fathers. It was the Victorian era translated to the American conception. Jefferson who died in 1826 was the champion of public education. He died without the realization of his dreams but he had sown the seed. Men like Andrew Jackson and Abraham Lincoln had been educated in the school of hard knocks and bumps, but nevertheless, educated in that virile type of democracy affording an equal opportunity to the youth. It was men of this type, brought up under the ethics and standards of this period, who wrote in 1879, Section 226, Title 39 of

the U. S. Code giving a low rate to newspapers and like publications. May the Postmaster General, therefore, have not been warranted in reaching his conclusions that the literature referred to was literature of desirable type of an educational value? The Postmaster General had to make his conclusions. He had to test the contents of the magazine by some standard. It may be that the standard of yesterday doesn't carry the same strict interpretation for it has well been said that: "There is nothing good or bad but that thinking makes it so". An appalling thing daily witnessed in our courts is the long string of juvenile delinquents: One has stolen an automobile, another is a sex pervert, while another is a bank robber, or at least a pilferer in some one's mail. It is more appalling to find that these young men in the main are devoid of any sense of shame. In their minds, they have no code of morals that they have been ashamed to break. They know no standard. It must be that they have not been taught. Indeed a man's conscience is dependent upon his conception of that which is just and right. A cannibal of the South Seas has no concientious scruples about catching, beheading, and barbecuing, as it were, the child of his neighbor. There may be many contributing causes to the delinquency of youth, but may not the Postmaster General have reasonably had in mind that of literature as one? And did not the authors of the measure enacted by Congress have in mind good literature?

2019 Turning away from the public mind, let's look behind the scene in the halls of Congress when the Bill was passed. Congressman Money of Mississippi, Manager of the Bill, said,

"In fact, it does not contemplate censorship of the press. It is for the protection of the legitimate journals of the country." (Congressional Record, February 28, 1879, p. 2135).

Continuing further, he said:

"We know the reason for which papers are allowed to go at a low rate of postage, amounting almost to the franking

privilege is because they are the most efficient educators of our people. It is because they go into general circulation and are intended for the dissemination of useful knowledge such as will promote the prosperity and the best interest of the people all over the country."

In Houghton v. Payne, 194 U. S. 88, the Supreme Court quoted Speaker Cannon of the House of Representatives as follows:

"The policy of that legislation being to encourage the dissemination of sound and desirable reading matter among the masses of the people of the country at cheap rates."

United States v. Burleson, 255 U. S. 407:

This privilege "is justified as part of the 'historic policy of encouraging by low postal rates the dissemination of current intelligence.'"

This view was undoubtedly accepted by Chief Justice White, one of the great jurists of our country. We find in his opinion in the Lewis case, 229 U. S. 302:

"Indeed, we think also that it is not open to controversy that a review of these statutes will demonstrate that it was always conceived not only that Congress might so exert its power as to favor the circulation of newspapers, by giving special mail advantages, but that it also possessed
2020 the authority to fix a general standard to which publishers seeking to obtain the proffered privileges must conform in order to obtain them." * * * *

"And it is obvious and is not disputed, that the classification thus adopted was based, not upon merely inherent distinctions or differences in the nature and character of the articles as mailable matter and the cost of their carriage, but rested upon broad principles of public policy." * * * *

"The extremely low postage rate accorded to second-class matter gives these publications a circulation and a corresponding influence unequaled in history."

In 1879 our public school system was yet in its infancy and we conclude that the Postmaster General was warranted in taking the view that Congress meant for second class mail to be a contribution toward public education and therefore, that the literature given such low rate should possess merit and be of educational value.

The defendant Walker has some basis for his findings in the nation's background and the traditions of our people. Then he has 1800 pages of testimony embracing views of many people and various exhibits. Looking for a moment at this record, we find the editor of plaintiff's magazine upon examination before the department admitted that the humor and cartoons as well as the articles of the magazine were of the stag party variety. They were called the smoking room type of humor. The girl gag type of humor was the gold-digger, confined to sex, jokes, and chorus girls and like art. Witness Solomon H. Metz testified for the
2021 department, giving his appraisal of the literary value:

"It seems to me that the whole atmosphere of this publication is such as to reduce the main interest of living to sex, and then degrade sex to its lowest vulgar expressions. I deem it destructive of morality and ethics."

Men differ about their appraisal of these things. They did in the record in the Postmaster General's hearing. The Postmaster General, in reaching his findings, however, had their views before him. It further appeared that Esquire has many imitators and that there is now a vast volume of this type of mail, and in connection with this volume of printed matter, he probably had in mind that some newspapers of the highest type were being limited print paper to the degree that they asked their readers to share the paper with others. Then again, he had before him, no doubt, his own reports. On page 89 of his Annual Report for 1941, he shows that first class mail produced $456,128,710.86; that it created expenditures of $309,313,132.13. Thus, the han-

dling of first-class mail gave to the department a new revenue of $146,000,000.00 in round figures. In second class mail, the figures ran in reverse: Total revenue, $25,724,959.81; total expenditures, $109,244,706.11, a deficit in round figures of more than $83,000,000.00, which in a sense amounted to a bonus thus paid to those having a permit of second class mail. The figures for 1942 show a net deficit for second class mail of $86,000,000.00 in round figures. The figures for 1943 are not yet in print.

In reaching his decision and viewing the matter in the light of Chief Justice White, Speaker Cannon and others, the Postmaster General, acting in the scope of duty, was confronted with creating annually a useless deficit unless the public who paid the bill was receiving some substantial benefit thereby, such as was in contemplation of Congress. In the light of these facts, we cannot say that his ruling was either unjust or unlawful. The plaintiff has not been deprived of property. It has not been stripped of any vested right. It may still publish its book or magazine. It may still mail it, but the Postmaster General doesn't elect to treat it as that character of mail to which Congress has extended special treatment in the way of rates. He says in his Report that it would amount to a bonus of $500,000.00 annually to the plaintiff. Moreover, the plaintiff may apply at any time for the reinstatement of its publication when it has brought it within the scope and purpose of Congressional enactment, and until that time it may pay the same postage that authors and publishers of books pay for their production.

Censoring. Does the act of the Postmaster General amount to that of censoring the mail? On this point we have found more difficulty. A censorship, except for military reasons, is the denial of the right of freedom of the press and the right of freedom of speech, and that is a denial of all those rights and privileges which are had in the enjoyment of a free government. It is the first step to a perpetuated tyranny. We feel, however, that there are

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safeguards against such. If the Postmaster General deals with an individual case without classifying it in a group, his act becomes capricious and arbitrary, and is subject to a review by the courts. Moreover, he is no doubt
2023 subject to the will of the President. Finally, if his course becomes too general, Congress can rewrite the Act that he has failed to interpret in keeping with prevailing standards and conceptions if he has so misinterpreted it. There is a very decided difference between grouping and classifying and that of censoring. Censoring deals more with the specific article, the deleting of objectionable portions. Classifying means grouping. This was the view of Judge White, Judge Clark and others in the cases above referred to.

"The Radio Commission's refusal to renew the broadcasting license on the ground that public interest, convenience or necessity would not be served, *held* not to constitute "censorship" of the radio station because there was no attempt on the part of the commission to subject any portion of the applicant's broadcasting matter to scrutiny prior to its release." (47 Fed. 2nd 670.)

The classification of things, however, is a different process.

"The word has been defined as meaning a characterization through the selection of some quality or feature, a grouping of classes or a putting together of like subjects or facts under a common designation." (14 CJS 1194.)

"Word "classification" as used in school budget statute, means putting together of like subjects or facts under common designation." (7 Words and Phrases 431.)

"Classification" is in law grouping of things in speculation or practice because they agree with one another in certain particulars and differ from other things in those same particulars." (7 Words and Phrases 432.)

2024 Appeals to the court do not lie from orders of the President or his executive officers. A court will not

review or overturn an act of an executive officer charged with the performing of a given duty unless the act is arbitrary, capricious or unlawful. Is the order of the Postmaster General unlawful, capricious or arbitrary? There is a very striking analogy between his attitude in making this classification and the act of the draft board in classifying a soldier for military duty. The draft board passes upon any claim of exemption that may be made by the draftee. The soldier may appeal to a board of appeals constituted for that purpose. If he is dissatisfied with that ruling, he may not appeal to the court. The court will review the classification, however, only when the draft board has acted arbitrarily or capriciously in disregard of law, and this is brought to the court's attention not in the way of appeal, but ordinarily by a writ of habeas corpus. The Supreme Court has lately held in the Jehovah Witnesses case, opinion by Justice Black, entered January 3, 1944, and not as yet in print, in the case of Nick Falbo, petitioner, that the court was without jurisdiction to set aside the rulings and finding of the draft board on matters of classification. In the Victor Burger case, styled Milwaukee Publishing Company vs. Burleson, 255 U. S. 407, the court held:

"The extremely low rate charged for second-class mail to carry it, was said, in arguments, to cost seven times the revenue which it yields—is justified as a part of "the historic policy of encouraging by low postal rates the dissemination of current intelligence." It is a frank extension of special favors to publishers because of the special contribution to the public welfare which Congress believes is derived from the newspaper and other periodical press. 229 U. S. 301, 304."

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* * *

"That the power to suspend or revoke such second-class privilege was a necessary incident to the power to grant it has long been recognized by statute and by many decisions of this court."

"Where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they have the power, and will occasionally exercise the right of so doing.

"As to what is second class mail matter, Houghton v. Payne, p. 88, followed." (194 U. S. 106.)

After a full hearing in which the Postmaster General shows due consideration of the subject and in connection with the consideration thereof, he withheld the enforcement of the putting of his order in operation until the court had passed upon his ruling showing that his attitude towards the plaintiff was not in any sense arbitrary. Having thus in good faith performed the duty of his office as he saw it, we find no logical ground to enjoin his action, or stated otherwise, no valid legal basis can be had for the substitution of the court's views for those of the executive officer. His findings, like those of the Master or the Jury must be upheld by the court. The injunction will, therefore, be denied.

T. WHITFIELD DAVIDSON
Judge

2026 Filed Jul 24 1944

Findings of Fact and Conclusions of Law

The above entitled cause is a civil action brought to enjoin the enforcement of, and to have declared invalid an order of the defendant revoking the second-class mailing privileges of plaintiff's periodical, Esquire.

The case came duly on for trial before the undersigned on July 10, 1944, and was tried on that day and succeeding days. Bruce Bromley, Esq., John F. Harding, Esq., and

Howard Boyd, Esq., appeared for plaintiff, and Benedict S. Deinard, Esq., appeared for defendant. The court having received and considered oral argument and written briefs of both parties and having entered its opinion, now makes the following findings of fact and conclusions of law

Findings of Fact

(1) Plaintiff is engaged in the publication, distribution and sale of the monthly periodical Esquire Magazine.

(2) Defendant is and has been since September 11, 1940, the Postmaster General of the United States and the head of the Post Office Department, an executive department of the United States. Defendant is a resident of the City of Washington, District of Columbia.

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(3) The matter in controversy here exceeds the sum of $3,000, exclusive of interest and costs.

(4) On December 15, 1933, plaintiff applied for and received second-class mailing privileges for Esquire.

(5) On September 11, 1943, pursuant to the provisions of the Act of March 3, 1941 (39 U. S. C. 232), a citation was issued to plaintiff to show cause why such privileges should not be suspended, annulled, or revoked. The citation was amended on October 4, 1943. Pursuant to the Department's Rules of Practice (Order No. 17493, April 21, 1942; 7 F. R. 3001-3003), the defendant designated three hearing officers to conduct and preside at the hearing of the citation. Extensive hearings were accordingly held, and by agreement two grounds for revocation of the second-class permit for Esquire were tried at these hearings: (1) Whether the cited issues of Esquire (comprising the monthly issues from January to November, 1943) were nonmailable on the ground of obscenity within the meaning of 18 U. S. C. 334, and (2) whether Esquire failed to comply with the Fourth Condition of 39 U. S. C. § 226 for second-class entry of a periodical publication, requiring, *inter alia*, that the periodical "be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry."

(6) At the hearings, both oral testimony and documentary evidence were received, and plaintiff was given full opportunity to be heard and to present its case. It is conceded that the hearing accorded plaintiff was fairly conducted and satisfies all of the requirements of due process of law. On November 11, 1943, the hearing officers submitted to defendant their respective recommendations together with a transcript of the proceedings, which included the testimony and exhibits, and the briefs and arguments of counsel.

(7) On December 30, 1943, defendant entered an order revoking the second-class mailing privileges of Esquire effective February 28, 1944, on the ground that it did not comply with the Fourth Condition of Section 14 of the Act of March 3, 1879 (39 U. S. C. 226), i.e., that it was not originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry.

(8) By stipulation filed in this case, the record of the proceedings had before the hearing officers, including the exhibits, were designated a part of defendant's answer, and the answer specifically incorporated said record. By stipulation embodied in the pre-trial order of this Court, it was agreed that defendant does not defend on the contention that Esquire is obscene within the meaning of 18 U. S. C. 224 or nonmailable within the provisions of that or any other statute.

(9) The determination and order of the defendant are supported by substantial evidence in the record before him, and are neither arbitrary nor capricious.

Note: This Court does not make any independent findings as to whether Esquire is in fact "originated or published for dissemination of information of a public character, or is devoted to literature, the sciences, arts, or some special industry," inasmuch as the Postmaster General is authorized by law to make such findings, and since the function of this Court does not extend beyond an inquiry

into whether the Postmaster General's order is clearly wrong or not supported by any substantial evidence. United States v. Barleson, 225 U. S. 407; Bates & Guild Co. v. Payne, 194 U. S. 106; American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 104.

2029 *Conclusions of Law*

(1) This Court has jurisdiction to hear and determine this matter under Section 24 of the Judicial Code (28 U. S. C. 41).

(2) The Postmaster General is by law charged with the duty of classifying mail matter into the four classes prescribed by the Act of March 3, 1879 (39 U. S. C. 221, et seq.) and therefore of determining to which class mail matter belongs; the standards for such classification are sufficiently definite.

(3) The determination of the Postmaster General that Esquire did not comply with the Fourth Condition of Section 14 of the Act of March 3, 1879 (39 U. S. C. 226), and therefore was not entitled to second-class mailing privileges thereunder, was within the jurisdiction of the Postmaster General, is presumptively correct, and is binding upon the court unless it is clearly wrong.

(4) The Postmaster General's determination that Esquire was not originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, was not clearly wrong, nor unlawfully made, nor arbitrary, capricious or unsupported by substantial evidence.

(5) The order of the Postmaster General, the enforcement of which is sought to be enjoined, is lawful and valid.

(6) The order of the Postmaster General involves only the amount of postage to be paid by plaintiff; it does not exclude Esquire from the mails; it does not impose censorship, nor involve any infringement of the right of free speech or abridgment of freedom of the press.

(7) The complaint should be dismissed and the injunction denied, with costs to defendant. Let judgment be entered accordingly,

2030 (8) In view of the court's disposition of this case on the merits, the court finds it unnecessary to act upon defendant's motion to strike the exhibits offered by plaintiff and received in evidence by this Court.

T. WHITFIELD DAVIDSON
United States District Judge

Dated at Washington, D. C., this 24th day of July, 1944.

* * * * * * * * * *

2031 Filed Jul 27 1944

Judgment

This cause came on to be heard on its merits before the Court on July 10, 11 and 12, 1944. Testimony was taken, exhibits were offered, and the case was argued by counsel for both parties. Upon consideration of the entire case, the Court having entered its opinion and made and filed findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed

1. That the plaintiff's application for temporary and permanent injunctive relief is denied.

2. That the plaintiff's complaint herein be, and same is hereby dismissed on the merits.

T. WHITFIELD DAVIDSON
United States District Judge

Dated: July 27, 1944.

Seen

HOWARD BOYD
HUGH LYNCH, JR.
ALFRED S. BERG

* * * * * * * * * *

2032 Filed Aug 18 1944

Notice of Appeal

Notice is hereby given this 18th day of August, 1944, that Esquire, Inc., the plaintiff above-named, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 27th day of July, 1944 in favor of defendant against said plaintiff, which judgment denied plaintiff's application for injunctive relief and dismissed plaintiff's complaint in the above-entitled action.

HUGH LYNCH, JR.
Attorney for Plaintiff,
616-621 Transportation
Building,
Washington, D. C.

TO:

EDWARD M. CURRAN, ESQ.,
United States Attorney for the
District of Columbia,
Washington, D. C.

FRANCIS M. SHEA, ESQ.,
Assistant Attorney General,
Department of Justice,
Washington, D. C.

CLERK, United States District Court,
District of Columbia.

2033 Filed Sep 20 1944

Order

It is by the Court this 20th day of September, 1944,
Ordered:

That the Clerk of the Court transmit to the United States Court of Appeals for the District of Columbia the originals of the exhibits filed in this cause in lieu of copies thereof.

DANIEL W. O'DONOGHUE
Justice.

HUGH LYNCH, JR.,
616 Transportation Building,
Washington 6, D. C.,
Attorney for Plaintiff.

No objection.
FRANCIS M. SHEA
Asst. Atty. General.

* * * * * * * * * *

2036 Filed Oct 28 1944

Stipulation as to Contents of Record on Appeal

It Is Hereby Stipulated and Agreed by and between the undersigned that, pursuant to Rule 75(f) of the Federal Rules of Civil Procedure, the following shall be included in, and shall constitute, the record on appeal to the United States Court of Appeals for the District of Columbia from the judgment entered in the above-entitled action on July 27, 1944:

1. Amended complaint for injunction verified February 11, 1944, and Exhibit A annexed, filed February 15, 1944.

2. Stipulation approved by Hon. T. Alan Goldsborough and filed February 8, 1944, relative to continuance of mailing as second-class matter at second-class rates until final determination of case.

3. Answer of defendant to amended complaint filed April 24, 1944.

4. Entire transcript of proceedings (three printed volumes) before the Post Office Department Hearing Board, including exhibits offered at hearings before said Board, filed as part of defendant's answer.

5. Pre-trial stipulation before Hon. F. Dickinson
2037 Letts, approved and filed June 7, 1944.

6. Pages 1, 55 through 144 of the stenographer's transcript of proceedings of the trial of the action before Hon. T. Whitfield Davidson on July 10, 11, and 12, 1944, and exhibits and attached excerpts from opening statements of Mr. Bromley on behalf of plaintiff and Mr. Deinard on behalf of defendant and colloquy of Counsel and Court, all in connection with proceedings before District Court.

7. Opinion of Judge Davidson filed July 15, 1944.

8. Findings of fact and conclusions of law dated and filed July 24, 1944.

9. Judgment entered and filed July 27, 1944, denying injunctive relief to plaintiff and dismissing complaint on merits.

10. Notice of Appeal filed August 18, 1944.

11. Order transmitting original exhibits.

12. This stipulation.

13. Docket entries.

Dated October 27, 1944.

HUGH LYNCH, JR.,
Attorney for Plaintiff.

FRANCIS M. SHEA
Assistant Attorney General

EDWARD M. CURRAN,
United States Attorney for the District of Columbia.

2034 Filed Sep 20 1944

Order

It is by the Court this 20th day of September, 1944, Ordered:

That the time for filing the record on appeal and docketing the action in the United States Court of Appeals for

the District of Columbia be, and it hereby is, extended to and including November 3, 1944.

DANIEL W. O'DONOGHUE
Justice.

HUGH LYNCH, JR.,
616 Transportation Building,
Washington 6, D. C.,
Attorney for Plaintiff.

No objection.
FRANCIS M. SHEA
Asst. Atty. General.

2035 Filed Oct 24 1944

Order

It is by the Court this 24th day of October, 1944, Ordered:

That the time for filing the record on appeal and docketing the action in the United States Court of Appeals for the District of Columbia be, and it hereby is, extended to and including November 16, 1944.

DAVID A. PINE
Justice.

HUGH LYNCH, JR.,
616 Transportation Building,
Washington 6, D. C.
Attorney for Plaintiff.

Consented to:
FRANCIS M. SHEA
Attorney for Defendant

CIVIL DOCKET
DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

NUMBER	PARTIES	ATTORNEYS	ACTION FOR	CASH
99999	Esq. et. Ux.	Cravath & Henderson Supreme Bureau & Wood (1914) ~~Hugh Lynch, J~~ Regan & Harlan		
	vs.			
	Frank C Walker as Postmaster Genl of U S	U S Atty		

DATE	PROCEEDINGS	DR.	CR.
1914	Lynch		
Jan 21	Complaint & precipe filed		
" 21	Summons & copy of complaint issued	Issued	
" 21	Notification & standing mailing of publishers proposed final distributions		
" 21	Amended Complaint	filed	
" 27	Affidavit of D Sargent	filed	
" 27	Order		
	[illegible]		
	[illegible]		
	[illegible]

CC

PROCEEDINGS

Signat

Complaint & exhibit

Summons & copy of complaint issued ... as to ...

Stipulation ... of substituted parties and ...

Amended Complaint (Amend by order dtd ... 4/4)

Affidavit of Service

Brief

... Motion ... Consolidate ... Cases

... Motion advancing ... cause ... Hearing

... Motion ... Leave ... Morris, J. ...

... Motion ... Leave ... Morris, J. ...

June 9 Ass'n of American Newspaper Pub. ... as amicus curiae, by ... Clerk Known. filed.

... Motion ... Leave ... Morris, J. (m)

... Motion ... Leave ... Morris, J. ...

17 Brief of the Authors League of America, Inc. Amicus Curiae & Certificate acknowledging service of brief filed

June 21 Plaintiffs Brief filed

" 28 Defendants Acknowledgment of Service filed

July 7 Motion of Gov't to Quash subpoena under rule 45 & notice ... Grants & Authorities filed

(CONTINUED ON P. 415)

	11	" " Record	"	12
	12	" " and exhibits	Judge	
		Praecipe for [illegible]		
	15	Copy of docket entries		
"	15	Memorandum opinion of Davidson, J.		filed
"	24	Findings of fact & conclusions of law		Davidson J
"	24	Plaintiff's proposed findings of fact & conclusions of law		filed
"	27	Judgment dismissing complaint		Davidson J
August	18	Notice of appeal by plaintiff & citation for appeal issued by Glenn		
		(Copy of notice mailed by clerk to Chapman, Shea, and Dawson)		
"	18	Cost bond on Appeal in the amt of $250.00 with Hartford Accident and Indemnity Co as surety		approved & filed
"	22	Plaintiff's exhibits 1 to 25 inclusive		filed
Sept	29	Order to transmit original exhibits or copies to U.S. Court of Appeals		Donoghue J
Oct	20	Order extending time to file record to & including November 3, 1947		Donoghue J
Oct	27	Order extending time to file record to and including Nov. 10, 1947 (consent)		Cooper J
"	28	Stipulation of counsel as to contents of record on appeal		filed
Nov	2	Transcript of proceedings before Davidson J. 1 vol copy		
Nov	8	Certificate of Clerk to transcript and copy as stipulated		
"	8	Stipulation with respect to changes to be made in stenographer's transcript of proceedings		

United States Court of Appeals for the District of Columbia.
Filed June 4, 1945. Joseph W. Stewart, Clerk.

United States Court of Appeals, District of Columbia

No. 8899

ESQUIRE, INCORPORATED, APPELLANT

v.

FRANK C. WALKER, AS POSTMASTER GENERAL OF THE UNITED STATES, APPELLEE

Appeal from the District Court of the United States for the District of Columbia

Argued April 20, 1945—Decided June 4, 1945

Mr. Bruce Bromley of the Bar of the Court of Appeals of New York, pro hac vice, by special leave of Court, with whom Mr. Hugh Lynch, Jr., was on the brief, for appellant. Messrs. Morris L. Ernst, George S. Collins, Alexander Lindey, and John F. Harding, all of the New York bar, also were on the brief for appellant.

Mr. Marvin C. Taylor, Attorney, Department of Justice, of the Bar of the Supreme Judicial Court of Massachusetts, pro hac vice, by special leave of Court, with whom Assistant Attorney General Shea and Messrs. Arnold Levy and David Lloyd Kreeger, Special Assistants to the Attorney General, and Edward M. Curran, United States Attorney, were on the brief, for appellee. Messrs. Charles B. Murray and Daniel B. Maher, Assistant United States Attorneys, also entered appearances for appellee.

Mr. Robert E. Coulson, on behalf of Reader's Digest Association, Inc., Mr. Albert E. Brault, on behalf of Authors' League of America, Inc., Mr. Charles A. Horsky, on behalf of the American Civil Liberties Union, Mr. Arthur H. Cleplane, on behalf of Curtis Publishing Company, and Mr. Elisha Hanson, on behalf of American Newspaper Publishers Association, each filed briefs as amicus curiae, urging reversal.

Before MILLER, EDGERTON, and ARNOLD, Associate Justices.

ARNOLD, Associate Justice: Esquire is a well known magazine of general circulation. It contains stories, articles, literary and dramatic reviews. Its contributors include distinguished authors, clergymen, and professors in our best educational institutions.

The postmaster General revoked the second-class mailing privileges of this magazine, not on the ground of obscenity but because he thought its dominant purpose was to publish writings and pictures described in his order as being "in that obscure and

treacherous borderland zone where the average person hesitates to find them technically obscene, but still may see ample proof that they are morally improper and not for the public welfare and the public good".[1] The revocation order would cost Esquire about $500,000 a year and put it in such a disadvantageous competitive position that it probably could not continue as a current magazine of general circulation.

The theory of the ruling depriving Esquire of second-class mailing privileges, while at the same time permitting it to be mailed at higher rates, is stated by the Postmaster General as follows: "A publication to enjoy *these unique mail privileges* [emphasis added] * * * is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. It is under a positive duty to contribute to the public good and the public welfare."

No doubt such a duty exists. But it does not follow that an administrative official may be delegated the power first to determine what is good for the public to read and then to force compliance with his ideas by putting editors who do not follow them at a competitive disadvantage. It is inconceivable that Congress intended to delegate such power to an administrative official or that the exercise of such power, if delegated, could be held constitutional.[2] Congress established the second-class mailing privileges because it believed that periodicals which disseminated public information, literature, art or science deserved to be encouraged on account of their contribution as a class to the public good. But the American way of obtaining that kind of contribution is by

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[1] The applicable sections of the Postal Law relating to second-class mail read, 39 U. S. C. §§ 224, 226 (1940):

"§ 224. Second-class matter. Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections 225 and 226 of this title."

"§ 226. Same; conditions admitting publications to. Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second class are as follows: First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second. It must be issued from a known office of publication. Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications. * * * Fourth. *It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry*, and having a legitimate list of subscribers. Nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates." [Italics added.]

The above italicized words of the fourth condition are those with which we are concerned on this appeal.

[2] No case has been cited involving the precise facts before us here. However, the broad principles outlined in the following cases make this conclusion inescapable: West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943); Hague v. C. I. O., 307 U. S. 496 (1939); Lovell v. City of Griffin, 303 U. S. 444 (1938); Grosjean v. American Press Co., 297 U. S. 233 (1936); Near v. Minnesota, 283 U. S. 697 (1931); Pike v. Walker, 73 App. D. C. 289, 121 F. (2d) 37 (1941).

See also dissenting opinions of Mr. Justice Holmes and Mr. Justice Brandeis in United States ex rel. Milwaukee S. D. Pub. Co. v. Burleson, 255 U. S. 407 (1921). The majority in the Burleson case does not sustain the position taken by the Postmaster General since it held that the publications involved there were nonmailable.

giving competitive opportunity to men of different tastes and different ideas, not by compelling conformity to the taste or ideas of any government official. This basic idea has nowhere been more eloquently expressed than in the famous quotation from Mr. Justice Holmes, dissenting in Abrams v. United States:

"But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out. That, at any rate, is the theory of our Constitution."

What the Government appears to assert is that the power to charge Esquire an additional $500,000 a year for use of the mails, unless it conforms to the Postmaster General's notions of the public good, is not a power to censor because the magazine may be mailed at the higher rate. The key to an understanding of this extraordinary contention is found in the Postmaster General's reference to second-class mailing rates as "unique privileges." He appears to think of his duty under the statute, not as administration of nondiscriminatory rates for a public service, but as analogous to the award of the Navy E for industrial contributions to the war. The Navy E is an award for exceptional merit. The second-class mailing rate is conceived by the Post Office to be an award for resisting the temptation to publish material which offends persons of refinement.

But mail service is not a special privilege.[3] It is a highway over

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[3] 250 U. S. 616, 630 (1919).

[4] "Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare. Not only this, but the postal system is a monopoly which the government enforces through penal statutes forbidding the carrying of letters by other means. It would be going a long way, therefore, to say that in the management of the Post Office the people have no definite rights reserved by the First and Fifth Amendments of the Constitution. * * *." Pike v. Walker, supra note 2, at p. 291.

Mr. Justice Brandeis dissenting in United States ex rel. Milwaukee S. D. Pub. Co. v. Burleson, supra note 2, at p. 430:

"Congress may not, through its postal police power, put limitations upon the freedom of the press which, if directly attempted, would be unconstitutional. This court also stated in Ex parte Jackson, that 'liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value.' It is argued that although a newspaper is barred from the second-class mail, liberty of circulation is not denied; because the first and third class mail and also other means of transportation are left open to a publisher. Constitutional rights should not be frittered away by arguments so technical and unsubstantial. 'The Constitution deals with substance, not shadows. Its inhibition was leveled at the thing, not the name.' Cummings v. Missouri, 4 Wall. 277, 325."

Mr. Justice Holmes dissenting in the Burleson case, at p. 437:

"The United States may give up the Postoffice when it sees fit; but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongues; and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man. * * *

"To refuse the second-class rate to a newspaper is to make its circulation impossible, and has all the effect of the order that I have supposed. I repeat. When I observe that the only powers expressly given to the Postmaster General to prevent the car-

which all business must travel.[3] The rates charged on this highway must not discriminate between competing businesses of the same kind.[4] If the Interstate Commerce Commission were delegated the power to give lower rates to such manufacturers as in its judgment were contributing to the public good the exercise of that power would be clearly unconstitutional. Such a situation would involve freedom of competitive enterprise. The case before us involves freedom of speech as well.

Little more need be said to decide this case. Nevertheless, since we hope that this is the last time that a government agency will attempt to compel the acceptance of its literary or moral standards relating to material admittedly not obscene, the voluminous record may serve as a useful reminder of the kind of mental confusion which always accompanies such censorship.

The first source of that confusion is, of course, the age old question when a scantily clad lady is art, and when she is highly improper. Some refined persons are hopeful that an answer to this vexing riddle may some day be found. Others are pessimistic. But whichever school eventually proves correct it is clear from the following cross-examination of one of the expert witnesses for the Post Office that the problem had not yet been solved when the record in this case went to press:

> Q. Now that you have heard Mr. O'Brien, could you tell me in your opinion whether that picture is decent or indecent?—A. Well, taking the expression of the picture and who the person is and what her attitude in life is, I think it is decent. I think the purpose for which you do things in life has a great deal to do with it. It is the motive in those pictures which is harmful.
>
> Q. Will you look at this Exhibit 133, and tell me if this picture is decent or indecent?—A. I think I am being trapped, Your Honor.
>
> Q. You found that out, haven't you?—A. Yes. I knew I was going to be trapped when I came here and I know I shall be in every column tomorrow.

---

riage of unlawful matter of the present kind are to stop and to return papers already existing and posted, when I notice that the conditions expressly attached to the second-class rate look only to wholly different matters, and when I consider the ease with which the power claimed by the Postmaster could be used to interfere with very sacred rights, I am of opinion that the refusal to allow the relator the rate to which it was entitled whenever its newspaper was carried, on the ground that the paper ought not to be carried at all, was unjustified by statute, and was a serious attack upon liberties that not even the war induced Congress to infringe."

[4] Even if second-class mail service actually were a privilege which could be withheld in the Postmaster General's discretion we still do not think it could be used to purchase compliance with his literary standards. If a publication is not actually obscene the publisher's right of free speech is clearly involved. In our opinion the principle of Terral v. Burke Construction Co., 257 U. S. 529 (1922), and Western Union Telegraph Co. v. Kansas ex rel. Coleman, 216 U. S. 1 (1910), which involves state imposition of unconstitutional demands on foreign corporations is broad enough to cover this situation. For a comprehensive review of cases supporting this principle see article by Robert L. Hale, 25 Columbia L. Rev. 321 (1935), entitled Unconstitutional Conditions and Constitutional Rights.

Q. You haven't been reading the newspapers, have you?—A. I read Dr. Marshall's testimony yesterday.

Q. You did?—A. Yes.

Q. Now, just where and how are you being trapped?—A. I am trying to be made a prude. I am not a prude.

Q. Well, would you mind telling me if that picture is decent or indecent?—A. If I had a daughter I shouldn't like to have her photograph in that costume. I have no daughter, I have only sons.

Q. Is that your criterion for decency, Madam?—A. My criterion for decency is anything that is proper, in order, certainly not harmful to human dignity. This woman is evidently by the ocean. I see the ocean there. She has probably come in and out of the ocean and if she stays there all right for me, but I do not wish to see that picture displayed except where it belongs. I believe in suitability, *suitability;* I don't like the picture. It is not pleasing to me and to my eye because I don't believe in such poses.

Now, I am going to be raked, I know, over the coals by those people over there for being a prude? No, I am not a prude. I know I am not a prude; I am a dignified woman who believes in life being lived for a purpose.

Have you ever been to the headquarters of the National Education Society and seen the statute of Horace Mann: "Be not afraid to die unless you have won some victory for humanity." Do you think this sort of thing is winning a victory? I don't.

Q. Well, do you think it is decent or indecent?—A. I think it is indecent. You force me to an answer. I say it is indecent for a picture, not for the beach. You asked me about the picture. Now, I don't know that young lady. On the beach I think it would be all right, but not as a picture to be published in a magazine.

Q. This picture, Exhibit 131, do you think it is decent or indecent?—A. I object to it very much.

Q. Do you think it is decent or indecent?—A. Do I have to answer, Your Honor?

Q. I wish you would, please.—A. It is a matter of please?

Q. Yes.—A. Then I refuse to answer. You have shown me enough. You know my state of mind.

Q. Now, why do you refuse to answer?—A. Because I will be misinterpreted.

A second source of confusion in determining what kind of literature furthers public welfare is the dividing line between refined humor and low comedy. To illustrate the difficulty in-

herent in this problem we cite the following colloquy between counsel for the Post Office and counsel for Esquire. It is typical of hundreds of similar instances.

> Mr. BROMLEY. I would like to know, Mr. Hassell, if you don't mind telling me now, just what it is in that article you don't like. I can't find it.
>
> Mr. HASSELL. I would be glad to read it to counsel.
>
> Mr. BROMLEY. Thank you.
>
> Mr. HASSELL. Third column at the bottom of page 144. "He noticed how large the uniform made her behind look."

It may be that the above encourages the use of unscientific terms. Or it may be that it is in the public interest to omit all comment on the part of the lady referred to. Yet it is difficult to make such judgments with the feeling of certainty which one should have when the result of one's decision is to cost a publication $500,000 annually.

This same kind of uncertainty appears in a third problem which must be faced whenever this censorship is exercised. How far will this reform of periodical literature go if the Postmaster General is given a free hand.[6] For example, recently the New York Times (on Sunday, of all days!) carried the following quip by Mayor LaGuardia on the front page where few churchgoers could fail to see it:

> "Sorry. Racing does no one any good. It has nothing to do with horses. It has as much bearing on improving the breed of horses as a bawdy house has on eugenics."[7]

Does this mean that the New York Times will lose its second-class mailing privileges if it does not stop that sort of thing?

The Postmaster General gives serious consideration to this aspect of the problem. His conclusion is that occasional indifference to the public welfare may be indulged by an editor provided that it is not so frequent as to be classed as a habit. His opinion puts it in this way:

"When such writings or pictures occur in isolated instances their dangerous tendencies and malignant qualities may be considered of lesser importance.

"When, however, they become a dominant and systematic feature they most certainly cannot be said to be for the public good, and a publication which uses them in that manner is not making

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[6] Over 25,000 publications now have second-class rates. Briefs amicus curiae filed in this case by the Reader's Digest Association, Inc., The Curtis Publishing Company, The American Newspaper Publishers Association, the American Civil Liberties Union, and The Authors' League of America, Inc., indicate that the above question has caused genuine anxiety in our most respectable publishing circles.

[7] New York Times, May 20, 1945.

the 'special contribution to the public welfare' which Congress intended by the Fourth condition."

The Postmaster General appears to think that the improper dominant motive which he suspects from reading Esquire is corroborated by its editor's statement. He quotes the editor as follows:

> "The editor of this publication admits that from its origin 'our humor and our articles and our fiction all stressed a man alone angle—you might call it a stag party type of treatment', and testified 'we called it the smoking room type of humor'."

Now it is well known that when men gather together without the companionship of women an unrefined atmosphere is apt to spread over the entire gathering like a fog. And so the Post Office argues that only an editor indifferent to the public welfare would permit an atmosphere of this kind to dominate his magazine.

Unfortunately this still leaves the dividing line between an occasional vulgar lapse and a vulgar dominant purpose in a good deal of obscurity. It also leaves unsettled the question who is finally to decide what the dominant purpose is. For example, when we turn to the record we find that the weight of the evidence is that the magazine as a whole is unobjectionable. Far more witnesses testified against the Postmaster General's conclusion than for it. They included men of national distinction as writers, scientists and educators. They also included the vigilant New England Watch and Ward Society. The Postmaster General is supported only by five clergymen, a psychiatrist, a lady prominent in women's organizations, and an assistant superintendent of schools. In this situation, assuming the existence of the power to censor, may a court review the issue of dominant vulgarity on its merits?

The answer of the Government is an unqualified no. It contends with some reason that this court has no right to review the Postmaster General's notions of dominant vulgarity if they are supported by substantial evidence. It argues even more persuasively that no right minded man can brush aside as insubstantial the opinions of five clergymen (among whom is a bishop) on what is good for the public.

We think the Government is clearly right in its contention once the power claimed by the Post Office is assumed to exist. There is a practical reason, apart from respect for the testimony of clergymen, why the administrative imposition of literary and artistic standards cannot be reviewed by a court on its merits. Opinions on such matters differ so widely that if the evidence in the record before the Post Office were to be weighed each side would have to continue calling witnesses indefinitely in order not

to be outweighed by the other. We have no doubt that thousands of reputable experts on the public good could have been obtained by each side in this case.[*] We know of no way a court can evaluate the comparative expert qualifications of persons who hold opinions on what the public should read. Once we admit the power claimed here we see no room for effective judicial review of its exercise. And so in practical effect it amounts to a power in the Postmaster General to impose the standards of any reputable minority group on the whole nation.

In addition, the record suggests that the power claimed here would be used by sincere and conscientious officials to bind modern periodical literature to the standards of a former generation. This is dramatically illustrated by the cross-examination of H. L. Mencken, who appeared as a witness for Esquire. No one today would question either Mr. Mencken's eminence or his complete respectability. Yet counsel for the Post Office attempts to impeach his testimony because about twenty years ago an issue of the American Mercury was refused all mailing privileges. It would be difficult to find anyone today who could with reason object to this issue of the magazine. The attempt to impeach Mr. Mencken on this account reads as follows:

> Q. Mr. Mencken, you are the author of a story called "Hat-Rack," aren't you?—A. I am not, sir.
>
> Q. You published it in your magazine?—A. I did, sir.
>
> Q. That story had to deal with some sexual activity in a boxcar or freight car?—A. Not specifically. It dealt with people who engaged in sexual activity, but there was no scene of sexual activity in the story.
>
> Q. Was "Hat-Rack" the name of the woman who did that?—A. Nickname. Did you ask who wrote it?
>
> Q. No, sir; I did not.—A. I will tell you if you want to know. It was written by Herbert Asbury, the great grandnephew of Bishop Asbury, the first American Methodist bishop.
>
> Chairman MYERS. For whom De Pauw University was originally named.
>
> The WITNESS. I didn't know that. There was a report that Asbury was the great-grandson of the Bishop, but the Bishop actually was a bachelor. He is a great-grandson of the Bishop's brother.
>
> By Mr. Hassell:
>
> Q. Mr. Menken, was the issue of your magazine containing that story declared non-mailable by the Post Office Depart-

[*] The printed record in this case apart from several hundred pounds of exhibits contained 1,986 pages.

ment?—A. Yes, sir. I think you ought to let me explain what happened, if you care to.

Q. Yes, sir; go right ahead.—A. The Post Office entered that case rather late. An effort was made in Boston to suppress the magazine as a measure of revenge by the Boston Watch and Ward Society, which we had been denouncing. They proceeded by threatening a newsdealer. The poor newsdealer had no stake in the thing and was willing to subside and withdraw the magazine, so I went to Boston and sold the magazine myself on Boston Common and insisted on the Watch and Ward Society arresting me.

I was arrested, tried, and acquitted.

Meanwhile, subsequent to my arrest, and four or five weeks subsequent to the time the magazine had gone through the mails, the Post Office Department issued an order barring it from the mails. It was a purely imaginary order. There were no more to be mailed.

So I went to court on that and I had injunctions against the Post Office by two Federal judges, both of whom denounced the Post Office as obscene, indecent, unfair, and ignominious.

I agreed with the verdict thoroughly and believe it was just to this minute.

The Post Office tried to hit me in the back when I was fighting with the filthy Comstocks in Boston. I fought the Comstocks and I fought the Post Office, and I put my magazine back in the mails and they have never molested me since.

Q. Didn't the Federal Court in New York refuse to issue an injunction as the case was moot?—A. That is not precisely what happened. I had my injunction in the district courts of Boston and in New York, and the Post Office, pursuing its filthy course of trying to persecute me, appealed to the Circuit and the Circuit after two years decided that the case was completely moot because we were [illegible] point of fact through the mails. They decided I could not get relief because the Post Office barring me from the mails was completely dishonest—I wasn't an applicant to the mails.

The three examples cited above effectively illustrate the intellectual standards required for the kind of censorship exercised in this case.

We intend no criticism of counsel for the Post Office. They were faced with an impossible task. They undertook it with sincerity. But their very sincerity makes the record useful as a memorial to commemorate the utter confusion and lack of intelligible standards which can never be escaped when that task is attempted. We believe that the Post Office officials should experi-

ence a feeling of relief if they are limited to the more prosaic function of seeing to it that "neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds."

Reversed and Remanded.

United States Court of Appeals for the District of Columbia

No. 8899—April Term, 1945

ESQUIRE, INCORPORATED, APPELLANT

vs.

FRANK C. WALKER, AS POSTMASTER GENERAL OF THE UNITED STATES, APPELLEE

Appeal From the District Court of the United States for the District of Columbia

Judgment

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from in this cause be, and the same is hereby, reversed, and that this cause be, and it is hereby, remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

Per Mr. JUSTICE ARNOLD.

Dated June 4, 1945.

In the United States Court of Appeals for the District of Columbia

No. 8899

ESQUIRE, INC., APPELLANT

vs.

FRANK C. WALKER, AS POSTMASTER GENERAL OF THE UNITED STATES, APPELLEE

Designation of record

The Clerk will please prepare a certified transcript on application to the Supreme Court of the United States for certiorari in the above-entitled case, including therein the following:

1. The printed record consisting of four volumes which appears in the form of a joint appendix.
2. All Exhibits.
3. Opinion.
4. Orders.
5. This designation.
6. Clerk's certificate.

(S) DANIEL B. MAHAR,
Assistant United States Attorney for the District of Columbia, Attorney for Appellee.

Service of designation of record acknowledged this 14th day of August 1945.

(S) HUGH LYNCH, JR.,
Counsel for Appellant.

United States Court of Appeals for the District of Columbia

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing pages numbered from 1867 to 1996, both inclusive, constitute a true copy of Volume 4 of the joint appendix to the briefs of the parties and the proceedings of the said Court of Appeals as designated by counsel for appellee in the case of:

No. 8899—April Term, 1945, as the Same Remain Upon the Files and Records of Said Court of Appeals

ESQUIRE, INC., APPELLANT

vs.

FRANK C. WALKER, AS POSTMASTER GENERAL OF THE UNITED STATES, APPELLEE

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 24th day of August A. D. 1945.

[SEAL]

JOSEPH W. STEWART,
Clerk of the United States Court of Appeals for the District of Columbia.
By C. PRESTON GAINOR,
Assistant Clerk.

Supreme Court of the United States

Order allowing certiorari

Filed October 22, 1945

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice JACKSON took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE 1945

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 399

FRANK C. WALKER, AS POSTMASTER GENERAL OF THE UNITED STATES, PETITIONER

v.

ESQUIRE, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Acting Solicitor General, on behalf of the Postmaster General of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered in the above-entitled case on June 4, 1945.

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 1963–1975) is reported at 55 F. Supp. 1015. The opinion of the Court of Appeals (R. 1987–1994) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 1945 (R. 1995). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Fourth Condition of Section 14 of the Postal Classification Act of 1879 casts upon the Postmaster General the duty to determine whether a publication, offered for mailing in the second class, is "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry" and if so, the scope of the power conferred.

2. Whether Congress has constitutional authority to vest such a duty in the Postmaster General.

STATUTES INVOLVED

Section 396 of the Revised Statutes (5 U. S. C. 369) provides, in part:

> It shall be the duty of the Postmaster General: * * *
>
> Second. To instruct all persons in the Postal Service with reference to their duties. * * *
>
> Ninth. To superintend generally the business of the department and execute all laws relative to the Postal Service.

The Classification Act of 1879, 20 Stat. 358, as amended, provides as follows:

Section 7 (39 U. S. C. 221)—

Mailable matter shall be divided into four classes:

First, written matter;

Second, periodical publications;

Third, miscellaneous printed matter and other mailable matter not in the first, second, or fourth classes;

Fourth, merchandise and other mailable matter weighing not less than eight ounces and not in any other class.

Section 10 (39 U. S. C. 224)—

Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections twelve and fourteen.

Section 14 (39 U. S. C. 226)—

Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second class are as follows: First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second. It must be issued from a known office of publication. Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding such as distinguish printed books for preservation

from periodical publications: *Provided*, That publications produced by the stencil, mimeograph, or hectograph process or in imitation of typewriting shall not be regarded as printed within the meaning of this clause. Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers. Nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

Section 1 of the Act of March 3, 1901, 31 Stat. 1107 (39 U. S. C. 232) provides in part:

> When any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested.

* * * * *

STATEMENT

The respondent is engaged in the publication, distribution, and sale of the monthly periodical, Esquire Magazine (R. 1868, 1976), which was entered at the United States Post Office as second-class mail matter on December 15, 1933 (R. 1868, 1976). The petitioner, the Postmaster General of the United States, caused a citation (R. 1–4)

and an amended citation (R. 5–10) to be issued on September 11 and October 4, 1943, respectively, requiring respondent to show cause why the second-class mailing privileges for Esquire should not be suspended, annulled, or revoked, upon the ground, *inter alia,* that because of the inclusion of obscene material "and other matter of a similar or related nature" in the issues for January through November 1943, Esquire "has not fulfilled the qualifications of second-class mailing privileges established by the Fourth Condition" of Section 14 of the Classification Act of 1879 (20 Stat. 359, 39 U. S. C. 226) (R. 1–2, 5–6). Pursuant to notice, a hearing was held from October 19 to November 6, 1943 (R. 20–1835), before a three-man hearing board designated by the Postmaster General (R. 19).

At the hearing, on October 25, 1943, counsel for the Postmaster General stated that it was the Post Office Department's position that Esquire did not meet the tests of the Fourth Condition of Section 14 of the Classification Act of 1879 because it was not "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry" (R. 604–605, 1011–1012). Extensive evidence was adduced by both parties (R. 45–1763).

On November 11 and 12, 1943, the members of the hearing board submitted their reports and recommendations to the Postmaster General (R.

1836–1855), together with a transcript of the proceedings before them, which included the testimony and exhibits and the briefs and arguments of counsel (R. 1857). Two members of the board recommended dismissal of the proceeding (R. 1839); the third, the withdrawal of second-class mailing privileges from respondent (R. 1851–1855). On December 30, 1943, the Postmaster General entered his order (R. 1856–1865), finding that Esquire does not comply with the Fourth Condition (R. 1864), and revoking Esquire's second-class mailing privileges, effective February 28, 1944 (R. 1865).

On February 15, 1944, respondent filed its amended complaint in the District Court of the United States for the District of Columbia (R. 1867–1885), seeking an injunction to restrain the enforcement of the Postmaster General's order (R. 1873–1875). The Postmaster General filed an answer (R. 1887–1891) incorporating the proceedings before the Post Office Department (R. 1890–1891). At a pretrial conference (R. 1891–1893), the parties stipulated, *inter alia*,[1] that the suit would not be defended on the ground that Esquire "is obscene within the meaning of 18 U. S. C. 334, or that it is non-mailable within the provisions of that or any other statute" (R. 1892).

[1] The parties also stipulated that petitioner would not defend "on the ground that plaintiff would not sustain irreparable damage if the order in question was wrongful and invalid" (R. 1892).

After a hearing (R. 1893–1963), the District Court issued its findings of fact (R. 1976–1978), conclusions of law (R. 1978–1979), and opinion (R. 1963–1975), and, on July 27, 1944, entered judgment for the Postmaster General, denying an injunction and dismissing respondent's complaint (R. 1979). The District Court found and concluded that "The Postmaster General's determination that Esquire was not originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, was not clearly wrong, nor unlawfully made, nor arbitrary, capricious or unsupported by substantial evidence" (R. 1978); and that the order assailed did not exclude Esquire from the mails, did not impose censorship or involve any infringement of the rights of free speech and free press, and was lawful and valid (R. 1978).

The court below reversed the judgment of the District Court (R. 1995).

REASONS FOR GRANTING THE WRIT

An authoritative decision by this Court of the questions presented by this case is of the highest importance from the standpoint of postal administration. These questions are (1) whether or not the Postmaster General has had confided to him by Congress in Section 14 of the Postal Classification Act a duty to determine whether a given periodical publication meets the prescribed condition

that it be "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry", so as to be eligible for second class mailing privileges, and (2) whether Congress may constitutionally confer such a duty upon him. A second class entry confers the benefit of a materially lower postage charge than would apply if it were withheld, involving service at less than cost to the Government.

Strongly indicated in the opinion and implicit in the decision below that the Postmaster General exceeded his power is the conclusion that he is not vested with the duty in question but must admit to second class privileges any periodical publication which complies with certain formal requirements of the Act. This conclusion is, we believe, erroneous and contrary to that required by the statutory language. The opinion, however, does not consider the statute in the light of its history and purpose and contains no clear guidance as to its proper interpretation. It leaves the Post Office Department at sea as to the administration of a provision which purports to vest in the Postmaster General an important power with regard to the classification of mail matter. In addition, the opinion casts grave doubt upon the constitutionality of possible future legislation for dealing with the problem, unless any attempt to classify periodicals accord-

ing to the character of their content should be omitted from it.

Section 14 of the Postal Classification Act (*supra*, pp. 3–4) prescribes four conditions upon which a periodical publication shall be admitted to the second class of mailable matter. The first three conditions relate to the physical makeup of the periodical and the manner of its publication. The Fourth Condition relates to origin and purpose, and contains the requirement that the publication be "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry * * *". On its face this language requires a determination of whether the publication complies with the condition—a determination which rests with the Postmaster General under his statutory duty "to instruct all persons in the Postal Service with reference to their duties" and "to * * * execute all laws relative to the Postal Service." (R. S. §396, 5 U. S. C. 369, *supra*, p. 2.) Such a determination involves the making of a judgment as to the character of the publication's content as does the Postmaster General's statutory duty to determine whether or not to suspend or annul second class privileges after a hearing (39 U. S. C. 232, *supra*, p. 4). In this case the Postmaster General, after elaborate hearings and careful consideration, determined that Esquire

Magazine derives its essential character from the consistent inclusion of morally improper and harmful articles, cartoons, drawings, and photographs, which negative the purpose required by the statute as a condition of admission to the second class (R. 1863).

The opinion of the court below recognizes at one point that "no doubt * * * a duty exists" for a publication "to contribute to the public good and the public welfare" as a condition of enjoying second class privileges (R. 1988), but it denies the existence of "the power claimed by the Post Office" to indulge in the "kind of censorship exercised in this case" (R. 1993, 1994). The opinion does not state whether no power at all exists to exclude periodicals from the second class because of their content, although this is indicated by admonitions to cease attention to "literary or moral standards" and to confine activity to getting the mails through (R. 1990, 1994). Constitutional cases involving freedom of speech and of the press are cited for their "broad principles" (R. 1988, n. 2) although, unlike the case at bar, they involve the use of penal sanctions or the contempt power; for evidently the economic effect of loss of second class privileges is deemed to be as serious as criminal punishment (R. 1987–1990). In this connection, however, compare the cited

case of *Board of Education* v. *Barnette*, 319 U. S. 624, at p. 632.

As a consequence of the state in which the matter has been left, the Post Office Department is confronted on the one hand by a Congressional mandate to admit to the second class only those publications which, *inter alia*, meet the requirements of the Fourth Condition, and on the other hand with a decision which seems to deny all power to exclude periodical publications for failure to comply with the Fourth Condition. Both administrative and legislative power to cope with the problem are jeopardized. Clarification is imperative.

In its denial of the authority here exercised and to the extent that it adopted a negative view of the authority of the Post Office Department in administering the Fourth Condition, the court below erred, as we believe, and its action requires correction at the hands of this Court. The language of the Fourth Condition on its face calls for the use of authority such as the Postmaster General exercised here. The opinion states no reason why this language should not be given its natural meaning except that the exercise of such authority would involve an objectionable, and possibly unconstitutional "censorship", enabling "an administrative official" to determine "what is good for the public to read" according to his own

"notions of the public good" (R. 1988, 1989). It is obvious, however, that the classification of postal matter on other than a purely mechanical basis necessarily involves the exercise of some discretion. The court below does not suggest that a better device could be adopted than the judgment of a responsible executive official, aided by a departmental administrative staff.

There is no question that in maintaining the second class of mail Congress is giving effect to a purpose of subsidizing periodical publications which meet the requirements of Section 14, in the belief that facilitating the circulation of such periodicals furthers the public welfare.[2] At the present time the extent of the subsidy to publishers through the enjoyment of second class privileges is approximately $80,000,000 a year.[3] The administration of this subsidy requires consideration each year of approximately 2,000 applications for admission of publications to the second class.[4]

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[2] The legislative history of the Postal Classification Act of 1879 contains explicit expression of the purpose which Congress had in mind. It was said in debate that "papers are allowed to go at a low rate of postage * * * because they are the most efficient educators of our people. It is because they go into general circulation and are intended for the dissemination of useful knowledge such as will promote the prosperity and the best interests of the people all over the country." 8 Cong. Rec. 2135.

[3] Annual Report of the Postmaster General, 1941, p. 89. In the year covered, first class mail revenues exceeded apportioned expenditures by $146,815,578; the exact second class deficit, on the other hand, was $83,519,746.

[4] *Idem*, p. 32; Annual Report, 1942, p. 23.

There is no reason to suppose it was intended that in distributing such largess out of the treasury all comers in the periodical field should share, regardless of how far removed their publications might be from the purposes stated in the statute.

We submit that the view expressed by the court below is wrong and requires correction. It violates the long settled principle that language in a statute is, where possible, to be given meaning rather than held meaningless. *Postmaster General* v. *Early*, 12 Wheat. 136; *Market Co.* v. *Hoffman*, 101 U. S. 112. No censorship is involved, such as was advanced to justify the disregard of the clear meaning of the statute. The mails remain open to Esquire Magazine, but at rates less costly to the public, which are applicable to other classes of mail. The only power that has been exercised is the well-established one of classifying the mails. As this Court has stated, Congress "has the comprehensive right to classify" the mails and may "in the interest of the dissemination of current intelligence", legislate so as to favor one class of matter over another. *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288, 313. Nor is the power to resort to administrative action inapplicable to this field. It is, on the contrary, particularly appropriate here; and the degree of finality which has been accorded to administrative decisions of the Postmaster General has been greater than in many other areas of

administration. *Leach* v. *Carlile*, 258 U. S. 138; *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407; *Smith* v. *Hitchcock*, 226 U. S. 53; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106. Financial benefit to a publisher does not furnish a persuasive reason for departure from these views.

We think it is clear that the exercise by Congress of its power of classifying the mails and the use of discretionary administrative authority in applying the classification to publications offered for mailing do not infringe any constitutional guaranty. This Court so held in *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 410, with respect to the second class privilege, which it recognized as "a frank extension of special favors to publishers because of the special contribution to the public welfare which Congress believes is derived from the newspaper and other periodical press." The validity of classifying mailable matter and the power to revoke a second class permit for failure to comply with the requirements of the statute were not denied in the dissenting opinions of Mr. Justice Holmes and Mr. Justice Brandeis in that case. Their dissents were based, rather, upon the ground that the presence of non-mailable matter in past issues does not by itself justify revoking a second class permit as to future issues of a publication which on the whole meets the statutory requirements. They contended, as we concede, that the wrongful denial of second class

privileges to a particular publication may constitute an infringement of constitutional guaranties; but it does not follow that the power to withhold such privileges for statutory reasons is nonexistent.

The effects of the denial of authority in this case cannot be confined to the specific instance, since the Postmaster General's order is not set aside because of error in the conclusion or in the proceedings which led to it. On the contrary, the opinion concedes that "the Government is clearly right in its contention" that a court may not review the Postmaster General's conclusion in a particular case if supported by substantial evidence, "once the power claimed by the Post Office is assumed to exist", and that the testimony supporting the order cannot be brushed aside as insubstantial (R. 1993).

Even as to the particular case, however, the elaborateness of the administrative proceedings, the substantial basis in the record for the Postmaster General's order, and the interests which turn upon the outcome, call for careful consideration of the issues involved and might, even without more, justify review by this Court. The amended citation which formed the basis of the proceeding for withdrawal of Esquire Magazine's second-class privileges cited 32 instances of specific material in 11 issues which was deemed to

be objectionable (R. 8–10) and which was alleged to be representative of other matter contained in the publication (R. 6).[5] The order of the Postmaster General cites testimony of the editor of Esquire to the effect that the magazine stressed a "stag party type of treatment" and "the smoking room type of humor" (R. 1863). A substantial body of testimony supported the view that the content of Esquire Magazine is basically objectionable.[6] Whether power exists to exclude such a publication from the enjoyment of a public subsidy is in itself a question of importance.

The administrative decision involves no suppression of Esquire Magazine, but simply withholds from its dissemination the assistance which

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[5] The original and amended citations (R. 1–10) charged that this material was obscene and nonmailable and that by reason of its inclusion and the inclusion of similar material the publication failed to satisfy the Fourth Condition for admission to the second class. During the hearing it was agreed that the basis alleged for revoking second-class privileges would be the publication of objectionable material, whether or not it was technically obscene and nonmailable (R. 26–28, 43–45, 601–606, 1011–1019). The order of the Postmaster General stated that no question of nonmailability because of obscenity was involved (R. 1857). At the pre-trial conference in the District Court it was stipulated that the Postmaster General would not defend upon the ground that Esquire Magazine was obscene or nonmailable (see *supra*, pp. 6–7).

[6] The testimony supporting the order is at R. 978–986, 1160, 1163–1165, 1187, 1216–1217, 1282, 1284–1285, 1293–1296, 1395–1397, 1420–1551, *passim*, 1567–1569, 1575, 1593–1595, 1601, 1635, 1656–1659, 1715–1724.

Congress has sought to limit to publications falling within a particular statutory description to which Esquire is thought not to answer. Not only is that decision soundly based, but the power to reach it was, we contend, validly conferred. It follows that the judgment of the Court of Appeals should be reversed.

CONCLUSION

We respectfully submit that for the foregoing reasons this petition should be granted.

HAROLD JUDSON,
Acting Solicitor General.

SEPTEMBER, 1945

U. S. GOVERNMENT PRINTING OFFICE 1945

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No. 399

In the Supreme Court of the United States

October Term, 1945

ROBERT E. HANNEGAN, AS POSTMASTER GENERAL OF THE UNITED STATES, PETITIONER

v.

ESQUIRE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE POSTMASTER GENERAL

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In the Supreme Court of the United States

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No. 399

ROBERT E. HANNEGAN, AS POSTMASTER GENERAL OF THE UNITED STATES, PETITIONER

v.

ESQUIRE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE POSTMASTER GENERAL

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 1963–1975) is reported at 55 F. Supp. 1015. The opinion of the United States Court of Appeals for the District of Columbia (R. 1987–1994) is reported at 151 F. 2d 49.

JURISDICTION

The judgment of the Court of Appeals was entered on June 4, 1945 (R. 1995). The petition for a writ of certiorari was filed on September 4, 1945 and was granted on October 22, 1945.

The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the fourth condition of Section 14 of the Postal Classification Act of 1879 vests in the Postmaster General discretion to determine whether a publication, offered for mailing in the second class, is "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry."

2. Whether Congress has constitutional authority to vest such discretion in the Postmaster General.

3. Whether, assuming an affirmative answer to both of the foregoing questions, the Postmaster General's finding that Esquire Magazine does not comply with the fourth condition of Section 14 of the Classification Act of 1879 is a proper exercise of the authority conferred upon him.

STATUTES INVOLVED

Section 396 of the Revised Statutes (5 U. S. C. 369) provides, in part:

> It shall be the duty of the Postmaster General: * * *
>
> SECOND. To instruct all persons in the Postal Service with reference to their duties.
>
> * * * * * * *

NINTH. To superintend generally the business of the department and execute all laws relative to the Postal Service.

The Classification Act of 1879, 20 Stat. 358, as amended provides in part as follows:

Section 7 (39 U. S. C. 221)—

Mailable matter shall be divided into four classes:

First, written matter;

Second, periodical publications;

Third, miscellaneous printed matter and other mailable matter not in the first, second, or fourth classes;

Fourth, merchandise and other mailable matter weighing not less than eight ounces and not in any other class.

Section 10 (39 U. S. C. 224)—

Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections twelve and fourteen.

Section 14 (39 U. S. C. 226)—

Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second class are as follows: First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second. It must be issued from a known office of publication. Third. It must be formed of printed

paper sheets, without board, cloth, leather, or other substantial binding such as distinguish printed books for preservation from periodical publications: *Provided*, That publications produced by the stencil, mimeograph, or hectograph process or in imitation of typewriting shall not be regarded as printed within the meaning of this clause. Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers. Nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates.

Section 1 of the Act of March 3, 1901, 31 Stat. 1107 (39 U. S. C. 232) provides in part:

> When any publication has been accorded second-class mail privileges, the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested.

Other relevant statutes are printed in the Appendix, *infra*, pp. 48–51.

STATEMENT

In this case the publishers of Esquire Magazine, pursuant to an amended complaint filed in the District Court of the United States for the

District of Columbia (R. 1867–1885), seek to enjoin the Postmaster General from carrying into effect an order (R. 1856–1865) by which he revoked Esquire's second-class mailing permit on the ground that the magazine does not meet the fourth condition for admission to or continuation in the second class, prescribed by Section 14 of the Postal Classification Act of 1879, *supra*, that "it must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry: * * *."

On September 11, 1943 and October 4, 1943, respectively, the then Postmaster General Frank C. Walker caused respondent to be served with original and amended citations to show cause why its second class permit should not be revoked (R. 1–10), charging that the magazine was unmailable because of the inclusion of matter "of an obscene, lewd and lascivious character; and other matter of a similar or related nature" and that "because of the inclusion of such matter in the publication it has not fulfilled the qualifications of second-class mailing privileges established by the Fourth Condition."

Hearings were thereafter held before a three-

In its order granting a writ of certiorari, sub nom. *Frank C. Walker, as Postmaster General of the United States* v. *Esquire, Inc.*, this Court granted a motion for the substitution of Robert E. Hannegan, present Postmaster General, as petitioner.

member hearing board designated by the Postmaster General, at which testimony covering over 1700 printed pages was taken, over 200 exhibits were introduced, and arguments of counsel for the Post Office Department and respondent were made. Written briefs were submitted by both sides. Two members of the board recommended that respondent's permit be not revoked (R. 1839). The third member recommended revocation (R. 1855). The board's report to the Postmaster General included the testimony, exhibits, briefs, and arguments of counsel before it. The Postmaster General entered his order, above referred to, on December 30, 1943.

The respondent's amended complaint, filed February 15, 1944 (R. 1867–1885), alleged that Esquire "satisfies, and at all times mentioned herein has satisfied, all statutory conditions for second-class mailing privileges"; that the Postmaster General misconstrued the fourth condition of the Classification Act; that he acted arbitrarily and capriciously; that his order was not supported by evidence; that the order was an unconstitutional interference with freedom of the press; that it arbitrarily discriminated against respondent in relation to other periodicals of the same general class; and that it was without statutory authority. Asserting that the order threatened irreparable injury, the respondent prayed for an injunction restraining enforcement. The Postmaster General filed an answer (R. 1887–1891) in-

corporating the proceedings before the Post-Office Department (R. 1890–1891). At a pre-trial conference (R. 1891–1893) the parties stipulated, *inter alia*, that the suit would not be defended on the ground that Esquire "is obscene within the meaning of 18 U. S. C. 334, or that it is non-mailable within the provisions of that or any other statute" and that objection would not be raised to the request for injunctive relief "on the ground that Plaintiff would not sustain irreparable damage if the order in question was wrong and invalid" (R. 1892).

After a hearing (R. 1893–1963), the District Court issued its findings of fact (R. 1976–1978), conclusions of law (R. 1978–1979), and opinion (R. 1963–1975), and on July 27, 1944, entered judgment for the Postmaster General, denying an injunction and dismissing respondent's complaint (R. 1979). The court held that: "The Postmaster General's determination that Esquire was not originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, was not clearly wrong, nor unlawfully made, nor arbitrary, capricious or unsupported by substantial evidence," and that the order did not exclude Esquire from the mails, did not impose censorship or involve any infringement of the rights of free speech and free press, and was lawful and valid (R. 1978).

The Court of Appeals reversed the District

Court, holding that the power to determine the eligibility of periodicals for second-class privileges in the manner here attempted involves an exercise of discretion which, if intended by Congress, amounts to an objectionable "censorship" probably contravening the Constitution. The opinion (R. 1987–1996) directs the Post-Office Department to confine itself to carrying the mails and not to concern itself with the character of the content of publications in determining their eligibility for second-class privileges. (R. 1995–1996).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the fourth condition of Section 14 of the Postal Classification Act does not authorize the Postmaster General to determine whether a periodical, offered for second class privileges, complies with the condition.

2. In holding that the order of the Postmaster General in this case involves the exercise of an unconstitutional power of "censorship".

3. In reversing the judgment of the District Court.

SUMMARY OF ARGUMENT

The petitioner contends that the intention of the statute is clear from its language and from judicial and legislative recognition of its purpose; that it validly confers the power here exercised; and that, contrary to the judgment of the court below, the order of the Postmaster General should stand.

I

The fourth condition of Section 14 of the Postal Classification Act, which is the statutory provision principally involved, specifies that publications admitted to the second class "must be originated and published for the dissemination of information of a public character" or be "devoted to literature, the sciences, arts, or some special industry." Either this provision requires exclusion by the Postmaster General of publications which do not conform to the requirement, or it is meaningless. The duty of determining whether a publication offered for second class privileges meets the condition rests with the Postmaster General, both by administrative necessity and because of his statutory duty to instruct persons in the Postal Service in their duties, to superintend the business of the Department, and to execute all laws relative thereto. Section 1 of the Act of March 3, 1901, *supra*, p. 4, moreover, recognizes administrative revocation of second class privileges by requiring that a hearing be held.

The conclusion of the court below, in effect denying any but mechanical functions to the Post Office Department, is contrary to the decisions of this Court in *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288; *Smith* v. *Hitchcock*, 226 U. S. 53, and *Bates & Guild Co.* v. *Payne*, 194 U. S. 106. The purpose of Congress in bestowing low postal rates upon periodicals in "the interest of dissemi-

nation of current intelligence" cannot be carried out unless differentiation between publications, guided by the statutory standard, is exercised.

II

The constitutionality of the fourth condition, quoted above, must be judged according to the nature of the governmental function involved and of the activities with which the statute deals. The function here exercised is not "censorship," but the power to provide for the Postal Service. This Court has recognized that the exclusion of material from the mails is different from its suppression, and that the exclusion of publications from second class privileges is a still less drastic measure. General regulation of what should be published, or even admitted to the mails, is not involved. The respondent is not threatened with criminal sanctions. Hence the test of constitutionality which applies must leave scope for greater legislative power than might exist in other circumstances. Particularly when it is recognized that Esquire Magazine has been found not to be devoted to literary or artistic ends, it is apparent that the bounds of constitutional power in relation to the First Amendment have not been exceeded. Neither does the statutory standard delegate legislative power to the Postmaster General. The standard prescribed is not less precise than those which have been sustained in numerous previous cases.

III

There is ample evidence in the record to sustain the order of the Postmaster General. Esquire Magazine is there shown to have commercial features and a prurient appeal which negative its compliance with the statutory condition.

ARGUMENT

The central issue in this case is the narrow but important question of whether the Postmaster General acted within his authority in revoking the second class entry of Esquire Magazine upon the ground that the publication was not "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry," as required by Section 14 of the Postal Classification Act of 1879, *supra*, p. 4. The decision of the court below holding that the Postmaster General exceeded his authority and that he lacks power to determine the eligibility of periodicals for second class privileges in the manner here attempted, in effect reads the above quoted language out of the statute.

The Court of Appeals reached the foregoing result, not on the basis of an inquiry into the actual intent of Congress in prescribing the condition, but because of objections to the breadth of the discretion which the statute allegedly confers if construed as the Postmaster General construes it, and of the court's belief that the existence of such a

power of "censorship" would be both unwise and unconstitutional. We think, however, that the intent of the statute is clear from its language and from judicial and legislative recognition of its purpose; that it validly confers the power here exercised; and that, as the court below in effect conceded, if the statute confers the power in question the decision of the Postmaster General must stand.

I

THE STATUTE CASTS UPON THE POSTMASTER GENERAL DISCRETION TO DETERMINE WHETHER PERIODICALS OFFERED FOR SECOND-CLASS MAILING PRIVILEGES COMPLY WITH THE FOURTH CONDITION OF SECTION 14 AND TO REVOKE THE PERMITS OF SUCH AS HE FINDS, AFTER HEARING, DO NOT MEET THE CONDITION

There can be no question that the language of the statute here involved upon its face limits second class mailing privileges to periodicals which actually are "originated and published for the dissemination of information of a public character," or which are "devoted to literature, the sciences, arts, or some special industry"; or that this requirement, as this Court has noted, is stated as one of several "conditions requisite to the admission of a publication" to the second class. (*Houghton* v. *Payne*, 194 U. S. 88, 96.) Either the provision requires exclusion by the Postmaster General of publications which do not meet the stated condition, or it is meaningless. If nothing

else, the principle of construction that statutory language is where possible to be given meaning, clearly requires that the language here involved be given effect. See *Postmaster General* v. *Early*, 12 Wheat. 136; *Market Co.* v. *Hoffman*, 101 U. S. 112; 2 Sutherland, *Statutory Construction* (3d ed., 1943), § 4705; *Drummond* v. *United States*, 324 U. S. 316, 319.

The duty of determining whether a publication offered for second class privileges is eligible to receive them, rests by statute and of necessity with the Postmaster General. By Section 396 of the Revised Statutes, *supra*, pp. 2–3, he is charged with the function of instructing "all persons in the Postal Service with reference to their duties", of superintending "the business of the Department", and of executing "all laws relative to the Postal Service". Although the classification provisions of the Postal Classification Act do not explicitly state that the Postmaster General shall make the necessary determinations, it falls within his province to do so; since otherwise the postmasters would be without guidance concerning the classification of matter offered for mailing, upon which the rates to be charged are based. Section 1 of the Act of March 3, 1901, *supra*, p. 4, moreover, recognizes that the revocation of second class privileges must be administrative, since it requires that before the privileges of a publication may be suspended or annulled a hearing must be granted to the parties interested, as

was done in this case. In *Bates & Guild Co.* v. *Payne,* 194 U. S. 106, this court upheld an order of the Postmaster General denying, and in *Houghton* v. *Payne,* 194 U. S. 88, and *Smith* v. *Hitchcock,* 226 U. S. 53, orders revoking, second class mailing privileges.

The conclusion of the court below, ignoring the terms of the statute and directing that the Postmaster General should cease giving attention to the character of periodicals for the purpose of determining their eligibility for second class privileges and should confine the activity of the Post Office Department to getting the mail through (R. 1990, 1994), is reminiscent of the argument advanced in *Lewis Publishing Co.* v. *Morgan,* 229 U. S. 288, 298, that the Department's "function is to carry the mails" and not to inquire into any aspect of the affairs of newspapers and periodicals. This contention, which in effect denies all but mechanical functions to the Post Office Department, was rejected at that time and is no more valid now than then. It would nullify the requirements imposed by Congress and overlooks the procedures which are necessary to effectuate the broad power of Congress to classify the mails, which this Court stressed in the *Lewis Publishing Co.* case. See 229 U. S. at p. 313. The Court there recognized that administrative judgment is required not only to give effect to the statutory classification of mailable matter, as *Bates & Guild*

Co. v. *Payne,* 194 U. S. 106, and *Smith* v. *Hitchcock,* 226 U. S. 53, had stated, but also to the end "that the results intended to be accomplished by Congress" in laying down the four conditions for second class privileges "might be realized" (229 U. S. at 305). The results sought by Congress were stated to be implicit in the bestowal of low postal rates upon periodicals in "the interest of the dissemination of current intelligence" (229 U. S. at 313; see also p. 304);[2] and their attainment justifies the exercise of discrimination among publications.

The determination of whether publications are eligible for second class privileges involves a judgment upon their content in a number of respects. This judgment is not automatic; for although the first three conditions laid down in Section 14 of the Postal Classification Act (*supra,* pp. 3–4) relate to the physical characteristics of the publication and the manner of its issuance, other statutory requirements are of a different character.

[2] The extent of the subsidy to periodical publications which is involved in second class postal rates and which is a matter of common knowledge, has not diminished with the years. The annual report of the Postmaster General in 1941, which disclosed that first class postage revenues for that fiscal year exceeded apportioned expenditures by approximately $146,000,000, revealed a second-class deficit of $83,519,746 (Report, p. 89). In 1944 apportioned expenditures in the handling of second class mail exceeded revenues from that class by $100,439,067. Post Office Department, *Cost Ascertainment Report for 1944,* p. 8.

Section 12 of the same Act (*infra* p. 48) provides that "matter of the second class may be examined at the office of mailing and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject". Section 7 (*supra*, p. 3) provides for the inclusion of only "periodical publications" in the second class; and the problem of what is such a publication presents difficulties which are soluble only in the exercise of discretion on the basis of an examination of the publication's content. *Smith* v. *Hitchcock*, 226 U. S. 53; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 107–108; *Houghton* v. *Payne*, 194 U. S. 88.

Nor is the duty cast upon the Postmaster General by the fourth condition, of giving attention to the purpose of a publication, by any means unique. The Act of July 16, 1894 (28 Stat. 105) admitted to the second class publications of benevolent and fraternal societies upon the condition *inter alia* "that such matter shall be originated and published to further the objects and purposes" of the organization. Similarly, publications of state departments of agriculture were admitted to the second class by the Act of June 6, 1900, c. 801 (31 Stat. 660, 39 U. S. C. 230) with the proviso "that such matter shall be published only for the purpose of furthering the objects of such departments". See also the similar provision of the Act of August 24, 1912 (*infra*, pp. 48–50), enlarg-

ing the class of organizations whose publications may be admitted to the second class.

The fact that drawing the line between publications which are eligible for second class privileges and those which are not is necessarily a delicate function does not negative its existence. The determination in each case turns not merely upon a judgment of the content of a periodical at a particular time, but also upon the purposes of those who publish it as revealed by its history and by the appeal which it attempts to make to prospective purchasers. The statute clearly calls for a judgment directed to the origin and purpose of the publication and the ends to which it is directed. It is reasonable to conclude, therefore, that Congress intended to leave to the Postmaster General, guided by the words of the statute, the question whether publications seeking second class privileges are of the character which Congress intended to subsidize by means of those privileges.

No other means of effecting such a differentiation has been or could be suggested. The sole practical alternatives would be to withdraw the benefits of less-than-cost service to all periodicals or to extend the subsidy indiscriminately to all that meet the remaining conditions in the statute. The latter is the alternative embraced by the court below. Congress did not intend, we believe, that this should be the outcome of its carefully-enacted provisions.

The purpose of Congress in maintaining low second class postal rates, which lends force to the already clear words of the fourth condition of Section 14 of the Postal Classification Act, has been authoritatively attested. This Court has given expression to it. *Lewis Publishing Co.* v. *Morgan, supra,* pp. 14–15, *infra,* pp. 22–24; *Milwaukee Publishing Company* v. *Burleson,* 255 U. S. 407, 410. In the debate in Congress upon the Act of 1879 it was noted that:

> * * * papers are allowed to go at a low rate of postage, * * * because they are the most efficient educators of our people. It is because they go into general circulation and are intended for the dissemination of useful knowledge such as will promote the prosperity and the best interests of the people all over the country. [8 Cong. Rec. 2135.]

In 1892 the Postmaster General referred to the "generous policy of Congress, which has always been to favor dissemination of current news and other desirable and beneficial intelligence among the people by granting a very low and unremunerative rate of postage to genuine newspapers and periodicals." Annual Report (1892) p. 71. In 1911–12 the Commission on Second-Class Mail Matter stated in its report that "the original object in placing on second-class matter a rate far below that on any other class of mail was to encourage the dissemination of news and of current

literature of educational value." H. Doc. No. 559, 62nd Cong., 2nd sess., Vol. No. 36, p. 142.[3]

It is clear, we submit, that the authority of the Postmaster General under the statute should be so construed as to give effect to the Congressional purpose—not, as the court below would have it, so as to nullify the fourth condition of Section 14 altogether. This is particularly true as respects the grounds of the Postmaster General's order in this case, which relate to a problem in the administration of the fourth condition that presents with growing acuteness the divergence between the legislative purpose and the use being made of second class privileges.

The courts themselves can scarcely be above noting judicially that the growth of trashy, prurient publications has been phenominal in recent years. The essential question in this case, from a practical standpoint, is whether the Postmaster General must permit the instrumentality which Congress created for a stated purpose to be perverted

[3] This Commission was created by a joint resolution approved March 4, 1911, 36 Stat. 1334. Previously, the Postal Commission of 1906–7 rendered a *Report Regarding Second-Class Mail Matter* (H. Doc. 608, 59th Cong., 2nd sess.) upon the second-class privilege, including recommendations for amendment of the Postal Classification Act. The reports, on the basis of previous administrative practice and the Commissions' own interpretation of the statutory language, concluded that the fourth condition of Section 14 did not provide a basis for discriminating among periodicals with reference to their enjoyment of second-class privileges.

to wholly different ends, or whether periodical publications falling outside the language employed in the statute to designate the periodicals which shall enjoy a subsidy may be dealt with in such a way as to promote the undoubted legislative purpose. It requires more than objections to administrative discretion in this field to establish that the Postmaster General is not empowered to administer the second class privilege in accordance with the ends prescribed.

It is not an objection to the interpretation for which we contend, that for a period of years the Post Office Department may not have withheld or revoked second class privileges merely for want of compliance with the fourth condition of Section 14. Not only has the Department been confronted of late with an outpouring of cartoon, "gag," and photographic magazines pandering to salacious appetites, which requires an adaptation of the standard contained in the law, but this Court has not hesitated in respect to the administration of second class privileges to give sanction even to an undoubted administrative reversal of previous policy. In *Houghton* v. *Payne*, 194 U. S. 88, this Court sustained an administrative construction which, as Mr. Justice Harlan and Chief Justice Fuller stated in their dissent, reversed a construction whereby "the Department had for sixteen years construed the statute to mean what the appellants say it plainly means and after Congress

had uniformly refused, upon full investigation, to comply with the requests of Postmasters General to so amend the statute that it could be interpreted as the Government now insists it should always have been interpreted." 194 U. S. at p. 102. The result there was to destroy a business advantage enjoyed by the publishers of inexpensive editions of undoubtedly high-grade literature. Therefore, even if it could be said that the order in the present case represents a reversal of previous departmental policy instead of an adaptation of that policy to new circumstances, it would not follow that the reversal is beyond the authorization of the statute. The meaning of the Act remains a question to be determined upon its merits in the light of the available data; and it is not foreclosed by the acts or the utterances of previous administrators and investigating bodies who may have come to a different conclusion from that which the Postmasters General have entertained during the recent past.

II

CONSTRUED AS CONFERRING THE DUTY IN QUESTION THE STATUTE IS CONSTITUTIONAL.

The constitutionality of enforcement of the fourth condition of Section 14 of the Postal Classification Act, construed as the Postmaster General construes it, must be judged according to the nature of the governmental function sought to be

exercised. That function is not, as the court below asserts, the exertion of "censorship" over publications, or even their exclusion from the mails, but simply the duty to classify them for postal purposes and to determine which ones shall enjoy the subsidy involved in second class privileges.

This Court long ago recognized that even the exclusion of writings and publications from the mails is distinctly different from the total suppression of their circulation. The latter would be "a fatal blow * * * to the freedom of the press"; but Congress may exercise a power to exclude utterances from the mails which is broader than its power to prevent circulation of the same material in other ways. *Ex parte Jackson*, 96 U. S. 727, 735; cf. *Lewis Publishing Co.* v. *Morgan*, 229 U. S. 288. The power to prevent dissemination is the power of censorship; the power to exclude from the mails, on the other hand, (and with it the lesser power to classify for postal purposes) is the power to provide for the Postal Service.

In *Lewis Publishing Co.* v. *Morgan*, *supra*, this Court recognized that the exclusion of publications from second class privileges constitutes a much less drastic measure than the total exclusion of material from the mails. In that case it was contended that a statute (*infra*, pp. 50–51) which required publications enjoying second

class privileges to file statements with the Post Office Department concerning their ownership and the names of stockholders and creditors, and required them to label paid advertisements as such, constituted an infringement of freedom of the press. The Court noted, however (229 U. S. 301, 313–314), that the power being exercised was simply that of classifying mailable matter with particular reference to second class privileges and that, then as now (see *supra*, p. 15, n. 2) inclusion within the class involved a substantial subsidy from public funds (229 U. S. 303–304). The Court then stated (229 U. S. at p. 308):

> When the question is thus defined its solution is free from difficulty, since by its terms the provision only regulates second class mail, and the exclusion from the mails for which it provides is not an exclusion from the mails generally, but only from the right to participate in and enjoy the privileges accorded by the second class classification.

Considered in this light, the statute was held to be clearly valid, since, as the Court repeated (229 U. S. 316), "we are concerned not with any general regulation of what should be published in newspapers, not with any condition excluding from the right to resort to the mails, but * * * solely and exclusively with the right on behalf of the publishers to continue to enjoy great privileges

and advantages at the public expense, a right given to them by Congress upon condition of compliance with regulations deemed by that body incidental and necessary to the complete fruition of the public policy lying at the foundation of the privileges accorded."

Equally here, the Postmaster General is exercising an authority which Congress deems essential to "the complete fruition of the public policy lying at the foundation of the privileges accorded"—a policy which encourages the circulation of periodicals designed to convey information of a public character or devoted to literature, the sciences, or the arts, but which excludes from the enjoyment of this favored position those publications that are not devoted to these ends. The fact that for the enforcement of this condition discretionary authority is conferred upon the Postmaster General raises constitutional questions additional to those in the *Lewis Publishing Co.* case; but in considering those issues, as in determining the constitutionality of the substantive policy which Congress has enacted, the actual consequences of the power which is being exercised must be kept clearly in mind.

The charge is made that the power sought to be exercised by the Postmaster General in this case infringes freedom of speech and of the press as guaranteed by the First Amendment. In cases arising under that Amendment, however, as in re-

lation to other constitutional provisions, this Court has stressed that the test of validity of legislation necessarily varies with circumstances. No rigid formulas or unvarying generalities can be applied. The line between valid and invalid statutes must necessarily be drawn in the light of "the concrete clash of particular interests and the community's * * * evaluation * * * of them." *Thomas* v. *Collins*, 323 U. S. 516, 531. The free speech decisions have recognized that the line which marks off the area of constitutionality must be most strictly drawn when criminal sanctions are invoked against speech, publication, or religious observance. *Board of Education* v. *Barnette*, 319 U. S. 624, 632; *Bridges* v. *California*, 314 U. S. 252, 260, 263. In the present case no criminal sanctions are involved. The consequence to a publication which does not meet this requirement of the statute is not even exclusion from the mails, but simply the denial of second-class privileges. Manifestly the test of constitutionality which applies in this situation, whether denominated "clear and present danger" or according to some other form of words, must leave room for greater legislative discretion than would be the case if total suppression of utterance were involved. Cf. *Ex parte Jackson*, *supra*. As respects "clear and present danger", the immediacy of the financial loss to the Government, incident to public subsidi-

zation of a periodical which Congress deems ineligible for second class privileges, is not open to doubt.

The nature of the particular activities with which a statute deals, as well as the governmental power being exercised, must be taken into account in determining the constitutionality of the statute. Thus it is one thing to limit religious observance and proselyting, but another to regulate the labor of children while engaged in religious activity. *Prince* v. *Massachusetts*, 321 U. S. 158. Similarly, the dissemination of commercial advertising may be prevented under circumstances which would not justify suppressing the distribution of literature containing opinion or information for other than commercial purposes. *Valentine* v. *Chrestensen*, 316 U. S. 52. So here, it makes a difference that Esquire Magazine, although containing literature and other material which in itself enjoys the protection of the First Amendment, has been found not to be devoted to literary, artistic, or scientific ends. Its otherwise protected content is swallowed up by a purpose which does not enjoy protection in the same degree, as the free speech of an employer may be limited under circumstances which cause it to assume the character of coercion of employees in respect to self-organization. *Labor Board* v. *Virginia Power Co.*, 314 U. S. 469, 477. When this estimate of the situation is coupled with the relatively mild

consequences of the denial of second class privileges, it is apparent, we think, that the bounds of constitutional power have not been exceeded.

Our contention here is not contrary to the stipulation in the present case that the United States would not defend the action "on the ground that plaintiff would not sustain irreparable damage if the order in question was wrongful and invalid" (R. 1892). It is established by the stipulation that the effort of the Postmaster General to exact higher postage rates from Esquire constitutes a threatened injury to respondent's business which warrants injunctive relief if the threat is illegal. This does not mean, however, that the injury would be the same as criminal punishment or total exclusion from the mails; and in determining the constitutionality of the statutory provision it is clearly necessary to take into account the precise nature of the consequences that would flow from its enforcement.[1] These are far from equivalent to those against which speech and publication have been protected in other cases.

In the cases most nearly similar with respect to the consequences of enforcement, involving attempts to suppress freedom of the press without resort to criminal sanctions in the ordinary

[1] The increased cost to Esquire of postage at other than second-class rates, if the Postmaster General's order should go into effect, would be approximately $44,000 monthly (R. 48) upon 300,000 copies which are sent through the mails to subscribers (R. 29).

sense of the term, the threatened effects upon publishers who violated the legislation were much more drastic than those which confront Esquire Magazine by reason of its failure to satisfy the fourth condition of Section 14 of the Postal Classification Act, if that provision is valid. In *Near v. Minnesota*, 283 U. S. 697, the publisher of forbidden material was threatened with injunction suits and with contempt proceedings for violation of any injunction that might issue, as this Court specifically noted, 283 U. S. at 712. In *Grosjean v. American Press Co.*, 297 U. S. 233, the device employed to strike at the newspapers which it was sought to restrict was a discriminatory tax consciously devised to exact large sums of money, uncompensated by any service to the publishers that might have justified the exaction. This is far different from the withdrawal of a subsidy such as is involved here, which simply leaves the publisher obliged to pay more nearly the value of services to be rendered, if he desires them. We submit, therefore, that nothing in the decisions which might condemn the adoption of more drastic measures than withdrawal of second class privileges with respect to the circulation of Esquire Magazine leads to the conclusion that Congress lacks the authority which it has here exercised and which the Postmaster General has validly implemented.

We do not contend that arbitrary discrimination among periodicals with respect to the enjoy-

ment of second class privileges, whether by legislative mandate or administrative action, would be constitutional. We do not rely upon expressions in the opinion of the Court in *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, which might be interpreted as pointing in that direction. Whether the decision in that case was soundly based is not in issue here. The revocation of second class privileges which was there upheld over the dissents of Mr. Justice Holmes and Mr. Justice Brandeis was produced by the inclusion of non-mailable matter in a limited number of past issues of the newspaper involved. The question was whether in these circumstances the statute authorized the withdrawal of second class privileges as to future issues. In the present case, by contrast, the character of Esquire Magazine as a whole, as evidenced by its characteristic content over a long period of time and by the purposes of its publishers, has been made the basis of an administrative determination that the magazine is not originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, or the arts. We submit that nothing in the Constitution compels Congress, as a condition of extending possible subsidies to periodicals which serve the public purposes Congress has in mind, to extend them also to a publication which in the considered judgment of the responsible head of an Executive Department, reached after a full hearing, does

not fulfill the condition prescribed by the legislature.

The view of the court below that the attempt to classify periodicals according to the criteria laid down in the fourth condition of Section 14 of the Postal Classification Act necessarily involves the exercise of a purely personal judgment by the Postmaster General is unsound. The language employed in the statute is reasonably precise and adapted to the legislative purposes, and it can be applied according to distinctions which conform to the legislative intent. We have already pointed out (*supra*, p. 17) that these distinctions turn not merely upon a judgment as to particular items contained in a periodical, but upon an estimate of the nature and purpose of the publication as a whole. No constitutional issue of due process, based upon an allegedly arbitrary classification of periodicals, and no contention that legislative power has been invalidly delegated, can successfully be made.

In the postal statutes themselves, other provisions, conferring authority to exclude material entirely from the mails, afford less precise guidance to the exercise of discretion than the fourth condition of Section 14, yet are of unquestioned constitutionality. Section 211 of the Criminal Code, 18 U. S. C. 334, provides that "obscene, lewd, * * * lacivious, and * * * filthy" matter "shall not be conveyed in the mails or de-

livered from any post office or by any letter carrier." Similarly, Section 212 of the Criminal Code, 18 U. S. C. 335, forbids the conveyance in the mails of any postcard or any matter the outside cover or label of which contains obscene or "libelous, scurrilous, [or] defamatory" material. Section 2 of Title 12 of the Espionage Act of 1917, 40 Stat. 230, 18 U. S. C. 344, declares non-mailable any material which contains "any matter advocating or urging treason, insurrection, or forcible resistance to any law of the United States". It has long been established that matter offered for mailing, which violates any of the foregoing prohibitions, may be administratively excluded. See *Ex parte Jackson*, 96 U. S. 727; *American Mercury* v. *Kiely*, 19 F. 2d. 295 (C. C. A. 2). The definition of material which may be excluded under these provisions is not more definite than the direction in Section 14 of the Postal Classification Act to limit second class privileges to publications which are originated and published to disseminate "information of a public character" or are devoted to "literature, the sciences, arts, or some special industry".

The fact that obscene and libelous material may be difficult to recognize was not regarded by this Court in *Near* v. *Minnesota*, 283 U. S. 697, as a sufficient ground to prevent the enforcement of "the primary requirements of decency * * * against obscene publications" (283 U. S. at p. 716) or to prevent the enforcement of libel laws

in proceedings for redress and punishment (283 U. S. at p. 719) notwithstanding the historic fact that the protection of liberty of the press against the licensing power sprang largely from the effort to shake off governmental restraints upon the publication of alleged libels, operating in advance of publication (See 283 U. S. 713-715). If punishment of libels and exclusion of libelous and obscene and treasonable matter from the mails are valid without precise definition of the meaning of these terms, the milder power to exclude from second class postal privileges upon the grounds invoked by the Postmaster General in this case, is also not vitiated by vagueness in the applicable standard.

This Court did not hesitate to sustain a similar legislative enactment, involving complete suppression of motion picture films which did not meet the requirements laid down by the legislature of Ohio as applied by a board of censors, in *Mutual Film Corp.* v. *Ohio Industrial Commission*, 236 U. S. 230. The statute there forbade the exhibition of motion picture films which were not "in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character." To the objection that the statute furnished "no standard of what is educational, moral, amusing or harmless, and hence leaves the decision to arbitrary judgment, whim and caprice", thereby "permitting the 'personal equa-

tion' to enter", this Court replied that the statutory standard derived "precision from the sense and experience of men" and thereby furnished "certain and useful guides in reasoning and conduct" (236 U. S. 245, 246. In that case as in this, the words employed in the statute could not be construed in the light of a common law background such as may be said to attach to the conceptions of libel, obscenity, or treason—vague and unsatisfactory as that is. We submit that in both instances the necessary degree of precision in the guides afforded to the administrative authorities derive from concepts which are not invalidly vague in the light of human experience.

In the *Mutual Film Corporation* case, which arose in a district court, the issues related to questions of state constitutional law, involving due process and the delegation of legislative power. The latter is, of course, the problem of Federal constitutional law which arises most prominently when the sufficiency of a legislatively prescribed standard to govern administrative action is called in question. This problem was fully reviewed by this Court in *Yakus v. United States*, 321 U. S. 414, 423–427, which cites the earlier authorities. As was there concluded, the adequacy of such guides to administrative action as "public interest," "just and reasonable rates," "fair and equitable" prices, and "public interest, convenience or necessity"

leaves little room for the contention that any reasonably precise legislative attempt to set down the criteria which are to govern administrative action fails of validity because Congress has not exercised its legislative power. And in a case where the legislative power has been exercised, administrative action which falls within the authority conferred is not arbitrary or discriminatory.

It has been stressed heretofore in this argument that the interests which turn upon the exercise of administrative authority here in question are threatened with less drastic action than may be the case in other instances of legislative measures bearing upon freedom of speech and freedom of the press. We submit, also, that the interests which here turn upon the exercise of administrative authority are not more entitled to constitutional protection against broad discretion than others which have been left to even less controlled administrative regulation. At the last term, for example, this Court sustained an exercise of state authority to refuse admission to its bar to an individual upon the ground that he did not possess "good moral character and general fitness to practice law," within the meaning of these concepts as they were deemed to be relevant to the practice of law. *In re Clyde Wilson Summers,* No. 139, October Term 1944, p. 6, fn. 10 of slip opinion. The rule of court involved in that case is typical of

the expressions used in licensing statutes. Freund, *Administrative Powers over Persons and Property* (1928) p. 100.

In the face of these authorities, it would sound strange to say that Congress is not entitled to provide for the administration of the Postal Classification Act in such a manner as to give effect to the criteria which are embodied in the fourth condition of Section 14. These criteria, like others, derive precision from experience and may legitimately be made the basis of evolving administrative policies.[5] The legislative provision here involved does not suffer because it may be impossible to lay down a dictionary definition of literature, science, or art within the meaning of the statute. See *Smith* v. *Hitchcock*, 226 U. S. 53, 59; *Houghton* v. *Payne*, 194 U. S. 88, 97. In the latter case, the Court noted that while it may be difficult to draw a line between periodicals and books, "it is usually, though not always, easy to determine within which category" a particular publication falls. So here, the proper classification of periodicals with respect to second class privileges may validly be left to case-by-case determination.

[5] See the suggestion in Riesman, *Civil Liberties in a Period of Transition*, in *Public Policy*, Volume III, 1942, at p. 35, that it may be possible "to shape a public policy on the basis of an investigation of the socio-psychological effects, if any, of commercially promoted pornography, and of the methods and effects of attempting to suppress it."

III

THE POSTMASTER GENERAL'S ORDER IS WITHIN THE AUTHORITY CONFERRED UPON HIM AND IS VALID

The opinion of the court below appears to concede (R. 1993) that if "the power claimed by the Post Office Department" and exercised in this case exists, "the Government is clearly right in its contention" that a court may not review the Postmaster General's conclusion in a particular case and that the testimony supporting the order cannot be brushed aside as insubstantial. We submit that this is true and that if, as we contend, the statute validly confers the power to reject periodicals for second class privileges because of failure to comply with the fourth condition, the Postmaster General's order must stand.

The general rule that courts will not interfere with administrative decisions of the heads of executive departments unless they are fraudulent, or palpably wrong, or wholly outside their authority is well recognized. It is based on respect for the separation of judicial and administrative functions and an appreciation of the significance of a grant of discretion which would become meaningless were the courts to give effect to their views as though the problem were presented first to them. The rule is stated in *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 109, with citation of the earlier cases upon which it rests, as follows:

> * * * where the decision of questions of fact is committed by Congress to the

> judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.

In *Leach* v. *Carlile*, 258 U. S. 138, this Court characterized a decision of the Postmaster General that the plaintiff's advertising was such a gross exaggeration as to justify a fraud order, as a decision of fact "which the statutes cited committed to the decision of the Postmaster General." As to the scope of review the court said (pp. 139–140):

> * * * the applicable, settled rule of law is that the conclusion of a head of an executive department on such a question [of fact], when committed to him by law, will not be reviewed by the courts where it is fairly arrived at and has substantial evidence to support it, so that it cannot justly be said to be palpably wrong and therefore arbitrary.[6]

[6] To the same effect see *United States ex rel. Reinach* v. *Cortelyou*, 28 App. D. C. 570, involving a determination that a periodical was primarily designed to advertise the publishers business; *Shoemaker* v. *Burke*, 92 F. 2d 205 (App. D. C.), involving construction of U. S. C. Title 18, § 335, declaring material nonmailable which is intended to reflect injuriously on character or conduct; and *Masses Publishing Co.* v. *Patten*, 246 Fed. 24 (C. C. A. 2); *Gitlow* v. *Kiely*,

We think it is evident that the same principles limiting judicial review of the Postmaster General's orders, are applicable in this case.

In considering the issue of the validity of the Postmaster General's order it is important to keep in mind that its stated conclusion is solely that Esquire does not fulfill the requirements of the fourth condition. The Postmaster General did not claim to have nor seek to exercise a right of censorship, nor the right to admit or exclude periodicals according to his personal standards of what is moral or desirable, as charged in the briefs and arguments of the respondent in the court below.

The order, after reciting the formal notice and referring to the prior proceedings, states clearly the issue to which the Postmaster General directed his remarks, namely, "The single issue is the character of the publication and whether that publication meets the conditions set out by Congress in respect to its use of the second-class mailing privileges" (R. 1857), either because it was not originated and published for the dissemination of information of a public character nor devoted to literature, the sciences, arts or some special

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44 F. 2d 227 (S. D. N. Y.), affirmed without opinion 49 F. 2d 1077 (C. C. A. 2), certiorari denied, 284 U. S. 648; *Branaman* v. *Harris*, 189 Fed. 461 (W. D. Mo.); *Anderson* v. *Patten*, 247 Fed. 382 (S. D. N. Y.), *Jeffersonian Publishing Co.* v. *West*, 245 Fed. 585 (S. D. Ga.), involving rulings as to whether material violated the statute against urging treason, insurrection, etc.

industry, or because it was non-mailable within the obscenity statutes (R. 1858). There is no further reference anywhere in the opinion to the obscenity charge and quite unmistakably the ultimate conclusion is confined to the question of compliance with the fourth condition.

After calling attention to the fact that second class rates represent a subsidy contributed to by the people of the United States, and to the declaration of the statutes and of the Supreme Court that second class carriage is a special privilege justifiable as an encouragement of the dissemination of current intelligence and other material of a nature designed to make a special contribution to the public welfare, the Postmaster General directs his attention to an analysis of the meaning of the fourth condition. He states and rejects both the theory of the respondent that Congress intended as a matter of national policy to foster and subsidize every kind of periodical irrespective of its contribution to the public welfare, and the "contrary theory" (R. 1860) which goes to the other extreme that the fourth condition establishes a "continuing requirement that a publication must serve a useful public purpose, editorially or otherwise", and that "literature, the sciences, arts" means "classic literature," the "fine arts" and the "useful arts."

The opinion continues with the statement that the decisions and administrative practice are inconsistent with themselves and with each other

and that there is no clear judicial definition of the limits of the Postmaster General's power and duty; contains a discussion of the importance to the Department and to the public of a determination by the courts of "what this statute means and what limits and restrictions there are upon the use of the second-class mail privileges" or "what restrictions and limitation in the public interest are proper to be placed upon" the "power and duty" of the Postmaster General; and finally comes to a statement of what the Postmaster General believes to be the meaning of the statute, viz: "The plain language of this statute does not assume that a publication must in fact be 'obscene' within the intendment of the postal obscenity statutes before it can be found not to be 'originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry.'" (R. 1861–1862.) There is allusion to giving attention to the preponderant or dominant quality or impact of a publication as a whole and to the fact that improper material in isolated instances may be considered of lesser importance, but that such material offends against the terms of the fourth condition when it reflects the systematic, deliberate, and dominant purpose and quality of the publication as a whole. While there is reference in this part of the discussion to a "duty to contribute to the public good and the

public welfare" (R. 1863), it is clear that these words are neither a statement of the ground of decision nor of the test applied, but merely refer to the basic purpose or objective "which Congress intended by the fourth condition."

That the ultimate decision and order were clearly based upon the fourth condition and on the Postmaster General's evaluation of the over-all impact and predominant quality of Esquire Magazine is clear from the final words (R. 1864–1865):

> Whatever the featured and dominant pictures, prose, verse and systematic innuendoes of this publication may be, they surely are not "information of a public character" or "literature, the sciences, arts or some special industry." I am unable to conclude that this publication complies with the Fourth condition or that Congress did intend or now intends that this publication be entitled to enjoy the second-class mailing privileges. I cannot assume that Congress ever intended to endow this publication with an indirect subsidy and permit it to receive at the hands of the government a preference in postal charges of approximately $500,000 per annum.

The Postmaster General's evaluation of Esquire is amply supported by the evidence and the exhibits. The history of the magazine and a description of its editorial policies and purpose were given in considerable detail by Arnold Gingrich, one of its founders and its present editor,

over whose desk all material passes (R. 1187, 1197). It appears from his testimony that Esquire started, not as a magazine or periodical, but solely as a medium for advertising men's attire (R. 978, 986), in the form of a "magazine for men" wherein the commercial material was "diluted" with humor and articles of a "stag party type" (R. 983, 1160). A relatively small number of the original issue were placed on newsstands to test the public reader reaction (R. 985), as distinguished from distribution among merchants of men's attire as originally intended (R. 984, 1159). There resulted an enormous demand with the result that it was decided to continue the publication as a magazine (R. 986). Mr. Gingrich testified that Esquire became "typed" (R. 1163) by its "original extreme emphasis on the exclusively masculine type of feature and emphasis in all the magazine's literary and humor content" (R. 1163), with respect to which it was conspicuously successful (R. 1164). It attracted a considerable number of imitators of its "smoking-room type of humor" and "girl-gag content" (R. 1163), i. e., "leg art, * * * sex jokes, chorus girls, gold-diggers, and that sort of thing" (R. 1284). Because of this imitation Esquire decided that while preserving "smartness" it would try to "get away from that type of" character (R. 1163) to a "balanced blend" as its "editorial formula" (R. 1165, 1285). However,

Congress by requiring that a periodical be "devoted" to literature, the sciences, or arts as a condition of admission to the second class, did not, we submit, indicate an intention to subsidize "balanced blends" of salacious smartness in cartoons, jokes, and pictures with honest literary and artistic effort.

Another feature to which Esquire is devoted is the "Varga girl" paintings of semi-draped girls. The first Varga girls appeared in December, 1940 (R. 1216), and the practice since then has been to print a group of twelve Varga-girl pictures (one for each month of the year) in the January issue, after two or three of these pictures have been printed in the December issue as a "preview" (R. 1216–17). In the January 1941 issue a coupon was printed offering bound reprints of the series for 25 cents. Although only 25,000 sets had been printed to meet the estimated demand, 327,000 sets were sold in 1941; in 1942 (when two advertisements were run) 504,000 sets were sold; in 1943 (when two or three advertisements appeared in each issue of Esquire) 1,000,000 sets were sold; and in 1944 the total reached 2,500,000 sets (R. 1395–6). The Varga-girl calendars are put out in many forms—the basic calendar, the desk calendar, the wall calendar (R. 1217) and for business firms for their own advertising purposes (R. 1396). The same or similar paintings are also put out on playing cards and oversized post cards (R. 1293); and all are extensively ad-

vertised in several places in each issue of the magazine (See Exhibits 1–11). Respondent has created a special department known as the "Varga Girl Calendar Sales Division" (R. 1293), which handles the calendars and the many other items of respondent's merchandise—Hurrell photographs, Szyk cartoons, sporting pictures, collections of miscellaneous cartoons, date books, men's fashion color charts and style books, cook books, jig saw puzzles, etc. (See Exhibit 28, R. 1293–1296, 1397, and advertisements in Exhibits 1–11.) This sales division employs agents on a regional basis around the country (R. 1217) and sells on news-stands (in 1943, 700,000 copies of the calendar were sold on news-stands (R. 1396)); but "the increasing sale of the Varga calendars * * *" was very largely accounted for through the magazine itself" (R. 1294).

The respondent's view as to the Varga girls is that "we do not contend that we publish them as art"; they are "frankly published for the entertainment they afford." (R. 38.)

Esquire has not infrequently stepped over the line into obscenity, with consequent suppression of particular items or issues. The July and November, 1937, issues were held non-mailable (R. 1265, 1312), and Esquire's attention was called to the condition of second class mailing that the magazine must be issued at stated intervals and was warned that if it persisted in publishing non-mailable issues action would be taken to revoke

its permit (R. 1415-7). The November 1940, issue was held to "completely overstep the line," and the inspector recommended reference to the United States Attorney (R. 1305–6, 1417). The December 1940, issue was held up because of the jingle printed on p. 1770 of the Record. Mr. Gingrich flew to Washington and, with the patient collaboration of the Solicitor's office of the Department, an acceptable revision was worked out. Beginning with the issue of January 1941, and continuing through that of July 1942, the Post Office insisted that Esquire submit its drawings in advance of publication in an attempt to avoid the necessity and difficulty of suppression after mailing (R. 1263). During this period deletions or changes of material as presented or in the drawings was insisted on in the issues of August 1941 (R. 1313, 1315–16), October 1941 (R. 1319), November 1941 (R. 1319–25), January 1942 (R.1326–7), March 1942 (R. 1327), April 1942 (R. 1328), May 1942 (R. 1329) and July 1942 (R. 1330). On May 21, 1942, the Department wrote respondent that it declined to continue premailing examinations and that full responsibility must be assumed by respondent, and suggested that "a sense of deceney and good morals should compel" the omission of any matter about which there might be doubt as to mailability (R. 1332).

Much of the evidence in the record consists of testimony of witnesses concerning their opinion of the propriety or impropriety of specific mate-

rial in Esquire and concerning their views of the Magazine as a whole. The testimony of the following witnesses supports the view adopted by the Postmaster General: Reverend Peter Marshall (R. 1567–1589), who emphasized the injurious effect upon public morals "of material in Esquire" and of the "editorial policy and tone of the magazine" (R. 1568–1569, 1575); Rabbi Solomon H. Metz (R. 1593–1633), who regarded the cumulative effect of material in Esquire as particularly harmful (R. 1601); Reverend John W. Rustin (R. 1656–1679), who gave his opinion that pictures in Esquire are not information of a public character (R. 1659); Father Thomas V. Moore (R. 1715–1762), who also believed that material which he read in Esquire is "most certainly not" information of a public character (R. 1724); Mrs. Harvey W. Wiley (R. 1680–1696); Bishop Edwin Holt Hughes (R. 1697–1715); Mr. Chester W. Holmes (R. 1634–1652); Dr. Benjamin Karpman (R. 1420–1551); and Dr. John K. Cartwright (R. 1553–1566).

In light of the evidence in support of the order, we think it is clear that, notwithstanding contrary testimony in behalf of Esquire, the order has ample support. Far from being "clearly wrong," it reflects a valid judgment.

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the court below should be reversed.

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January, 1946.

APPENDIX

RELEVANT STATUTES

39 U. S. C. 225:

> Matter of the second class may be examined at the office of mailing, and if found to contain matter which is subject to a higher rate of postage, such matter shall be charged with postage at the rate to which the inclosed matter is subject. Nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same (Mar. 3, 1879, c. 180, § 12, 20 Stat. 359).

39 U. S. C. 229:

> All periodical publications issued from a known place of publication at stated intervals, and as frequently as four times a year, by or under the auspices of a benevolent or fraternal society or order organized under the lodge system and having a bona fide membership of not less than one thousand persons, or by a regularly incorporated institution of learning, or by a regularly established State institution of learning supported in whole or in part by public taxation, or by or under the auspices of a trades-union, and all publications of strictly professional, literary, historical, or scientific societies, including the bulletins issued by State boards of health, and by State boards or departments of public charities and corrections, shall be admitted to the mails as second-class matter, and the post-

age thereon shall be the same as on other second-class matter; and such periodical publications, issued by or under the auspices of benevolent or fraternal societies or orders or trades-unions, or by strictly professional, literary, historical, or scientific societies, shall have the right to carry advertising matter, whether such matter pertain to such benevolent or fraternal societies or orders, trades-unions, strictly professional, literary, historical, or scientific societies, or to other persons, institutions, or concerns; but such periodical publications, hereby permitted to carry advertising matter, must not be designed or published primarily for advertising purposes, and shall be originated and published to further the objects and purposes of such benevolent or fraternal societies or orders, trades-unions, or other societies, respectively; and all such periodicals shall be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications. The circulation through the mails of periodical publications issued by, or under the auspices of, benevolent or fraternal societies or orders, or trades-unions, or by strictly professional, literary, historical, or scientific societies, as second-class mail matter, shall be limited to copies mailed to such members as pay therefor, either as a part of their dues or assessments, or otherwise, not less than 50 per centum of the regular subscription price; to other bona fide subscribers; to exchanges, and 10 per centum of such circulation as sample copies. When such members pay therefor as a part of their dues or assessments, individual subscrip-

tions or receipts shall not be required. The office of publication of any such periodical publication shall be fixed by the association or body by which it is published, or by its executive board, and such publication shall be printed at such place and entered at the nearest post office thereto (Aug. 24, 1912, c. 389, § 1, 37 Stat. 550).

39 U. S. C. 230:

All periodical publications issued from a known place of publication at stated intervals as frequently as four times a year by State departments of agriculture shall be admitted to the mails as second-class mail matter: *Provided,* That such matter shall be published only for the purpose of furthering the objects of such departments: *And provided further,* That such publications shall not contain any advertising matter of any kind (June 6, 1900, c. 801, 31 Stat. 660).

Act of August 24, 1912, c. 389, sec. 2, 37 Stat. 553:

* * * * * * *

That it shall be the duty of the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication to file with the Postmaster General and the postmaster at the office at which said publication is entered, not later than the first day of April and the first day of October of each year, on blanks furnished by the Post Office Department, a sworn statement setting forth the names and post office addresses of the editor and managing editor, publisher, business managers, and owners, and, in addition, the stockholders, if the publication be owned by a corporation; and also the names of known bondholders, mortgagees,

or other security holders; and also, in the case of daily newspapers, there shall be included in such statement the average of the number of copies of each issue of such publication sold or distributed to paid subscribers during the preceding six months: *Provided,* That the provisions of this paragraph shall not apply to religious, fraternal, temperance and scientific, or other similar publications: *Provided further,* That it shall not be necessary to include in such statement the names of persons owning less than one per centum of the total amount of stock, bonds, mortgages, or other securities. A copy of such sworn statement shall be published in the second issue of such newspaper, magazine, or other publication printed next after the filing of such statement. Any such publication shall be denied the privileges of the mail if it shall fail to comply with the provisions of this paragraph within ten days after notice by registered letter of such failure.

That all editorial or other reading matter published in any such newspaper, magazine, or periodical for the publication of which money or other valuable consideration is paid, accepted, or promised shall be plainly marked "advertisement." Any editor or publisher printing editorial or other reading matter for which compensation is paid, accepted, or promised without so marking the same, shall upon conviction in any court having jurisdiction, be fined not less than fifty dollars ($50) nor more than five hundred dollars ($500).

U. S. GOVERNMENT PRINTING OFFICE: 1949

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 399

ROBERT E. HANNEGAN, AS POSTMASTER GENERAL OF THE UNITED STATES, PETITIONER,

vs.

ESQUIRE, INC., RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

ROBERT E. HANNEGAN,[1] AS POSTMASTER GENERAL OF THE UNITED STATES, PETITIONER, vs. ESQUIRE, INC., RESPONDENT.	No. 309

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

STATEMENT

The issue in the case is whether the Postmaster General has power, in respect of a magazine which he has himself decided *not* to be obscene, to deny it second-class mailing entry on the ground that it contains material which in his opinion is objectionable and does not meet his test of making a positive contribution "to the public good and the public welfare" (R. 1863).

We contend that no question is presented to justify granting of certiorari.

[1] Substituted, on motion of petitioner, in place of Frank C. Walker, his predecessor. Throughout this brief the terms "Postmaster General" and "petitioner" generally refer to Mr. Walker.

(a) The Citation and Post Office Department Hearings.

Respondent is the publisher of the monthly periodical Esquire Magazine. The publication conforms to the practice of most present day magazines of presenting stories, articles, stage and screen departments, pictorial features, cartoons, jokes, correspondence with the editors and advertising.[2]

On September 11, 1943, petitioner caused a citation to be issued requiring respondent to show cause why its second-class mailing rights in respect of Esquire Magazine should not be revoked (R. 1-2, 6). A fair reading of the citation shows that it was based upon the ground that certain specified material contained in eleven issues of the magazine was non-mailable because obscene within the meaning of the so-called obscenity statute.[3] Esquire denied the charge and thereafter hearings were held before a Hearing Board appointed by the Postmaster General. A new charge (introduced in the second week of the hearings) is the only one with which we are now concerned. That charge in substance was that even if the magazine was not obscene and therefore was mailable, it nevertheless was not entitled to second-class mailing rates since it did not comply with the Fourth Condition relating to such second-class mail i.e., that it "be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry, * * *"[4] (R. 601-7). It thus involved the claim that

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[2]In the words of the Court of Appeals, it is "a well-known magazine of general circulation. It contains stories, articles, literary and dramatic reviews. Its contributors include distinguished authors, clergymen and professors in our best educational institutions." (R. 1987).

[3]35 Stat. 1129 (18 U. S. C. 334).

[4]20 Stat. 359 (39 U. S. C. 226).

the content of the magazine was not "public information", "literature" or "art". In addition to the fact that it is obvious on the face of the magazine that its content comes within these categories, the new charge was promptly met and disposed of by expert witnesses, who analyzed the entire content of the magazine from the standpoint of such categories and compared its content and editorial formula with that of other leading magazines (See for example R. 881, 1191-4, 1137, 1151-2).

(b) The Hearing Board Recommendations and Findings.

On November 11, 1943, after the hearings had been completed, the Hearing Board filed its Recommendations that the proceeding "be dismissed and that the second-class entry of the magazine, Esquire be continued in full force and effect" (R. 1839). At the same time the Board filed its Findings (1) that the charge of obscenity "has not been supported and proved in fact or in law" and (2) that the publication "has not failed to comply" with the Fourth Condition of the statute (R. 1838-9). One member of the Hearing Board dissented on the obscenity issue, solely on the ground that he regarded a one-page item (out of 1972 pages in the ~~H.~~cited issues) as obscene, that the entire issue containing such item was therefore non-mailable, and that Esquire's second-class mailing rights should be revoked because its regularity of issuance was thereby interrupted (R. 1851-5).

On November 22, 1943, at the Postmaster General's suggestion, Walter Myers, Chairman of the Hearing Board, made a "Supplementary Recommendation" (R.

1892) in which he again advised that obscenity had not been established, stated that an attempt to withhold second-class rates from an otherwise mailable periodical such as Esquire on an alleged violation of the Fourth Condition would be contrary to law, and suggested that the Postmaster General might recommend new legislation to Congress as a possible means of withholding second-class rates from publications which he might regard as coarse and objectionable (Pl.'s Ex. 25 for Iden. in Dist. Ct.).

(c) The Order of the Postmaster General.

On December 30, 1943, the Postmaster General handed down an order revoking Esquire's second-class mailing rights (R. 1856-65). The order disregarded both the Findings and Recommendations of the Hearing Board and the Supplementary Recommendations of Chairman Myers. It based the revocation on the ground that the magazine did not comply with the Fourth Condition because it did not meet the Postmaster General's test of a "positive duty to contribute to the public good and the public welfare (R. 1863).

(d) The Proceedings in the District Court.

On January 21, 1944, Esquire commenced an action in the District Court for the District of Columbia to enjoin the revocation order.[4] On July 10, 11 and 12, 1944, the case was tried in the District Court before Judge T. Whitfield Davidson.[5] The evidence consisted of the entire rec-

[5]United States District Judge from the Northern District of Texas, sitting on special assignment in the District Court for the District of Columbia.

ord of the proceedings before the Post Office Department and proof to establish that the occasion of the instant case was the first in 65 years of administrative practice when a Postmaster General resorted to the Fourth Condition to justify a qualitative evaluation of the content of a periodical publication as a condition of entry to second-class mail.

On July 15, 1945, the District Court handed down its opinion, sustaining the Postmaster General (R. 1963-75), reported at 55 F. Supp. 1015). The opinion discussed at length the educational environment of members of Congress at the time of the enactment of the Postal Law (March 3, 1879) and concluded that the Postmaster General was warranted in holding that "the literature" referred to in the statute meant "literature of desirable type of an educational value" (R. 1969). The opinion further stated that Esquire was not "deprived of property" since it could still mail its magazine; although admittedly at the additional cost of $500,000 per year (R. 1972). With respect to freedom of the press, the District Court stated that there was no abridgement of Esquire's constitutional rights because if the Postmaster General was arbitrary, his action was subject to review by the courts, that the Postmaster General was also subject to the will of the President, and that, in any event, if the Postmaster General generally misinterpreted the law, "Congress can rewrite the Act" (R. 1973). Finally, the opinion stated that the Postmaster General's action was in good faith and not arbitrary and, therefore, conclusive on the Court. Esquire's demand for an injunction was denied and its complaint dismissed (R. 1979).

(e) The Decision of the Court of Appeals.

On June 4, 1945 the Court of Appeals for the District of Columbia unanimously reversed the District Court (R. 1987-95).

The question presented to and passed upon by the Court of Appeals was strictly limited since, while case was pending in the District Court, the Postmaster General stipulated or conceded that the magazine did not violate the obscenity statute, that it was mailable, that it complied with all conditions of second-class mail other than the Fourth Condition, and that the revocation order would cause irreparable injury (R. 26, 1891-3).

Accordingly, the sole question before the Court of Appeals was whether the Fourth Condition could be construed, as the Postmaster General in effect contended, to enable him to measure all periodicals enjoying second-class rates by his personal standards and moral yardstick and if he found that any of them did not measure up to his test of "positive duty to contribute to the public good and public welfare," withhold the second-class rates and thus deny them any practicable use of the mails.

The Court of Appeals held that the Fourth Condition cannot be so construed. The essence of the holding is contained in the Court's words that "It is inconceivable that Congress intended to delegate such power to an administrative official or that the exercise of such power, if delegated, could be held constitutional" (R. 1988).

THE CASE DOES NOT PRESENT ANY QUESTION APPROPRIATE FOR THIS COURT TO REVIEW

The Postmaster General's petition asks this Court to pass upon two questions which are, it is asserted, (a) pre-

sented by this case, and (b) of the highest importance from the standpoint of postal administration. We submit that neither (a) nor (b) can be substantiated.

The questions posed are:

> "(1) whether or not the Postmaster General has had confided to him by Congress in Section 14 of the Postal Classification Act a duty to determine whether a given periodical publication meets the prescribed condition that it be 'originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry', so as to be eligible for second class mailing privileges, and
>
> "(2) whether Congress may constitutionally confer such a duty upon him." (Petition, pp. 7-8).

The Questions Posed are not Presented by this Case.

As to Question (1), the issue in this litigation is not whether the Postmaster General may determine, as a basis for eligibility to second-class mail, whether a periodical publication is "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry". It is, rather, whether these words can be interpreted to mean that the Postmaster General is to decide "what is good for the public to read" (R. 1988).

Petitioner suggests that the Court of Appeals has held that Congress did not confide to the Postmaster General the duty to determine whether a periodical falls within the Fourth Condition. There was no such holding. The decision merely limited the claimed construction of the Fourth Condition. It struck down the additional condition which

the Postmaster General sought to read into the statute, i.e. the claimed power to censor on the basis of the value of content.

The construction of the Postmaster General involved the initial error of using the postal classification procedure as a means of passing upon the merit of the content of a publication. Under the Postal Law, Congress divided mailable matter into four classes: letters and postal cards in the first class, periodical publications in the second class, books and circulars in the third class, and miscellaneous material within certain weight, size and other limitations in the fourth class.[6] In enacting these classification provisions, Congress was concerned, not with the content and merit of written or printed material, but only with a physical allocation of mailable matter to certain classes whereby varying rates of postage could be charged. Advertising pamphlets, it is true, were excluded from the second-class but that was purely a regulation of a business practice and did not involve a review of the content and merit of the material published. To the extent that Congress was concerned over the content of written or printed material other statutes were specifically enacted so as to provide that, for example, obscene matter,[7] fraudulent material,[8] and seditious literature[9] were non-mailable in any class.

The foregoing clearly indicates that Congress never intended that the classification of mail should be used for the purpose of evaluating the content of the publication. The Postmaster General recognized the validity of this proposition in his Brief in the Court of Appeals where he

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[6]20 Stat. 358 (39 U. S. C. 221)
[7]35 Stat. 1129 (18 U. S. C. 334)
[8]35 Stat. 1130 (18 U. S. C. 338)
[9]40 Stat. 230 (18 U. S. C. 344)

stated that "a thought expressed in the form of a letter must pay 48¢ a pound for the use of the mails, the expression of the same thought in a book may be transmitted at 4¢ a pound; while in a magazine it may cost as little as 1½¢ a pound". This statement shows a realization of the fact that the classification of mail and the applicability of different rates of postage depend not on the content of the thought nor an evaluation of its merit but solely on the format by which it is conveyed.

Moreover, contrary to the impression conveyed by the Petition, the construction urged by the Postmaster is completely antagonistic to the history and purpose of the Fourth Condition. On the other hand the ruling of the Court of Appeals is completely consistent with that history and purpose. The present Postal Law, except for amendments not significant here, was enacted on March 3, 1879 and one of the primary objects of that legislation was to exclude from the more favorable second-class rates which had existed from the commencement of the postal system periodical publications devoted primarily to advertising. The effort of Congress to achieve this result brought about the enactment of the words of the Fourth Condition. The object of Congress in formulating the Fourth Condition in terms of the publication's content was to insure the exclusion of private advertising material from the low mailing rates.

The subsequent history of the Fourth Condition and its practical construction by all previous Postmasters General, establish beyond question that Congress did not intend to clothe the Postmaster General with the power to dispense second-class rates on the basis of his personal standards of what does or does not contribute to the public good and

welfare. The words of the Fourth Condition have always been understood to include all periodicals in the usually accepted sense and to exclude none.

In 1904 this was precisely the position taken by the Postmaster General before this Court in *Houghton v. Payne*, 194 U. S. 88 (Brief of Postmaster General in Supreme Court, pp. 34, 73).

In 1906 a Joint Commission of Congress made an exhaustive study of the second-class mail statute and concluded that the words of the Fourth Condition were "so broad as to include everything and exclude nothing."[10] This Postal Commission recommended an amendment to limit second-class rates to periodicals dealing with current topics but no limitation was made then or at any time since.

In 1911 another Postal Commission investigated the subject headed by former Mr. Chief Justice Hughes of this Court. That Commission reached virtually the same conclusion:

> "* * * but the experience of the post office has shown the impossibility of making a satisfactory test based upon literary or educational values. To attempt to do so would be to set up a censorship of the press. Of necessity the words of the statute—'devoted to literature, the sciences, arts, or some special industry'—must have a broad interpretation."[11]

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[10]House Document No. 608, Postal Commission 1906-07, 59th Congress, 2nd Session, "Report Regarding Second-Class Mail Matter" (pp. xxxvi-xxxvii).

[11]House Document No. 559, Postal Commission 1911-12, 62nd Congress, 2nd Session, "Report of Commission on Second-Class Mail Matter", p. 142.

Upon the trial in the District Court, an official of the Classification Division of the Post Office Department testified that in his 26 years of experience he had never known of a qualitative test being applied in the administration of the Fourth Condition (R. 1910-2).

Finally, the Postmaster General who made the revocation order in the case at bar made three rulings within the preceding six months in which he himself rejected the suggestion that the words of the Fourth Condition be used to justify a determination that the content of a periodical was not for the best interest of the public (Pl.'s Exs. 9, 10, 11, 12, 15, 16; 21 and 22 in District Court R. 1936-8, 1943).

Thus, we submit, the decision of the Court of Appeals is in full accord with the history and purpose of the Fourth Condition. The discussion likewise disposes of the suggestion that the decision makes the provisions of the Fourth Condition meaningless. The purpose of the Fourth Condition was to assist in the Congressional intent to exclude private advertising material from second-class mail. Otherwise it was designed to have an exceedingly broad interpretation and necessarily so, in view of constitutional principles of freedom of the press. The Court of Appeals decision does not mean that the Postmaster may not determine whether a given periodical complies with the Fourth Condition; it merely confirms what has been understood for the past sixty-five years, that such provisions cannot be interpreted to give the Postmaster General the power to pass upon what is good for the public to read.

As to Question (2), the claimed issue of the constitutionality of the right of Congress to permit the Postmaster General to administer the Fourth Condition is not presented by this case. The Postmaster General's argument

that that issue is presented is predicated on the erroneous premise that the Court of Appeals has decided that the Postmaster General shall not determine whether a periodical complies with the Fourth Condition. But, as we have said, the Court of Appeals made no such decision. The right of the Postmaster General to administer the Fourth Condition as it has been administered since 1879 remains unchanged. The constitutionality of that right is not in issue here.

It is true that the Court of Appeals, in holding that the Fourth Condition can not be interpreted in the manner urged by the Postmaster General, passed upon the corollary question, namely, that if the Fourth Condition could be so interpreted, it would be unconstitutional. A resolution of that constitutional issue was not and is not necessary to the decision of this case. The Court of Appeals merely chose to buttress its decision by referring to constitutional guarantees as well as to grounds of statutory construction. And in holding that the interpretation of the statute urged by the Postmaster General would be unconstitutional, the Court followed well-established precedents of this Court. No new question of federal law is presented. Therefore, even if the resolution of the constitutional issue had been necessary to the decision below, that decision is so clearly correct that there is no need for this Court to review it on certiorari.

The Postmaster General himself does not dispute that the constitutional guarantees of the First Amendment apply to the use of the mails. In fact, in his petition for certiorari he expressly "concede(s) that the wrongful denial of second-class privileges to a particular publication may constitute an infringement of constitutional guarantees" (Petition, pp. 14-15). Moreover, in his Brief in the Court

of Appeals the Postmaster General unequivocally disclaimed any argument that the use of the mails or of the second-class mail as such was a privilege as opposed to a right and therefore exercisable beyond the orbit of constitutional guarantees. He said:

> "The discussion in this opinion provides a complete answer to the contention * * * that the Postmaster General's decision is based on 'the so-called privilege doctrine' which treats the use of the mails not as a right but as a privilege similar to a bare license or sufference * * *. There is no such doctrine and no such contention."

The relevance of the First Amendment being thus conceded the unconstitutionality of a statute which would condition second-class privileges on the Postmaster's estimate of "what is good for the public to read" (R. 1988) is obvious. See *Near* v. *Minnesota*, 283 U. S. 697 (1931) where the statute declared unconstitutional set up standards far more precise than "contribution to the public good" and where this Court nevertheless said (pp. 721-2):

> "Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, *but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication.*" (Italics added).

This Court took similar action in *Grosjean* v. *American Press*, 297 U.S. 233 (1936) where a 2% tax on the gross

receipts of all newspapers having a circulation above a certain amount[12] was held unconstitutional. The Court pointed out that such a financial discrimination was just as invalid constitutionally as any more direct form of censorship (p. 249):

> "In the light of all that has now been said, it is evident * * * that by the First Amendment it was meant to preclude the national government, and by the Fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications, or their circulation * * *.
>
> "This court had occasion in *Near* v. *Minnesota*, *supra*, at pp. 713 *et seq.*, to discuss at some length the subject in its general aspect. The conclusion there stated is that the object of the constitutional provisions was to prevent previous restraints on publication; *and the court was careful not to limit the protection of the right to any particular way of abridging it.*" (Italics added).

Nor is a proper question of constitutionality raised by the Postmaster General's assertion that the opinion of the Court of Appeals "casts grave doubt upon the constitutionality of possible future legislation for dealing with the problem" (Petition, p. 8). In substance he is asking this Court to give an advisory opinion on the constitutionality of some future legislation which might attempt to grant him the power which he has assumed here by his unwarranted construction of the Fourth Condition. Certainly it is not the function of this Court to set forth in the abstract the limits to which Congress might go, if

---

[12]The additional burden imposed upon Esquire in the present case is $500,000 per year (R. 1972).

willing, in granting additional powers to the Postmaster General.[13]

The Case Presents no Question of Importance from the Standpoint of Postal Administration.

The Fourth Condition was enacted over 66 years ago. For about 65 years, until the revocation order in the instant case, no Postmaster General ever attempted to interpret the Fourth Condition as requiring him to pass upon the quality of the material published. In fact, as we have noted above, even the Postmaster General who made the revocation order here rejected that idea on several occasions prior to the instant case. The uncontradicted testimony of J. O. Bouton, an official in the Classification Division of the Post Office Department for over 26 years, was that no qualitative test has ever been applied, to his knowledge, in administering the Fourth Condition (R. 1910-12). In this connection it may be noted that 25,000 publications now enjoy second-class rates (R. 1888). From this number and for the first time in all these years, an attempt was made to apply a qualitative test to Esquire magazine.

The foregoing clearly shows the lack of substance in petitioner's assertion that this case is "of the highest importance from the standpoint of postal administration". If Postmasters General had no difficulties of administration for the past 65 years it may reasonably be asked why the opinion of the Court of Appeals in the instant case, confirming all past administrative practice, "leaves the Post Office Department at sea".

[13] It may be noted that the Postmaster General, at the time apparently undisturbed by any constitutional question, on the very day when the Court of Appeals handed down its decision, wrote to the Post Office and Post Roads Committee of Congress calling for prompt legislative action. New York Times, June 5, 1945, p. 17.

Whatever administrative difficulties the Postmaster General believes he is laboring under are those of his own creation. We think that this Court will not be impressed by an argument that a question of great administrative importance is involved because an official has himself created confusion by attempting to inaugurate an untenable construction of a statute. And in passing we may suggest the enormity of the administrative problem which would result if the Postmaster General's theory were upheld.

CONCLUSION

The opinion of the Court of Appeals was obviously correct. The decision is in accord with the broad policy of protecting freedom of speech and of the press exemplified by the recent decisions of this Court. No sound reason exists for a review by this Court. The petition for writ of certiorari should be denied.

September 28, 1945.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 399

ROBERT E. HANNEGAN, AS POSTMASTER GENERAL OF THE UNITED STATES,
Petitioner,

v.

ESQUIRE, INC.,
Respondent.

BRIEF FOR RESPONDENT

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January 9, 1946.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

ROBERT E. HANNEGAN, as Postmaster General of the United States,

Petitioner

v.

ESQUIRE, INC.,

Respondent.

No. 399

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the District Court is reported at 55 F. Supp. 1015. The opinion of the Court of Appeals for the District of Columbia is reported at 151 F. 2d 49.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C. 347).

STATUTE INVOLVED

The applicable sections of the Postal Law relating to second-class mail read, 20 Stat. 359 (39 U. S. C.):

> "§ 224. Second-class matter. Mailable matter of the second class shall embrace all newspapers and

other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections 225 and 226 of this title.

* * * * * *

§ 226. Same; conditions admitting publications to. Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second class are as follows: First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second. It must be issued from a known office of publication. Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications. * * * Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers. Nothing herein contained shall be so construed as to admit to the second class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates." (Underscoring added.)

The above underscored words of the Fourth Condition are those with which we are here concerned.

STATEMENT

The Brief of the Postmaster General is predicated entirely upon the erroneous proposition that the question posed by the instant case is whether the Postmaster General has the right to determine whether a periodical complies with the Fourth Condition.

Actually, the basic issue is whether the Fourth Condition can be construed to authorize the Postmaster General to withhold second-class postal rates from a periodical upon the ground that that periodical does not in his judgment make an affirmative contribution to the public good.

The foundation of the revocation order (held unlawful by the Court below) is the Postmaster General's conviction that:

> "Publication to enjoy these unique mail privileges and special protections is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. It is under a positive duty to contribute to the public good and the public welfare." (Revocation Order, R. 1863).

Thus the order on its face discloses that it is based upon the Postmaster General's personal evaluation of whether the content of Esquire Magazine contributes to the public good.

At the outset, therefore, it should be made clear that the issue is not whether the Postmaster General may determine administratively that a periodical is "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry"[1] but, rather, whether these words

[1] 20 Stat. 359 (39 U. S. C. 226).

can be given a completely novel construction so as to permit the Postmaster General to deny second-class rates on the ground that the content of a periodical is not *good* information or *good* literature or *good* art.

STATEMENT OF CASE

(a) The Citation and Post Office Department Hearings.

Respondent is the publisher of the monthly periodical, Esquire Magazine. The publication conforms to the practice of most present day magazines of presenting stories, articles, stage and screen departments, pictorial features, cartoons, jokes, correspondence with the editors and advertising.

On September 11, 1943, petitioner caused a citation to be issued requiring respondent to show cause why its second-class mailing rights in respect of Esquire Magazine should not be revoked (R. 1-2, 6). A fair reading of the citation, as amended, shows that it was based upon allegations that certain specified material contained in eleven issues of the magazines[2] was non-mailable because obscene within the meaning of the so-called obscenity statute.[3] Esquire denied the charge and, thereafter, hearings were held before a Hearing Board appointed by the Postmaster General. During the second week of the hearings a new charge, the only one with which we are now concerned, was introduced. That charge in substance was that even if the magazine was not obscene, and there-

[2] The issues of January to November, 1943, inclusive (Dept. Ex's. 1-11 in Post Office Dept., R. 46).

[3] 35 Stat. 1129 (18 U. S. C. 334).

fore was mailable, it nevertheless was not entitled to second-class entry since it did not comply with the Fourth Condition i.e., it was not "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry" (R. 601-7). Although it is obvious on the face of things that the content of the magazine comes within these categories the new charge was promptly met and disposed of by expert witnesses, who analyzed the entire content of the magazine from the standpoint of such categories and compared its content and editorial formula with that of other leading magazines (See, for example, R. 881, 1191-4, 1137, 1151-2).

(b) The Hearing Board Recommendations and Findings.

On November 11, 1943, after the hearings had been completed, the Hearing Board filed its Recommendations that the proceeding "be dismissed and that the second-class entry of the magazine Esquire be continued in full force and effect" (R. 1839). At the same time the Board filed its Findings (1) that the charge of obscenity "has not been supported and proved in fact or in law" and (2) that the publication "has not failed to comply" with the Fourth Condition of the statute (R. 1838-9). One member of the Hearing Board dissented on the obscenity issue, solely on the ground that he regarded a one-page item (out of 1972 pages in the 11 cited issues) as obscene, that the entire issue containing such item was therefore non-mailable, and that Esquire's second-class mailing rights should be revoked because its regularity of issuance was thereby interrupted (R. 1851-5).

On November 22, 1943, at the Postmaster General's suggestion, Walter Myers, Chairman of the Hearing Board, made a "Supplementary Recommendation" (R. 1892) in which he again advised that obscenity had not been established, stated that an attempt to withhold second-class rates from an otherwise mailable periodical such as Esquire on an alleged violation of the Fourth Condition would be contrary to law, and suggested that the Postmaster General might recommend new legislation to Congress as a possible means of withholding second-class rates from publications which he might regard as coarse and objectionable (Pl.'s Ex. 25 for Iden. in Dist. Ct., R. 1949).

(c) The Revocation Order of the Postmaster General.

On December 30, 1943, the Postmaster General handed down his order revoking Esquire's second-class mailing rights (R. 1856-65). The order disregarded both the Findings and Recommendations of the Hearing Board and the Supplementary Recommendation of Chairman Myers.

The revocation order, while at times lacking in consistency and on the whole being self-serving, unmistakably shows that the Postmaster General determined to revoke Esquire's second-class privileges, and then made an unprecedented interpretation of the Fourth Condition as a plausible reason to support his conclusion. After referring to the citation (R. 1856), the order asserts that since the proceedings involve only the second-class mail, no question of the right of freedom of the press is presented (R. 1857). The order goes on to emphasize the so-called "unique" characteristics of second-class rates and classifies them as "true privileges," concluding that Congress enacted the Fourth Condition to insure that publications make a special

contribution to the public welfare in order to obtain them (R. 1858-9). The order then refers to an alleged lack of consistency and uniformity in prior administrative practice and interpretation, asserts that in the first instance it is for the courts to say what the statute means and states that no matter what result is reached by the courts, Congress should set up more definite standards and rigid limitations to govern eligibility to the second-class (R. 1861-2). The order then points out that the Postmaster General should not be hesitant to expose the existing situation to the public eye nor reluctant to determine the matter in such a way that all phases of it "may be fully considered and decided by a court of competent jurisdiction" (R. 1862). The order then states:

> "The plain language of this statute does not assume that a publication must in fact be 'obscene' within the intendment of the postal obscenity statutes before it can be found not to be 'originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry'.
>
> "Writings and pictures may be indecent, vulgar, and risque and still not be obscene in a technical sense. Such writings and pictures may be in that obscure and treacherous borderland zone where the average person hesitates to find them technically obscene, but still may see ample proof that they are morally improper and not for the public welfare and the public good. When such writings or pictures occur in isolated instances their dangerous tendencies and malignant qualities may be considered of lesser importance.
>
> "When, however, they become a dominant and systematic feature they most certainly cannot be said

to be for the public good, and a publication which uses them in that manner is not making the 'special contribution to the public welfare' which Congress intended by the Fourth condition.

"A publication to enjoy these unique mail privileges and special preferences is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. It is under a positive duty to contribute to the public good and the public welfare." (R. 1862-3).

The order concludes that the magazine does not meet the test thus laid down and revokes the second-class entry. It provides that it shall not become effective for 60 days so as to permit an appeal to a court to fully review and settle the matter (R. 1865).

(d) The Proceedings in the District Court.

On January 21, 1944, Esquire commenced an action in the District Court of Columbia to enjoin the revocation order. After the commencement of suit the Postmaster General agreed to continue to mail Esquire at second-class rates until the final determination of the suit on condition, however, that if it should finally be decided that Esquire is not entitled to second-class rates Esquire will pay the difference between second and fourth-class rates for the period from February 28, 1944 to the date of such final decision (R. 1885-6). During pretrial proceedings in the District Court, the Postmaster General stipulated that he would not contend that the magazine violated the obscenity statute, agreed that it was mailable, and that the revocation order would cause irreparable injury (R. 1891-3).

Upon the trial in the District Court, the record of the proceedings before the Post Office Department was intro-

duced and additional evidence was received to establish that the occasion of the instant case was the first in 65 years of administrative practice when a Postmaster General made a qualitative evaluation of the content of a periodical as a condition of entry to second-class mail.

On July 15, 1945, the District Court handed down its opinion, sustaining the Postmaster General (R. 1963-75). The opinion discussed at length the Court's impressions about the educational environment of members of Congress at the time of the enactment of the Fourth Condition (March 3, 1879), and concluded that that was sufficient warrant for the Postmaster General to hold that "the literature" referred to in the statute meant "literature of desirable type of an educational value" (R. 1969). The opinion also asserted that Esquire was not "deprived of property" since it could still mail its magazine in one of the other classes, although admittedly at the additional cost of $500,000 per year (R. 1972). On the matter of freedom of the press, the opinion stated that there was no abridgement of Esquire's constitutional rights because if the Postmaster General was arbitrary, his action was subject to review by the courts, that the Postmaster General was also subject to the will of the President, and that, in any event, if the Postmaster General generally misinterpreted the law, "Congress can rewrite the Act" (R. 1973). The opinion concluded that the Postmaster General's action was taken in good faith and was not arbitrary and was, therefore, conclusive on the Court.

(e) The Decision of the Court Below.

On June 4, 1945, the Court of Appeals for the District of Columbia unanimously reversed the judgment of the District Court (R. 1987-95).

The question presented to and passed upon by the Court of Appeals was whether the Fourth Condition could be construed, as the Postmaster General in effect contended, to enable him to measure all periodicals enjoying second-class rates by his personal standards and moral yardstick and if he found that any of them did not measure up to his test of "positive duty to contribute to the public good and public welfare," to withhold the second-class rates and thus deny them any practicable use of the mails.

The Court of Appeals held that the Fourth Condition cannot be so construed. The essence of the holding is contained in the Court's words that "It is inconceivable that Congress intended to delegate such power to an administrative official or that the exercise of such power, if delegated, could be held constitutional" (R. 1988).

THE MAGAZINE

The magazine, 11 issues of which were the subject of the Postmaster General's attack, in the words of the Court below:

> "is a well-known magazine of general circulation. It contains stories, articles, literary and dramatic reviews. Its contributors include distinguished authors, clergymen and professors in our best educational institutions" (R. 1987).

It can be readily seen that the content of the magazine comes within the categories of the Fourth Condition, "information of a public character", "literature", "arts", "sciences" or "special industry", by simply referring to the Table of Contents which appears at page 5 of each of the cited issues.

The 11 issues in question follow a rather standard editorial pattern, each containing a number of articles of current interest, short stories, articles on sports and interesting personalities, one feature on men's clothing, regular departments on Books, the Theatre, etc., and pictorial features including paintings, water colors, photographs and drawings. Among the better known literary contributors are, in alphabetical order: Sholem Asch, Ivan Bunin, Theodore Dreiser, John Dos Passos, Lord Dunsany, Havelock Ellis, Lion Feuchtwanger, F. Scott Fitzgerald, Maxim Gorky, Ernest Hemingway, D. H. Lawrence, Maurice Maeterlinck, Thomas Mann, Andrew Marquis, Franz Molnar, Luigi Pirandello, John Steinbeck, Jacob Wassermann, Thomas Wolfe and Arnold Zweig. The art contributors include: George Bellows, Thomas Benton, Alexander Brook, James Chapin, John Steuart Curry, Salvador Dali, William J. Glackens, George Grosz, Rockwell Kent, George Luks, Reginald Marsh, Henry Varnum Poor, Diego Rivera, Paul Sample, John Sloan and Eugene Speicher.

Tabulating the text features of the 11 issues, there are:

85 *full-length articles* on subjects of current interest, the greater number of which concerned the war effort, including such subjects as The Coming Battle of Germany (Jan., p. 109); The Future of Air Power (Jan., p. 77); Technique of bombing (Feb., p. 57); Germany's preparations for the use of poison gas (Mar., p. 37); Submarine warfare (May, p. 51); Britain's policies as to colonial empire (June, p. 27); Navy training films (Sept., p. 69); and Rocket warfare (Oct., p. 59);

59 *short articles* on a great variety of subjects such as self-portraits and self-interviews in which men

prominent in various fields express their views: Editor William Allen White (Jan., p. 140); Secretary Harold L. Ickes (Feb., p. 101); Senator Harry Truman (Mar., p. 96); Senator Arthur Capper (Apr., p. 105); Senator Claude Pepper (May, p. 116); Senator Guy M. Gillette (June, p. 122); and Senator Robert F. Wagner (July, p. 177); a movie star's article about his dog (May, p. 138); an opera singer's ideas on entertainment (May, p. 132); survey of the most popular campus swing music (May, p. 172); and how to grow Victory gardens in the city (May, p. 135);

73 fiction short stories;

57 sports articles or stories (including the regular sports poll on questions of current interest in sports);

22 articles on personalities such as Admiral William F. Halsey, Jr.; Bernard Baruch; Lt. William Eddy, of the U. S. Navy; Russia's Marshall Timoshenko; France's Henry Giraud; Nazi Admiral Karl Doenitz; Damon Runyon; Leo McCarey; and motion picture director, Walt Disney;

and in each issue regularly recurring departments on "*Books*" (written by the late William Lyon Phelps); on the "*Theatre*" (by George Jean Nathan); on what to eat, drink and wear ("*Edibles*", "*Potables*" and "*Wearables*"); on the "*Lively Arts*" (Gilbert Seldes acting as a roving reporter); on "*Correspondence*" (The Sound and the Fury—the usual column of letters from readers to the editor); on "*Contributors*" (a who's who on new contributors to each issue); and a humor department at first called "*Potpourri*" (Ad Libbing with Esquire) and later "*Camp Humor*" (Goldbricking with Esquire).

Tabulating the *pictorial features* of the 11 issues, we find the following:

24 war action paintings by John Falter, Alexander Leydenfrost and William Pachner;

11 color photographs of champion dogs by Henry Waxman, and water colors or etchings of game birds by Walter Bohl;

11 sets of paintings, prints and drawings reproduced through the courtesy of the Associated American Artists; The Cincinnati Art Museum; The Knoedler Art Galleries; The Gallery of Modern Art; The Arthur Kaufman Galleries; The Perls Galleries; the André Seligmann Galleries; and the Schoeneman Galleries;

27 color photographs of Hollywood stars and prospective stars;

14 color photographs of performers from Broadway plays, musical shows, the circus and night clubs taken by such recognized photographers as Anton Bruehl, George Serebrykoff and Jon Abbott;

27 paintings or drawings with a fashion treatment or emphasis;

23 paintings of the so-called Varga girl; and

7 sets of drawings of current war interest by Paul C. Maxwell in a serious vein, and by Derso and Kelen with a satirical approach to international politics.

The two foregoing lists tabulate the main features of the magazine although there are in addition a number of cartoons and jokes, for the most part consisting of filler material.

STIPULATED AND CONCEDED MATTERS

All issues other than the construction and application of the words of the Fourth Condition, "originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry," have been stipulated out of the case. The sole basis for the original attack against Esquire, i.e., non-mailability because of obscenity, now is not even in the case for, as pointed out above, the Postmaster-General agreed during pretrial proceedings in the District Court that he does not defend his order on the ground that the magazine violates the obscenity statute or that it is non-mailable under that or any other statute (R. 1891-3). It is also conceded that the magazine satisfies the other conditions of Section 226 of the Postal Law viz., that it is a periodical, that it has a legitimate list of subscribers, and that it is not designed primarily for advertising, or for free circulation, or for circulation at nominal rates (R. 26, 1976). Finally, it is uncontradicted that the withholding of second-class rates would result in an additional mailing expense of $500,000 per year (R. 1972) and the Postmaster General has stipulated that his revocation order will cause irreparable injury to Esquire (R. 1892).

OUTLINE OF ARGUMENT

The contentions of respondent upon this appeal are:

(1) that in making the revocation order the Postmaster General unlawfully construed the Fourth Condition so as to add the unprecedented requirement that periodicals must make an affirmative contribution to the public good according to his own personal standards;

(2) that if the statute were interpreted according to the contentions of the Postmaster General, it would be unconstitutional (a) because it would abridge the freedom of the press guaranteed by the First Amendment, and (b) because it would involve an improper delegation of power; and

(3) that, in any event, the Postmaster General's revocation order is arbitrary, capricious and clearly wrong and results in unjust discrimination.

POINT I

IN MAKING THE REVOCATION ORDER THE POSTMASTER GENERAL UNLAWFULLY CONSTRUED THE FOURTH CONDITION SO AS TO ADD THE REQUIREMENT THAT PERIODICALS MUST MAKE AN AFFIRMATIVE CONTRIBUTION TO THE PUBLIC GOOD ACCORDING TO HIS OWN PERSONAL STANDARDS.

(a) The Postmaster General's Construction of the Fourth Condition Necessarily Involves a Review of the Content of the Publication and an Evaluation of its Merit According to His Own Views.

One of the fundamental fallacies of the Postmaster General's argument which pervades his entire brief on the instant appeal is that he fails to recognize that his construction of the Fourth Condition necessarily involves a personal evaluation on his part of the content of Esquire. In making the revocation order, the ultimate conclusion of the Postmaster General is that Esquire does not disseminate "information of a public character" and is not devoted to "literature", "the sciences", "arts" or "special industry"

but that conclusion, as is established beyond question by the record in the case, is reached only upon a primary determination that Esquire does not comply because the Postmaster General does not like some of the public information, literature, or art which it publishes. In other words, he has interpreted the words "public information", "literature" and "art" to be synonymous with "public information, literature and art which, in my opinion, make an affirmative contribution to the public good".

The Postmaster General's revocation order itself makes this plain for it discloses that he has predicated his determination of non-compliance with the Fourth Condition upon the ground that he does not believe Esquire is contributing to the public good and the public welfare (R. 1863). The revocation order states that the Postmaster General's complaint is that some of the content of Esquire is, in his opinion, indecent, vulgar, and risque and that while he is uncertain as to the level of good or bad taste which they attain, his conclusion is that they are not information of a public character, or literature or art (R. 1864). The one unmistakable feature of the order is that the Postmaster General has viewed the content of Esquire with relation to his concepts of contribution to the public welfare and has asserted that some of the items contained in the magazine fall within an "obscure and treacherous borderland zone" so as not to be information of a public character or devoted to literature or art. (R. 1863).

A simple test to show that the Postmaster General's determination involved his personal evaluation of the content of Esquire is derived from a consideration of the charges made in the case and the Postmaster General's decision with respect to them. A substantial number of the items

complained of by the Postmaster General[3] are articles, stories and poems. To illustrate, one of the items complained of is an article by Gilbert Seldes appearing on page 83 of the January, 1943 issue criticizing a Broadway musical comedy as being nothing more than a burlesque show. Other examples include an article by H. B. Lawrenson on page 30 of the February, 1943 issue dealing with a legendary character of the United States Merchant Marine; an article by Edmund Gilligan in the April, 1943 issue describing arraignment proceedings in a magistrate's court; an article by Paul Gallico in the May, 1943 issue regarding as dull and puerile the trend of theatrical productions toward burlesque; an article by David Emory in the August, 1943 issue deploring the ideas of an English professor advocating plural marriage; and poems such as the one entitled "Benedicts, Awake!" on page 45 of the January, 1943 issue.

It is idle for the Postmaster General or anyone else to contend that such theatrical reviews, articles, stories and poems are not information of a public character, or devoted to literature or art. In order to exclude them from these categories, the Postmaster General has to interject his personal evaluation, which he has expressed in terms of contribution to the public welfare in the revocation order. In other words the Postmaster General's application of the Fourth Condition results in his exclusion of a theatrical review or

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[3] The material originally complained of was listed in the original and amended citations and consisted of items on 32 pages of 11 separate issues (R. 3-4, 8-10). In addition, by way of further particularization of the charges in answer to Esquire's request that every item against which the citation was in any way directed be specified, further items on 54 pages were specified (R. 31-33), so that the entire matter against which evidence was made consists of items on 80 pages (out of a total of 197 pages).

a poem from the field of public information, literature or art only because he believes that they are in bad taste. The theatrical criticism of Gilbert Seldes is removed, under the Postmaster General's test, from the field of public information, literature or art to an obscure borderland because it discusses a burlesque show. The poem "Benedicts, Awake!" loses its literary and artistic character because the Postmaster General ascribes to it an air of indelicacy.

The same considerations apply to cartoons, jokes and pictures. The Postmaster General's brief erroneously suggests that Esquire admits that such items are not information of a public character, or devoted to literature or art. We do contend that they come within these categories and the instant record clearly establishes that many of such items, appearing not only in Esquire but in other periodicals, are admittedly in compliance with the Fourth Condition so long as they are unobjectionable to the Postmaster General. The revocation order itself concedes that humorous periodicals devoted primarily to entertainment are not to be excluded from the second-class (R. 1860). It follows that the Postmaster General cannot assert that jokes, cartoons or pictures as such are not public information, literature or art. He is driven to the position that items of that class which he complains of in Esquire are not within those categories because he regards them as coarse or indelicate.

We submit that the record establishes beyond question that the Postmaster General's construction of the Fourth Condition results in an additional requirement that the publication not only contain public information, literature and art but that the public information, literature and art must be of a calibre as meets his personal test of contribution to the public good and welfare.

(b) The Circumstances Surrounding the Enactment of the Fourth Condition Show that it was Never Designed to Give to the Postmaster General the Power which he has Asserted here.

The Fourth Condition was enacted when the classification of mailable matter was revised on March 3, 1879. Except for minor amendments not significant here, that Postal Law is still in effect. For several years prior to the passage of the Act in 1879, mailable matter had been divided into 3 classes: letters in the first class, printed periodicals in the second class, and other printed material and miscellaneous articles in the third class. During this period, there was a growing practice on the part of many private enterprises of taking advantage of the more favorable second-class rates solely for advertising purposes. An amendment of July 12, 1870 sought to correct this situation by raising the postal rates on periodicals devoted primarily to advertising.[5] It appears that the amendment did not have the desired result and one of the primary objects of the act of 1879 was to remedy this defect. The act of 1879 provided for the classification of mailable matter into four rather than three classes, the new third and fourth classes taking the place of the former third class. It continued newspapers and magazines in the second class, but specifically excluded therefrom publications originated and published primarily for advertising purposes. It is in connection with this feature of the act that the words of the Fourth Condition came into being and all of the evidence establishes that the words were never devised to give powers of censorship to the Postmaster General as

[5]Chap. 71 of Laws of 1863 (12 Stat. 701).
[6]Chap. 179 of Laws of 1876 (19 Stat. 78).

he now contends. On the contrary, it is abundantly clear that the Fourth Condition was formulated solely in an effort to exclude private advertising sheets and pamphlets from the second class. To accomplish this result Congress undertook affirmatively to define eligible periodicals so as to include all those which were in the commonly accepted sense recognized as such. And to make doubly sure that purely advertising material was not included, Congress added a specific negative proviso, in the final sentence of the section that publications "designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates" were not entitled to second-class rates.

These circumstances make it clear why Congress used the broad, all-inclusive terms, "public information," "literature," "arts," "sciences" and "special industry" in describing the matter which qualified for the second class. Except for advertising publications, Congress was not attempting to exclude any periodical publication from the second-class, much less clothe the Postmaster General with the power generally to supervise the tastes of the reading public of the country.[7] As we shall discuss, no Postmaster General has ever suggested, until the instant case, that the words of the Fourth Condition could be construed except in

[7] The passage of an amendment to admit to the second class periodical publications of benevolent and fraternal societies, unions, state boards of health, etc. (37 Stat. 550, 39 U. S. C. 229) does not support any inference that the Fourth Condition contemplated an evaluation of content (See Pet. Br. p. 16). The purpose of that amendment was to give second-class rates to such publications despite the fact that they did not have a legitimate list of paying subscribers. See Letter of Postmaster General of June 16, 1910, Congressional Record, 61st Congress, Second Session, p. 9033; Senate Report 1242, part 2, "Increase of Postage Upon Advertisements in Certain Periodicals", 61st Congress, Third Session.

a manner as would include all matter which could possibly be the subject of periodical publication.

It is to be noted that in enacting the law of 1879, Congress was not embarking on any new departure of according low mailing rates to periodical publications. Such substantially lower rates had been in effect continuously since the passage of the first general Postal Law in 1792.[8] It cannot be rightly argued, therefore, that Congress, without word or discussion, attached a drastic condition to the low mailing rates always accorded to periodicals when it enacted the Fourth Condition as part of the Postal Law of 1879.

The construction of the Fourth Condition presently urged by the Postmaster General involves the fundamental error of using the classification procedure as a means of passing upon the content of a publication in relation to merit or lack of merit. In enacting the classification provisions, Congress was concerned not with the content and merit of written or printed material, but only with a physical allocation of mailable matter to certain classes whereby varying rates of postage could be charged. To the extent that Congress was concerned over content other statutes, criminal in nature, were specifically enacted so as to provide that, for example, obscene material (35 Stat. 1129, 18 U.S.C. 334), fraudulent material (35 Stat. 1130, 18 U.S.C. 338), and seditious literature (40 Stat. 230, 18 U.S.C. 344), were non-mailable in any class.[9] The Postmaster General

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[8] Newspapers were accorded a more favorable rate in 1792 (1 Stat. 232), and magazines in 1794 (1 Stat. 354).

[9] Clear indication that Congress never conceived that it had given the Postmaster General the power he has asserted here appears in the debates in Congress in 1908 when it was proposed to amend the obscenity statute so as to outlaw "disgusting", "vile" and "indecent" publications. Objections were made, in

automatically recognized the validity of the foregoing when he stated in his brief in the Court below that "A thought expressed in the form of a letter must pay 48¢ a pound for the use of the mails, the expression of the same thought in a book may be transmitted at 4¢ a pound; while in a magazine it may cost as little as 1½¢ a pound". By this statement the Postmaster General conceded that the classification of mail and the applicability of different rates of postage depend not on the content of the thought nor an evaluation of its merit but solely on the format by which it is conveyed.

We do not contend that Congress was not motivated by considerations of the public good when it passed laws designed to give more favorable rates to periodical publications. It may be assumed that this was the fact. Congress did not, however, delegate to the individual who might enjoy the incumbency of the office of Postmaster General at any particular time, the right to pick and choose according to his personal taste and moral standards which periodicals were for the public good and which, although admittedly "periodicals", were not up to his standards and therefore should be mailed in some class other than second. The point is well stated in the opinion of the Court below:

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substance, that such an amendment "would give to Postmasters General and Judges too great a power in using their individual sense and judgment of what would be indecent to exclude from the mail what has heretofore been mailable matter". (Congressional Record, Vol. XLII, pp. 905-908, Jan. 2, 1908; Vol. XLIII, pp. 283-5, December 15, 1908). Such objections are clearly inconsistent with the idea that Congress had already given the Postmaster General the power to pass upon risque and indelicate material when it passed the Fourth Condition in 1879. The proposed amendment to the obscenity statute did not pass.

> "Congress established the second-class mailing privileges because it believed that periodicals which disseminated public information, literature, art or science deserved to be encouraged on account of their contribution as a class to the public good. But the American way of obtaining that kind of contribution is by giving competitive opportunity to men of different tastes and different ideas, not by compelling conformity to the taste or ideas of any government official." (R. 1988-9)

One fact is clear and that is that Congress in enacting the Fourth Condition did not, assuming that it could have done so constitutionally, attempt to draw a line between good and bad literature, refined or unrefined public information or classical and non-classical art.

Congress, in passing the act of 1879, was fully aware that many periodicals which were of doubtful benefit to the public in the educational and virtuous sense would benefit by the low second-class rates. Thus at the time of the passage of the act and in connection with a dispute over a slightly higher rate (within the second class) which was to be charged to periodicals published less frequently than once a week, Representative Money, a member of the Postal Committee, referred to "the mass of ephemeral dailies that furnish the gossip and scandal of the hour,"[10] and to "the daily newspapers, with their load of gossip and scandal and everyday topics that are floating through the press",[11] as being entitled without question to the lowest second-class rate and complained that higher rates were charged to better grade publications.

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[10]Congressional Record Vol. VIII, p. 693, January 23, 1879.

[11]Congressional Record Vol. VIII, p. 2135, February 28, 1879.

There is, then, no support whatever for any argument that the circumstances surrounding the passage of the Fourth Condition as part of the act of 1879 establish that Congress intended to empower the Postmaster General to withhold second-class rates unless the publication meets his test of affirmative contribution to the public welfare. On the contrary, the facts negative that proposition.

(c) The Postmaster General's Interpretation of the Fourth Condition in the Instant Case is Contrary to 65 Years of Settled and Uniform Administrative Practice.

The history of the Fourth Condition since 1879 and its practical construction by all Postmasters General, including the incumbent who made the revocation order in the case at bar, show conclusively that Congress did not delegate any discretionary power of censorship when it used the words of the Fourth Condition to identify the periodicals entitled to second-class rates. The statute has always been understood to include all periodicals in the usually accepted sense, and to exclude none. It has never been interpreted to authorize the Postmaster General to pass upon the content of periodicals and to decide whether they conform to his view of the public good.

In 1904 the then Postmaster General argued before this Court that the language of the Fourth Condition is comprehensive and includes all periodicals which are, in the commonly accepted sense, known and recognized as such. In his brief in the case of *Houghton* v. *Payne*, 194 U. S. 88 (1904), the Postmaster General said:

> "Taking these words 'originated and published for,' 'dissemination,' 'information,' 'devoted to,' they all point to one conclusion. They are, we repeat,

strong and pregnant words. There is but one concept consistent with them all. We confidently submit that an attentive reading of the statute will leave no doubt that what Congress constantly had in mind in the creating of this privileged class of publications was the universally recognized, commonly accepted, and perfectly well understood periodical of everyday speech.' (p. 34).

* * *

"In establishing a rate for 'newspapers and other periodical publications' Congress was not seeking to discriminate between good literature and bad literature or to establish a censorship of the press with prizes for merit. The thing it had in mind was not the goodness or the badness of the information disseminated but the instrumentalities by which that dissemination might be accomplished." (p. 73).

In 1906 a joint commission of Congress was authorized to make an inquiry regarding the whole subject of second-class mail matter. That commission held many hearings, heard numerous witnesses and made an exhaustive study of the statute. It concluded that the words of the fourth condition were *"so broad as to include everything and exclude nothing."* With reference to the precise question presented here, it concluded as follows:[12]

"* * * But in what way can it be said that a requirement that a certain printed matter should be 'devoted to literature' serves to mark it off from anything else that can be put into print. There is

[12] House Document No. 608, Postal Commission 1906-07, 59th Congress, 2nd Session. "Report Regarding Second Class Mail Matter."

practically no form of expression of the human mind that can not be brought within the scope of 'public information,' 'literature, the sciences, art, or some special industry.' It would have been just as effective and just as reasonable for the statute to have said, 'devoted to the interests of humanity,' or 'devoted to the development of civilization,' or 'devoted to human intellectual activity.'

"The prime defect in the statute is, then, that it defines not by qualities but by purposes, and the purpose described is so broad as to include everything and exclude nothing.

"With the exception of a few instances where the publication has been excluded because the information was deemed not to be public, no periodical has ever been classified by the application of tests of this kind. Any attempt to apply them generally would simply end in a press censorship." (pp. xxxvi-xxxvii.)

This Postal Commission recommended an amendment to the statute to limit second-class rates by changing the law to read:

"Fifth. It must be originated and published (a) for the dissemination of current public information, or (b) for the presentation, discussion, or treatment of current topics in relation to literature, the sciences, arts, or some special industry.

"Sixth. It must not consist wholly or substantially of fiction."

Despite this elaborate report specifically calling the attention of Congress to the breadth of the second-class statute, the Commission's recommended amendments were rejected and no amendment has ever been made to the

Fourth Condition by way of any limitation on the type of public information, literature, arts or sciences that is required.

A few years later Congress by joint resolution approved March 4, 1911, authorized the appointment of another commission on second-class mail matter. The commission was headed by Hon. Charles E. Hughes, then Associate Justice of this Court, and included the late President A. Lawrence Lowell of Harvard University. It made a most exhaustive and critical inquiry into the subject of second-class matter. This commission reached virtually the same conclusion:

> "* * * but the experience of the post office has shown the impossibility of making a satisfactory test based upon literary or educational value. To attempt to do so would be to set up a censorship of the press. Of necessity the words of the statute—'devoted to literature, the sciences, arts, or some special industry'—must have a broad interpretation."[13]

Although amendments have been made to the second-class mailing statute and others proposed, and although Postmasters General have repeatedly pointed out alleged defects in the broad provisions admitting periodicals to second-class rates,[14] it is significant that no change has been

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[13] House Document No. 559, Postal Commission 1911-12, 62nd Congress, 2nd Session, "Report of Commission on Second-Class Matter", p. 142.

[14] House Document No. 608, Postal Commission, 1906-07, 59th Congress, 2nd Session, Report Regarding Second Class Mail Matter, page 6.

made in the Fourth Condition by Congress and that every bill seeking such a change has been defeated.[15]

Finally, the Postmaster General who undertook to revoke the second-class permit of Esquire made three rulings within the preceding six months in which he rejected a suggestion that the words of the Fourth Condition be used to justify a determination that the content of a periodical was not for the best interests of the public. For example, on July 6, 1943, the Postmaster General held a hearing on an application of "The National Police Gazette" to be admitted to the mail at second-class rates. Two members of the Hearing Board recommended that the application be denied upon the ground, *inter alia*, that it was not published for the dissemination of information of a public character because it did not "contribute to the education, prosperity and best interests of the people" (Pl.'s Ex. 9 in Dist. Ct., R. 1927). The third member of the Hearing Board dissented from this view and wrote two memoranda recommending that the application be granted (Pl.'s Exs. 10 & 11 in Dist. Ct., R. 1928). In these he pointed out that the duty of the Postmaster General in classifying mail was limited to a question of identification, and that he had no power to pass upon the

[15] "In 1915, a bill (H.R. 20644, 63d Cong., 3d sess.) was introduced in Congress to deny the use of the mails entirely to any person who, in the opinion of the Postmaster, 'is engaged or represents himself as engaged in the business of publishing any books or pamphlets of an indecent, immoral, scurrilous or libelous character.' It was objected that '* * * it is not safe to leave to the decision of one man, after an ex parte investigation, a decision which will involve the freedom of the press.' The bill did not pass. [Hearings Before the Committee on Post Offices and Post Roads on Exclusion of Certain Publications from the Mails, 63rd Cong., 3d sess. (1915), pp. 38, 39.]" [Eberhard P. Deutsch, Freedom of the Press and of the Mails, 36 Mich. L. Rev. pages 723-4.]

content of the publication and determine whether it was good or bad literature. He said (p. 3 of Ex. 11 in Dist. Ct., R. 1928):

> "I challenge any one to cite or quote any applicable authority supporting the construction put upon the words of the statute quoted by the majority members of this board. Even the Commission headed by Chief Justice Hughes said in their report: '* * * the experience of the Post Office has shown the impossibility of making a satisfactory test *based upon literary or educational values. To attempt to do so would be to set up a censorship of the press*'.
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> * * * * *
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> "Under the authorities here cited the National Police Gazette is devoted to literature and the arts within the meaning of the statute as above construed by the Postal Commission of 1907. If the theory of the majority members is accepted, the thin edge of the wedge of censorship has got into a crack and it won't be long till freedom of the press will be split up to suit the censors."

In reviewing the case and commenting upon the division of opinion within the Hearing Board, Third Assistant Postmaster General Ramsey S. Black said (Pl.'s Ex. 12 in Dist. Ct., R. 1931):

> "As to the second reason for denial of the application given in the majority report of the Hearing Board, namely, 'The National Police Gazette' 'is not published for the dissemination of information of a public character' because it is not the kind of publication which Congress had in mind when establishing the second-class mailing privilege, it is my opinion that this reason is unsound, constitutes cen-

sorship of the press, and could not be sustained in the court. * * *"

The Postmaster General granted the second-class mailing rate.

Similar cases were presented in respect of "The Hobo News" and "Laff", and similar results were reached (Pl's Exs. 15, 16, 21 and 22 in Dist. Ct., R. 1933-9, 1943).

Thus the construction of the Fourth Condition, adopted in actual practice by the Post Office Department and all Postmasters General including the one who made the revocation order in the present case, has always been to admit to second-class entry every publication which was a periodical in the generally accepted sense and to deny that Congress delegated to the Postmaster the power to pass upon the content of the publication.

The Postmaster General seeks to avoid the effect of 65 years of administrative construction of the Fourth Condition by referring to *Houghton* v. *Payne*, 194 U. S. 88 (1904) where this Court affirmed a ruling of the Postmaster General that the Riverside Literature Series (consisting of books bound in paper covers and published monthly or quarterly) were not periodicals notwithstanding that for many years it had been the practice to give second-class rates to such publications. It was pointed out there, however, that evidence of contemporaneous construction is given great weight only when the statute is ambiguous and, in that case, the statute was clear and precise. In the case at bar our primary contention is that the statute is clear and that the Postmaster General's interpretation is wrong. The most that can be said for the Postmaster General's contention is that the statute is ambiguous and, consequently,

the administrative construction of almost 65 years would resolve the ambiguity against him. *United States* v. *Finnell*, 185 U. S. 236 (1902), *United States* v. *Chicago North Shore & Milwaukee Railroad Co.*, 288 U. S. 1 (1933), *United States* v. *Alabama Great Southern Railroad Co.*, 142 U. S. 615 (1892).

(d) There is no Warrant in any Judicial Opinion for the Postmaster General's Interpretation of the Fourth Condition.

The only case in which a Postmaster General has utilized the words of the Fourth Condition in an attempt to extend his power over second-class mailing rights is *Payne* v. *National Railway Publishing Co.*, 20 App. D. C. 581 (1902).[16] In that case the Postmaster General undertook to correct what he believed to be abuses of second-class mail by passing a regulation requiring that a publication, to be entitled to second-class rates, must "consist of current news or miscellaneous literary matter, or both (not including advertising)". The publication there involved was "The Railway Guide", which was issued monthly and contained railroad and steamboat time-tables with general information concerning the movements of the trains and boats. It had been mailed in the second class for many years. The Court held that the Postmaster General's order revoking the second-class rates under his "current news" regulations was invalid and stated (pp. 597-9):

> "It is very clear that the Congress of the United States has not committed to the Postmaster General, or to any one else, the matter of determining what should be carried in the mails as second-class matter,

[16] Certiorari granted 189 U. S. 512; certiorari dismissed on motion of Postmaster General, 192 U. S. 602.

and what as matter of the third class. It has reserved that power exclusively to itself. It has itself made the classification; and it is not competent for the Postmaster General to add anything to the statute or to take anything from it.

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"Of course the Postmaster General and his subordinates are required to use judgment and discretion, and it may sometimes be a matter of much difficulty to identify a publication as one included in the category prescribed by Congress. But their discretion is limited to this question of identification; and it is not competent for them to impose additional requirements beyond those specified in the statute.

"The postal regulation of July 17, 1901, under which it was sought to exclude the relator's publication from the category of second-class mail matter, is clearly in excess of the statute. It prescribes conditions which the statute does not prescribe."

Other authorities have uniformly held that an administrative official may not add new conditions to the requirements of statutes, even when the additional requirements are imposed under the pretext of concern for the public welfare. *Morrill* v. *Jones*, 106 U. S. 466 (1882) is a case in point. There a section of the revenue law provided that animals which were specifically imported for breeding purposes should be admitted free of duty. The Secretary of the Treasury, apparently not satisfied with this limitation and, like the Postmaster General in the case at bar, purporting to be more sensitive than Congress in his concern for the public welfare, adopted an additional regulation to the effect that such breeding animals should not be ad-

mitted free of duty unless they were also of superior stock. It is obvious that the Secretary's regulation specifying the additional requirement of "superior" quality corresponds to the Postmaster General's new condition of "contributing to the public good". This Court unanimously held that the new condition was invalid, stating (p. 467):

> "The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. * * * In the present case we are entirely satisfied the regulation acted upon by the collector was in excess of the power of the Secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. * * *"

The similarity in the case at bar of the administrative official attempting to regulate beyond the powers given to him by Congress is apparent.

The argument of the Postmaster General (Pet. Br. pp. 13-16) that the decisions of *Houghton* v. *Payne*, 194 U. S. 88, *supra*, *Bates & Guild Co.* v. *Payne*, 194 U. S. 106 (1904), and *Smith* v. *Hitchcock*, 226 U. S. 53 (1912), give him some discretion in limiting the scope of the language of the Fourth Condition is completely without justification. Those cases had nothing to do with the Fourth Condition. They merely held that complete books or musical scores, enclosed in paper covers and published at regular intervals, were not periodicals. There was no suggestion in any of those cases that the Postmaster General has any discretion to pass upon or evaluate the content of periodical publications.

Lewis Publishing Co. v. *Morgan*, 229 U. S. 288 (1913), also relied upon by the Postmaster General, actually supports the position of Esquire. In that case this Court upheld a statutory regulation compelling publishers to file certain information about the ownership of their publications. But while the regulation in question was held reasonable and proper, this Court pointed out that the case did not present any "regulation of what should be published" (p. 316 of 229 U. S.). In the case at bar we are faced with that precise situation, which the Court clearly implied would not be countenanced.

POINT II

IF THE POSTMASTER GENERAL'S INTERPRETATION OF THE FOURTH CONDITION WERE ADOPTED, THE STATUTE WOULD BE AN UNCONSTITUTIONAL ABRIDGEMENT OF FREEDOM OF THE PRESS IN VIOLATION OF THE FIRST AMENDMENT.

In answer to the Postmaster General's contention that the Fourth Condition requires him to determine in the case of each publication for which admission is sought to second class mail whether it discharges "a positive duty to contribute to the public good and the public welfare," the Court below held:

> "It is inconceivable that Congress intended to delegate such power to an administrative official or that the exercise of such power, if delegated, could be held constitutional." (R. 1988)

According to the Court, "the broad principles outlined in the following cases make this conclusion inescapable: *West Virginia State Board of Education* v. *Barnette*, 319

U. S. 624 (1943); *Hague* v. *C. I. O.*, 307 U. S. 496 (1939); *Lovell* v. *City of Griffin*, 303 U. S. 444 (1938); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *Near* v. *Minnesota*, 283 U. S. 697 (1930); *Pike* v. *Walker*, 73 App. D. C. 289, 121 F. (2d) 37 (1941). See also dissenting opinions of Mr. Justice Holmes and Mr. Justice Brandeis in *United States ex rel. Milwaukee S. D. Pub. Co.* v. *Burleson*, 255 U. S. 407 (1920)." (R. 1988, fn. 2).

In what follows, we shall develop in greater detail the reasons why the foregoing and related decisions of this Court make the conclusion of unconstitutionality inescapable.

(a) The Postal Power is Limited by the First Amendment.

The Postmaster General argues that "the power of censorship" is not involved here; that Congress in promulgating the Fourth Condition (assuming, arguendo, that it means what the Postmaster General says it means) was merely exercising "the power to provide for the Postal Service." (Pet. Br., p. 22). This is double talk. The "power of censorship" is rarely sought to be exercised directly as such. Especially is this true of the federal government, which is a government of delegated powers. The point was expressed in the concurring opinion of Mr. Justice Jackson in *Thomas* v. *Collins*, 323 U. S. 516 (1945) (at p. 547):

> "It is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control."

The power of Congress to provide for the Postal Service is, like the interstate commerce and other delegated powers, subject to the inhibitions of the First Amendment:

> "It would be going a long way, therefore, to say that in the management of the Post Office the people have no definite rights reserved by the First and Fifth Amendments of the Constitution." (*Pike* v. *Walker*, 121 F. (2d) 37, 39 (1941)).

Just because the United States Government is a government of delegated powers, it would be an odd doctrine indeed that any degree of immunity from the Bill of Rights could attach to a governmental edict merely because it purported to be an exercise of a delegated power. Obviously, "Congress may not through its postal police power put limitations upon the freedom of the press which if directly attempted would be unconstitutional." (Mr. Justice Brandeis, dissenting in *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 430 (1920)).

(b) The First Amendment is Primarily Directed Against Prior Restraints on Publication and Circulation.

There is no question but that the guarantee of freedom of the press includes freedom to circulate as well as freedom to publish. As this Court recently reiterated in *Lovell* v. *Griffin*, 303 U. S. 444, 452 (1938):

> ". . . Liberty of circulating is as essential to that freedom [of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value. Ex Parte Jackson, 96 U. S. 727, 733." (Matter in brackets ours).

There is also no question but that the First Amendment was primarily directed against the imposition of prior restraints on publication and distribution:

> "In the light of all that has now been said, it is evident * * * that by the First Amendment it was meant to preclude the national government and by the fourteenth Amendment to preclude the states, from adopting any form of previous restraint upon printed publications or their circulation. * * *
>
> "This Court had occasion in *Near* v. *Minnesota*, *supra*, at pp. 713 *et seq.* to discuss at some length the subject in its general aspect. The conclusion there stated is that the object of the Constitutional provisions was to prevent previous restraints on publication, and the Court was careful not to limit the protection of the right to any particular way of abridging it. Liberty of the press within the meaning of the Constitutional provision, it was broadly said (p. 716), meant 'principally,' although not exclusively, immunity from previous restraints or [from] censorship." (*Grosjean* v. *American Press Co.*, 297 U. S. 233, 249 (1936)).

In view of the foregoing, it is obvious that the Postmaster General is mistaken when he contends that "the line which marks off the area of constitutionality must be most strictly drawn when criminal sanctions are invoked against speech, publication or religious observance." (Pet. Br. p. 25).[17] The prohibition of the First Amendment is focused primarily on prior restraints.

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[17] An examination of the cases cited by the Postmaster General reveals that they do not support this contention. In *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624 (1943) for example, the oppression of the statute could have been avoided by any parent who was economically able and willing to send his child to a private school or hire a private tutor, yet the Court held that an unconstitutional condition could not be imposed "on the privilege" of enjoying the economic advantages of free public education.

(c) The Fourth Condition, as Interpreted by the Postmaster General, Imposes a Prior Restraint.

The Postmaster General very explicitly points out that there are "no criminal sanctions involved here," that what is at stake is "simply the denial of second class privileges." (Pet. Br., p. 25), "a relatively mild consequence" (Id., at p. 26). We agree that exclusion from second class rates is not a "criminal sanction." Criminal sanctions are ordinarily if not invariably imposed subsequent to utterance, and they fall into the category not of prior restraint but of subsequent punishment. But the construction of the Fourth Condition for which the Postmaster General contends gives him the right in advance and as a condition of using the mails to compel Esquire to choose between two alternatives: compliance with his notion of what textual matter contributes to the public good and public welfare or the payment of an additional $500,000 for the transmission of its magazine through the mails. And it is to be noted that the stated financial burden affects not only the current issues, whose content is said not to contribute to the public good and welfare, but future issues not yet even composed as well.[18]

[18]The Court may well take notice of the similarity in effect of this penalty on future issues to a bill of attainder prohibited by Article I, Section 9, of the Constitution. It is a basic principle of democratic government that sanctions are to be applied only against a person or thing actually violating the law [See the Federalist (Lodge Edition 1882) page 279]. At the Constitutional Convention a motion was made to insert a declaration "that the liberty of the press should be inviolably observed" at the end of the clause regarding bills of attainder. This motion was vetoed because it was believed that as the Constitution was then written the power of Congress did not extend to the press. Thus the founders of the Constitution were fully aware of the grave dangers of 'censorship by employment of attainder,' the

A clearer instance of a prior restraint would be difficult to imagine. As a matter of fact, the Postmaster General in his brief in this Court freely concedes that his interpretation of the Fourth Condition means pre-censorship in its most virulent form; for he points out that under that interpretation "*the Post Office has insisted that Esquire submit its drawings in advance of publication in an attempt to avoid the necessity and difficulty of suppression after mailing.*" (Pet. Br. p. 45, italics ours). The concluding pages of the Postmaster General's brief make abundantly clear the inevitable results of the exercise of the power of censorship which he claims the Fourth Condition confers upon him. (Pet. Br. pp. 42-46).

As applied to any channel of communication, the prior restraint represented by the revocation order would be damaging. As applied to the mails, it threatens to be fatal to Esquire's very existence. For, in the words of the Court below, the mails today are the "highway over which all business must travel." "Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare." (*Pike* v. *Walker*, 121 F. (2d) 37, 39, *supra*).

In the case of a periodical publication such as Esquire, access to the mails means access on the same terms as its competitors; realistically speaking, it means access to the

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very result threatened by the Postmaster General's order in this case. Farrand, The Records of the Federal Convention (Yale University Press 1937) Vol. 2, pages 617 and 618.

second class rates[19]. The Postmaster General concedes that "total suppression" of the circulation of writings and publications would be a "fatal blow * * * to the freedom of the press." (Pet. Br. p. 22). Yet that is precisely what is effected here. "To refuse the second-class rate to a newspaper is to make its circulation impossible." (Mr. Justice Holmes dissenting in *Milwaukee Publishing Co. v. Burleson*, 255 U. S. 407, 437, *supra*). The precise argument advanced by the Postmaster General here was rejected by Mr. Justice Brandeis in his dissenting opinion in the *Burleson* case, *supra*, and as to this phase of the matter, the majority did not disagree (255 U. S. 407) (at p. 431):

> "It is argued that although a newspaper is barred from second class mail, liberty of circulation

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[19] In the Court below, the Postmaster General disclaimed any argument that use of the mails was a privilege rather than a right. In his brief in this Court, however, he constantly refers to "second class privileges" although he does not argue the point. Even if, however, the second class rates be regarded as a privilege, the unconstitutionality of the conditions upon which the Postmaster General seeks to withhold them remains. See *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, *supra*. In the words of the Court below:

> "Even if second-class mail service actually were a privilege which could be withheld in the Postmaster General's discretion we still do not think it could be used to purchase compliance with his literary standards. If a publication is not actually obscene the publisher's right of free speech is clearly involved. In our opinion the principle of *Terral v. Burke Construction Co.*, 257 U. S. 529 (1922) and *Western Union Telegraph Co. v. Kansas ex rel. Coleman*, 216 U. S. 1 (1910), which involves state imposition of unconstitutional demands on foreign corporations is broad enough to cover this situation. For a comprehensive review of cases supporting this principle see article by Robert L. Hale, 35 Columbia L. Rev. 321 (1935), entitled *Unconstitutional Conditions and Constitutional Rights*." (R. 1900, *in.* 5).

> is not denied, because the first and third class mail and also other means of transportation are left open to a publisher. Constitutional rights should not be frittered away by arguments so technical and insubstantial. 'The constitution deals with substance not shadows. Its inhibition was levelled at the thing, not the name.' *Cummings* v. *Missouri*, 4 Wall. 277, 325."

The revocation order herein effects a "total suppression" of Esquire's circulation and is "a fatal blow * * * to the freedom of the press." (Pet. Br. p. 22).

But we do not have to establish that the revocation order would effectively terminate the existence of Esquire or completely bar it from the mails. Even if the restraint here were less severe, were, to use the Postmaster General's words "relatively mild," (Pet. Br., p. 26), it would still be unconstitutional.

> "The restraint is not small when it is considered what was restrained. The right is a national right federally guaranteed. There is some modicum of freedom of thought, speech and assembly which all citizens of the Republic may exercise throughout its length and breadth, which no State, nor all together, nor the Nation itself, can prohibit, restrain or impede. If the restraint were smaller than it is, it is from petty tyrannies that large ones take root and grow. This fact can be no more plainly illustrated than they are imposed on the most basic rights of all. Seedlings planted in that soil to grow great and growing, break down the foundations of liberty." (*Thomas* v. *Collins*, 323 U. S. 516, 543, *supra*).

This Court has repeatedly applied the protection of the Constitutional guarantee to prior restraints on freedom of

expression of every kind and degree. The protection has not been limited to cases where as here the restraint threatens the very existence of the publisher.[20] In fact, the Court has been "careful not to limit the protection of the right to any particular way of abridging it." (*Grosjean* v. *American Press Co.*, 297 U. S. 233, 249, *supra*).

Thus in *Lovell* v. *Griffin*, 303 U. S. 444, *supra*, the Court held unconstitutional an ordinance merely requiring a permit for the distribution of literature in public places, on the ground that it was a previous restraint. A like result was reached in *Hague* v. *C. I. O.* 307 U. S. 496, (1939), which involved a municipal ordinance requiring speakers to obtain permits as a condition of speaking in the public places of the municipality. In *Thomas* v. *Collins*, 323 U. S. 516 *supra*, the Court found that "a registration statute and nothing more" applicable to labor organizers was "incompatible with the freedom secured by the First Amendment", saying (p. 540):

> "So long as no more is involved than exercise of the rights of free speech and free assembly, it is immune to such a restriction. If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious, or politi-

[20] It may be noted that in the cases hereinafter discussed in which the Court has declared unconstitutional statutes or ordinances restricting or prohibiting the distribution of pamphlets, house-to-house canvassing or the holding of meetings without registration or a license, there have been alternate ways in which the publication or speech might have reached the public yet the Court has held that notwithstanding the existence of other conduits the First Amendment prohibits interference with even one effective method of reaching the public mind.

> cal cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment."

Near v. *Minnesota*, 283 U. S. 697 (1930) presents in substantial aspects a close parallel to the instant case. The *Near* case involved a Minnesota statute which provided for the issuance of an injunction against further publication of any paper found by the Court to be "a malicious, scandalous and defamatory newspaper." The statute set up standards far more precise than any the Postmaster General can point to in the Fourth Condition. Moreover, judicial—not administrative—findings were prerequisite to the issuance of an injunction. This Court nonetheless held the statute unconstitutional on its face, stating that while "charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal * * * the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication" (at p. 722).

The prior restraints in the cases just discussed took the form of licensing (*Lovell* and *Hague*), registration (*Thomas*) and injunction (*Near*) statutes. A financial burden imposed in advance of publication and circulation such as the revocation order here involved is equally invalid even when it does not impinge directly on content as it does herein.

As a matter of fact, one of the basic reasons for the adoption of the constitutional guarantee of freedom of the press was a desire to protect against the then current indirect restraints on free expression which took the form of

discriminatory taxes; so-called "taxes on knowledge." For over 100 years prior to the adoption of the First Amendment there had been no attempt by the government to restrain freedom of the press by direct prohibition, licensing or injunction. See *Grosjean* v. *American Press Co.*, 297 U. S. 233, 245, *supra*. The British Government had repeatedly, however, restrained freedom of expression by imposing discriminatory taxes of many kinds upon the press—designed to encourage literature palatable to the rulers and to discourage that which might stir up dissatisfaction.[21] This type of financial restraint upon freedom of the press was unquestionably one of the abuses of governmental power that led to the passage of the First Amendment.

In *Grosjean* v. *American Press Co.*, 297 U. S. 233, *supra*, this Court had occasion to strike down as unconstitutional an indirect restraint on freedom of the press in the form of a financial burden considerably less severe than the $500,000 impost which in effect is sought to be imposed here.[22] That case involved a Louisiana statute imposing a tax of 2% on the gross receipts of all newspapers having a circulation of over 20,000 and carrying paid advertising. In holding that the Louisiana tax was an unconstitutional

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[21] For a discussion of such taxes and their administration, see 1 Collet, History of the Taxes on Knowledge, London, 1899, p. 29. In the American colonies the imposition of stamp taxes on newspapers caused a riot in New York in 1765. Deutsch, Freedom of the Press and of the Mail (1938), 36 Mich. Law Review 703, 710. Strong public reaction resulted from a few attempts of colonial legislatures to levy taxes on newspapers. Mott, American Journalism, 1941, page 144; Mott, The History of American Magazines, 1939, page 92.

[22] The financial burden against Esquire ($500,000 on circulation of 300,000 at $5 per subscription) would amount to 33⅓% as compared to the 2% tax imposed by Louisiana.

restraint on the freedom of the press, this Court reviewed the historical background of the First Amendment, pointing out that one of the basic reasons for the adoption of the guarantee of freedom of the press was a desire to prevent the imposition of financial burdens upon publications. It was held that the amendment protected not only against previous restraints in the form of more direct censorship but also against the imposition of special taxes or other financial burdens.

In the light of the foregoing, it is clear that if the Fourth Condition is construed as the Postmaster General contends, an unconstitutional prior restraint is established.

(d) The Only Exception To the Constitutional Inhibition Against Prior Restraints is "A Clear and Present Danger"; Failure of a Publication to Contribute to the Public Good and the Public Welfare Does not Fall Within the Exception.

This Court has described freedom of speech and of the press as "the matrix, the indispensable condition of nearly every other form of freedom." *Palko v. Conn.*, 302 U. S. 319, 327 (1929). The test of the constitutionality of a regulation which is alleged to conflict with these constitutional guarantees is not the ordinary due process test of reasonableness although that is obviously what the Postmaster General has in mind when he argues that "the test of validity of legislation necessarily varies with circumstances." (Pet. Br. p. 25.)[23] When it comes to free-

[23]The State of Texas, unsuccessfully, advanced the same argument with reference to the statute involved in *Thomas v. Collins*, 323 U. S. 516 *supra*: "In short, the state would apply a 'rational basis' test, appellant one requiring a showing of 'clear and present danger'." (at p. 527-8).

dom of the press, this Court has held that "the rational connection between the remedy provided and the evil to be curbed which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation." (*Thomas* v. *Collins*, 323 U. S. 516, 530, *supra*). The presumption of constitutionality, normally operative in due process cases, loses its force where free speech and press are involved:

> "The case confronts us again with the duty our system places on this Court to say where the individual's freedom ends and the State's power begins. Choice on that border, now as always delicate, is perhaps more so where the usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. Cf. *Schneider* v. *State*, 308 U. S. 147; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Prince* v. *Massachusetts*, 321 U. S. 158. That priority gives those liberties a sanctity and a sanction not permitting dubious intrusions. And it is the character of the right, not of the limitation, which determines what standard governs the choice. Compare *United States* v. *Carolene Products Co.* 304 U. S. 144, 152-153." (*Thomas* v. *Collins*, 323 U. S. 515, 529-30; *supra*).[24]

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[24] In the *Carolene Products* case, 304 U. S. 144 (1938) cited by the court, Mr. Chief Justice Stone forecast this later ruling when he remarked (p. 152 fn. 4):

> "There may be narrower scope for the operation of the presumption of Constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the 14th. See *Stromberg* v. *California*, 283 U. S. 359, 369, 370 . . . ; *Lovell* v. *Griffin* . . . , 303 U. S. 444, 452 . . ."

Previously this Court had, in *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, *supra*, emphasized the inapplicability of the due process test to First Amendment cases, saying (p. 639):

> The right of a state to regulate for example a public utility may well include as far as the due process test is concerned power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender ground. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect."

Although many of the prior restraint cases in this Court appear to assume that there is no exception to the prohibition against such restraints, for the purposes of this case it may be assumed that an exception exists in the form of the "clear and present danger" rule. This rule has been strictly interpreted and it is obvious that the issues of Esquire here in question do not fall within it.[25] This Court has never found that such a "clear and present danger" exists where as here

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[25] Cases involving regulation of commercial enterprises such as *Valentine* v. *Christensen*, 316 U. S. 52 (1942), *Labor Board* v. *Virginia Power Co.*, 314 U. S. 469 (1941), and *Mutual Film Corp.* v. *Ohio Industrial Commission*, 236 U. S. 230 (1914) are not, strictly speaking, exceptions to the broad guarantees of the First Amendment. They involve applications of the police power to business matters where the effect on speech and press is incidental and indirect. Even in such cases, the constitutional guarantees are upheld whenever the regulation has the primary effect of curtailing freedom of expression. Cf. *Thomas* v. *Collins*, 323 U. S. 516, *supra*.

> "The statements forbidden were not in themselves unlawful, had no tendency to incite to unlawful action, involved no element of clear and present, grave and immediate danger to the public welfare." (*Thomas* v. *Collins*, 323 U. S. 516, 536, *supra*).

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high * * *" *Bridges* v. *California*, 314 U. S. 252, 263 (1941). "Neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression." (Id. at 273).

At one point, the Postmaster General recognizes the applicability of the "clear and present danger" rule to the instant case for he argues that "As respects 'clear and present danger', the immediacy of the financial loss incident to public subsidization of a periodical that Congress deems ineligible for second-class privileges is not open to doubt." (Pet. Br., pp. 25-26). It is obvious from the quotations from the cases above and from the whole line of "clear and present danger" decisions that the factor adverted to by the Postmaster General falls far short of the constitutional requirements. The Postmaster General's argument is patently unsound since obviously the "clear and present danger" must be something far more serious and threatening than the possibility of financial loss. If the argument were accepted a publication criticizing a revenue law or any program for governmental assessment would be within the "clear and present danger" rule. The allegedly threatened "financial loss" to the government is infinitely less of a "clear and present danger" than the assaults and the commission of crime which the State of Minnesota found on

the basis of actual past experience were threatened by the publication sought to be suppressed in the *Near* case. Yet in the *Near* case, this Court acknowledging that the paper "tends to disturb the peace of its community" and "to provoke assaults and the commission of crimes" held that Minnesota was without power to interfere with the publication. "The theory of the constitutional guarantee is that even a more serious evil would be caused by authority to prevent publication." (*Near* v. *Minnesota*, 283 U. S. 697, 722, *supra*).

Except for the one sentence adverted to-above, the Postmaster makes no effort to justify his revocation order on the ground of clear and present danger. In effect, as we have seen, he defends on the ground of Esquire's failure to contribute to the public good and welfare. Assuming arguendo, that such a failure on the part of Esquire is established, it plainly does not constitute a "clear and present danger" within the meaning of the rule.

Concern for the public good has been historically the proffered excuse for curtailment of free expression. And even when the concern has been justified (which we deny to be the case here) the excuse has been rejected. Thus Thomas Jefferson wrote:

> "I deplore * * * the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them * * *. These ordures are rapidly depraving the public taste.
>
> "It is, however, an evil for which there is no remedy; our liberty depends on the freedom of the press, and that cannot be limited without being lost." (Quoted in *Bridges* v. *California*, 314 U. S. 252, 270, *supra*.)

The same philosophy is expressed by Mr. Justice Holmes, dissenting in *Abrams* v. *United States*, 250 U. S. 616 (1919) (at p. 630):

> "But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."

Whatever the merits of Esquire as a publication, the Postmaster cannot under a plea of public interest impose such a prior restraint against its dissemination as it is sought to justify here:

> "But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. *The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion.* In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624. Nor would I. Very many are the interests which the state may protect against the practice of an occupation, very few are those it may assume to protect against the practice of propagandizing by speech or press. These are thereby left great range of freedom.

"This liberty was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate, or useful to society. As I read their intentions, this liberty was protected because they knew of no other way by which free men could conduct representative democracy." (*Thomas* v. *Collins*, 323 U. S. 516, 545, *supra*, concurring opinion of Mr. Justice Jackson.) (Italics ours).

(e) There is no Support in the Decisions of this Court for the First Amendment Arguments Advanced by the Postmaster General Herein.

The Postmaster General adverts to only two decisions of this Court as direct authority for the stand he has taken on freedom of the press. *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, *supra*, and *Lewis Publishing Company* v. *Morgan*, 229 U. S. 288, *supra*. Neither of these cases supports his contention that the Fourth Condition as he seeks to construe it is valid under the First Amendment.

The Postmaster General himself acknowledges the inapplicability of much of the language in *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, *supra*. He recognizes that "the revocation of second class privileges which was there upheld over the dissents of Mr. Justice Holmes and Mr. Justice Brandeis was produced by the inclusion of non-mailable matter in a limited number of past issues of the newspaper involved." (Pet. Br. p. 29). The majority of the Court in the *Burleson* case placed their decision on the narrow ground that since Congress had declared the seditious material there submitted for mailing to be nonmailable in any class, the Postmaster General was justified

in preventing such material from being mailed in the second class. We submit that the later decisions of this Court discussed above cast considerable doubt even on this narrow holding. (See *Pike* v. *Walker*, 121 F. 2d 37, 39, *supra*). In any event, the decision in the *Burleson* case has no relevance here because it is conceded that Esquire is mailable. (R. 1892).

Lewis Publishing Co. v. *Morgan*, 229 U. S. 228, *supra*, buttresses Esquire's position rather than the Postmaster General's. In that case, this Court upheld a statute which required publishers to file certain information as to the ownership of their publications. The Court expressly stated that it was "concerned not with any general regulation of what should be published" but merely with a reasonable regulation incidental to the classification procedure. (p. 3[illegible] of 229 U. S.) The Court thus clearly pointed out that an evaluation of the content of a publication would not be justified under any guise or pretext that it was a classification regulation—that is the justification advanced here for the revocation order which is admittedly based on the nature of Esquire's content.

(f) The Unconstitutionality of the Postmaster General's Construction of the Fourth Condition is Further Reason for the Adoption of the Construction of the Statute Urged in Point I supra.

We submit that we have established in this Point II the correctness of the Court of Appeals' conclusion that if the Postmaster General's construction of the Fourth Condition were adopted, the statute would be an abridgement of the freedom of press guaranteed by the First Amendment. At the very least it can be said that the constitutionality of the

statute as construed by the Postmaster General is open to grave doubt. This doubt presents an additional and compelling reason for adopting the construction of the statute urged in Point I herein.

> "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." (*U. S.* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408 (1909)).

See to the same effect *U. S.* v. *Jim Fuey Moy*, 241 U. S. 394, 401 (1916): "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts on that score."

POINT III

THE FOURTH CONDITION, AS INTERPRETED BY THE POSTMASTER GENERAL, WOULD BE UNCONSTITUTIONAL AS AN IMPROPER DELEGATION OF LEGISLATIVE POWER.

The Postmaster General's interpretation of the Fourth Condition raises a further constitutional question. It involves the delegation to him of the power to withhold second-class rates on condition that the publication fulfill a "positive duty to contribute to the public good" (R. 1863). The limit of his assumed power is thus measured by the vague and illusory concept "contribution to the public good" as applied to public information, literature and art.

The revocation order itself is indicative of the admitted lack of any standards or boundaries within which the Post-

master General may act for it asserts that some of the items complained of may fall in an "obscure and treacherous borderland zone" (R. 1863) so that whatever they "may be, they surely are not 'information of a public character' or 'literature, the sciences, arts or some special industry'" (R. 1864). It is obvious that the standard to be followed in the exercise of the power asserted by the Postmaster General is his personal fancy and that a publisher's enjoyment of second-class rates will depend on whether he has been fortunate enough to express his views in accordance with those of the Postmaster General.

Although the decisions of this Court have approved broad delegations of power by Congress to administrative agencies, in every case a fundamental requirement has been that Congress fix intelligent principles and standards to which the administrative agency is directed to conform. Wherever Congress has attempted to delegate power without standards or other criteria to delimit the power granted, this Court has held that such legislative action is unconstitutional. Thus in *Panama Refining Co. v. Ryan*, 293 U. S. 388 (1935), a section of the National Industrial Recovery Act, purporting to authorize the President to prohibit transportation of petroleum products in excess of the amount allowed by any state law was held invalid for lack of definiteness in standards, this Court stating (p. 430):

> "Thus, in every case in which the question has been raised, the Court has recognized that there are limits of delegation which there is no constitutional authority to transcend. We think that §9 (c) goes beyond those limits. As to the transportation of oil production in excess of state permission, the Congress has declared no policy, has established no standard, has laid down no rule. There is no requirement,

> no definition of circumstances and conditions in which the transportation is to be allowed or prohibited."

See also *Schechter Corp. v. United States*, 295 U. S. 495 (1935); cf. *Yakus v. United States*, 321 U. S. 414 (1944).

The Postmaster General argues that a standard of "contribution to the public welfare" is as definitive as many that have been approved. Cf. *Radio Commission v. Nelson Brothers Co.*, 289 U. S. 266 (1933); *Mutual Film Corp. v. Ohio Industrial Commission*, 236 U. S. 230, *supra*. However, in the field of public information, literature and art, such a standard would, as the Court below pointed out, produce complete "mental confusion" (R. 1990). The Court below elaborated:

> "Opinions on such matters differ so widely that if the evidence in the record before the Post Office were to be weighed each side would have to continue calling witnesses indefinitely in order not to be outweighed by the other. We have no doubt that thousands of reputable experts on the public good could have been obtained by each side in this case. We know of no way a court can evaluate the comparative expert qualifications of persons who hold opinions on what the public should read. Once we admit the power claimed here we see no room for effective judicial review of its exercise. And so in practical effect it amounts to a power in the Postmaster General to impose the standards of any reputable minority group on the whole nation." (R. 1993-4).

It is submitted, therefore, that the Postmaster General's interpretation of the Fourth Condition would result in unconstitutionality on the further ground of an improper dele-

gation of power because of a lack of a definite and intelligible standard according to which the power is to be exercised.[26]

POINT IV

THE POSTMASTER GENERAL'S REVOCATION ORDER IS ARBITRARY, CAPRICIOUS, RESULTS IN UNJUST DISCRIMINATION AND, EVEN ON HIS OWN THEORY, IS UNSUPPORTED BY EVIDENCE.

Entirely apart from the considerations set forth in the preceding points of this Brief, we contend that the record establishes that the Postmaster General's revocation order is arbitrary, capricious, results in unjust discrimination and, even on his own theory, is unsupported by evidence.

(a) The Revocation Order is Arbitrary, Capricious and Results in Unjust Discrimination.

We submit that a fair reading of the record herein makes it evident that even prior to instituting proceedings the Postmaster General made up his mind to revoke Esquire's second-class mailing permit, accorded a hearing

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[26] The impossibility of setting up satisfactory standards designed to regulate speech and press was recognized by this Court in *Thomas* v. *Collins*, 323 U. S. 516, *supra*, where it was stated (p. 535):

> "In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied understanding of his hearers, and consequently of whatever inference may be drawn as to his intent and meaning.
>
> "Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. * * *"

ostensibly to comply with the requirements of due process, and finally entered his order, not on the merits of the case, but on a novel ground calculated to extend his own power over the periodical publications of the nation.

Illustrative of the extremes to which the Postmaster General is willing to go in his zealous but misguided program of censorship[27] are the following:

(1) notwithstanding repeated assertions in his revocation order that he was determining the case so as to permit a full review by the courts, the Postmaster General has pleaded in his answer and argued in all courts that his determination is final and not subject to review;

(2) the Postmaster General repudiated the Findings and Recommendations of his own, self-appointed Hearing Board;

(3) in his revocation order, the Postmaster General professes to be confused because of an alleged lack of uniformity and consistency in the application of the Fourth Condition although he himself had on three oc-

[27] There is a striking parallel between the Postmaster General's revocation order and Mr. Justice Jackson's reference in his opening statement in the Nuremberg trial to one of the aspects of the German totalitarian program. Referring to the Nazi Party, he said:

"Its hostility to civil liberties and freedom of the press was distinctly announced in these words: 'It must be forbidden to publish newspapers which do not contribute to the national welfare. We demand the legal prosecution of all tendencies in art or literature of a kind likely to disintegrate our life as a nation and the suppression of institutions which might militate against the above requirements.'" (New York Times, November 22, 1945).

casions shortly before repudiated the idea that he could withold a second-class entry upon the ground he now asserts, (See this Brief, pp. 28-30, *supra*), and although J. O. Bouton, an official in the Classification Division of the Post Office Department for over 20 years, affirmed that no qualitative test had ever been applied, to his knowledge, in administering the Fourth Condition (R. 1910-12);

(4) the Postmaster General's present Brief relies upon alleged violations of the obscenity law in the past in clear violation of his formal stipulation during pre-trial proceedings that he "does not defend on the contention that plaintiff's magazine is obscene within the meaning of 18 U. S. C. 334". (R. 1892).

The foregoing items are some of the highlights but the arbitrary and capricious tenor of these proceedings has been evident throughout. In the beginning the Postmaster General's sole charge was that the magazine was non-mailable because it was allegedly obscene (R. 1-2, 6). On October 8, 1943, just prior to the commencement of the hearings, counsel for the Postmaster General wrote to counsel for Esquire:

> "As I explained to you when you called here, I shall not contend in the hearing aside from the non-mailable obscenity angle that the publication does not comply with the Fourth condition of the Second Class Act." (R. 603)

The hearings commenced on October 19, 1943. On October 25, 1943, at the beginning of the second week of the hearings, counsel for the Postmaster General withdrew

from his former position and stated that, in addition to the claim of obscenity, he would also contend that the magazine did not comply with the Fourth Condition (R. 601-6).

This change of position was unquestionably brought about by the fact that during the first week of the hearings testimony by Kenneth J. Tillotson, physician and psychiatrist of Boston, Massachusetts, and consultant to the Hygiene Department of Harvard University (R. 50-202), Herbert W. Smith, principal of the Francis W. Parker school of Chicago, Illinois (R. 203-395), Louis J. Croteau Executive Secretary of the New England Watch and Ward society, a social service agency formed to assist in the enforcement of law and characterized as the "watch dog of New England morals" (R. 395-563), and Clements C. Fry physician and psychiatrist of Yale University (R. 563-600), made it clear that the Postmaster General's charges of obscenity were without foundation.

The change of position was countenanced by the Hearing Board. Thereafter, although the alleged obscenity continued to be the primary subject of investigation, Esquire presented testimony which conclusively established that the content of the magazine came within the categories of the Fourth Condition. Such evidence was given by Dr. Fred S. Seibert, Director of the University of Illinois School of Journalism, with respect to information of a public character;[93] by the President of the Associated American

[93] He analyzed Esquire from the point of view of "information of a public character" and testified in part as follows:

"Q. Would you say that the magazine Esquire is made up largely, if not chiefly, of material of information of a public character? A. I would.

"Q. And advertising, of course? A. When I say information of a public character, I mean that there is in that

Artists, Reeves Lewenthal, as to art content;[29] by Henry L. Mencken, author of "The American Language"; Dr.

publication a sufficient amount of that type of material, including advertising, to make it a magazine primarily of that character (R. 1191).

* * * *

"Q. Now, does the fact that these particular eleven issues of Esquire to which Mr. Hassell has referred contain material like the Varga girls and the Sultan cartoons and other cartoons change your opinion in any way that the magazine as a whole and each issue thereof is primarily devoted to the dissemination of information of a public character? A. No sir; it does not (R. 1192).

* * * *

"Chairman Myers: What is your idea about being devoted—you use the term 'devoted'—to literature, the arts, sciences, and so forth?

"The Witness: My idea being that that is one of the major appeals of the magazine. It has in each issue a sufficient number of items of that character in that number of the magazine.

"Chairman Myers: If it is devoted to a subject, it necessarily may touch upon, but not necessarily be what that subject purports to be?

"The Witness: Not exclusively.

"Chairman Myers: That is, a periodical may be devoted to literature and not be literature in the best and highest sense?

"The Witness: That is true.

"Chairman Myers: Is the same thing true about art?

"The Witness: I should say so. If it is devoted to art, whether it became art or not, wouldn't make much difference if that was the primary purpose" (R. 1193-4).

After testifying in some detail with respect to each issue, he summarized the art content and quality of the magazine as follows:

"Q. Would you say in summary, then, that in each one of these eleven issues there has been a substantial art content of high value? A. I definitely would, sir" (R. 1137).

Ernest Osborne, of Teachers College, Columbia University; Raymond Gram Swing; Bennett Cerf; George Jean Nathan and many others as to the high literary quality of Esquire.[30]

Although one member of the Hearing Board differed from the majority in respect of one item of the cited material, there was no division on the point that the magazine complied with the Fourth Condition. The dissenting member of the Board felt that many of the cited items, while not obscene, were objectionable and therefore raised a question as to whether Congress intended to extend the benefits of second-class rates to such publications. His recommendation, however, was that the whole subject be submitted to Congress for new legislation (R. 1854-5).

The findings of the Hearing Board unquestionably embarrassed the Postmaster General in his effort to bar the magazine from the second-class rates. He therefore suggested that the Chairman make a supplementary review of the case and this was done under date of November 22,

---

[30]Swing testified as follows with respect to the quality of the fiction content of the magazine:

"Q. Would you say it was usual for Esquire over years to have printed pieces of fiction which deserve to rank as literature? A. Oh, yes; I think Esquire has probably done much better than its share of publishing first rate artistic fiction.

"Q. Would you say that it had a reputation over its ten year period for having published a very considerable amount of first rate short story fiction? A. Oh, yes; I think it has some of the best writing that has been found anywhere in American periodical literature" (R. 881).

Mencken testified that "* * * Esquire has very high literary merit * * *" and that "Practically all the principal American authors have written for it in my time, headed by Dreiser, and including every author of any significance whatsoever" (R. 1151-2).

1943[31] (Pl.'s Ex. 25 for iden. in Dist. Ct.). This supplementary recommendation reaffirmed the Chairman's conclusion that the magazine was not obscene and suggested the possibility of new legislation pursuant to which the Postmaster General might act against matter which he regarded as objectionable.

The Postmaster General, however, held that the Fourth Condition had not been complied with, obviously not because of any objective determination that the content was not public information, or literature, or art, but upon the novel theory that the magazine did not measure up to the Postmaster General's ideas of the public welfare. It is fully apparent from the revocation order that the Postmaster General was cognizant of his unprecedented assumption of power for it states that he should not be reluctant "to determine the matter in such a way that all phases of it may be fully considered and decided by a court of competent jurisdiction" (R. 1862). Presumably more opportune judgment later prevailed with the result that ever since the Postmaster General has strenuously urged that his determination is final and not subject to court review.

The record further shows that the uniform practice of granting second-class entry to all periodicals without regard to the value of their content was not due to oversight or laxity as has been suggested at times by the Postmaster General in the Courts below. And it also shows that this case has not been decided on its own merits but as an incident in a broad program to extend the powers of the Postmaster General. Indeed, counsel for the Postmaster General expressly stated (R. 1906):

[31] Although the District Court excluded this document from evidence (erroneously, we believe), Esquire was permitted to refer to it in argument (R. 1949).

> "I will say of record that if this order stands other publications which are now getting the second-class privilege will no longer get it."

The foregoing, we believe, makes it sufficiently clear that the revocation order is arbitrary and capricious and based upon a disregard for the merits of the case. The case has been merely the vehicle by which the Postmaster General has attempted drastically to extend his administrative power.

In addition, the record discloses that the revocation order, if permitted to stand, would be clearly discriminatory against Esquire Magazine. An examination of the magazine and the testimony with respect to its content shows that it is not substantially different from other nationally known publications (testimony of Lloyd H. Hall generally, R. 1019-28, Respondent's Exhibit 46 before Post Office Department, R. 1024). The Hearing Board found, in effect, that the magazine was in accord with current standards and the "mores of the day" and that many other publications having similar content are accorded the second-class rates.

Finally the record establishes without contradiction that although over 25,000 publications now enjoy second-class rates and although a qualitative test has never been applied in the past 65 years of the administration of the Fourth Condition, Esquire Magazine has been singled out to be the subject of the Postmaster General's novel concept of postal classification.

The situation makes apt the words of the Court of Appeals for the District of Columbia in *Consumers Union of United States, Inc.* v. *Walker*, 145 F. 2d 33, 35 (1944):

> "In the Government's brief, it is urged by way of excuse for no action having been taken against

> Fortune Magazine, the Reader's Digest, or the American Medical Journal, that this was probably the result of oversight and that no benefit can be claimed in favor of the pamphlet issued by appellant merely because the Postmaster General has neglected to proceed in other cases. This is not a persuasive argument. * * * Whether intended or not, the result of the action taken in the present case constituted a clear discrimination against appellant's pamphlet in favor of the others."

It is manifest from the record that the Postmaster General failed to pass upon the merits of the instant case, based his revocation order on a theory contrary to all precedent, and adopted a strained and unjustified construction of the Fourth Condition in an effort to extend his power over periodicals using second-class mail. The only justifiable conclusion is that the revocation order is arbitrary and capricious and discriminatory against Esquire Magazine.

(b) Even Adopting the Postmaster General's Theory, the Revocation Order is not Supported by Evidence.

In discussing the matter of whether there is evidence to support the Postmaster General's determination, even upon his own theory of the case, an inherent difficulty is presented because of the lack of any intelligible or definable standard to be applied. Upon the Postmaster General's appraisal, a publication may sometimes fall into an "obscure and treacherous borderland zone" and thereby incur his condemnation; and the lack of a definitive standard produces a corresponding uncertainty as to whether evidence is present to support a finding. Several examples of the resulting uncertainty are given in the opinion of the Court

below for the purpose, however, of conclusively proving the fundamental fallacy of the Postmaster General's revocation order. And although the Court below agreed with the theory that an administrative determination, if supported by substantial evidence, is binding upon the courts, it nevertheless did not hold that there is substantial evidence to support the order in the case at bar.

The Postmaster General's theory seems to be that some of the material in Esquire is, in his opinion, risque and lacking in good taste, that these attributes supply the predominant characteristic of the magazine, and that the magazine with such a predominant characteristic does not disseminate public information nor is it devoted to literature or art.

It is apparent that in order to justify an order based on the foregoing theory there must be evidence on the subject of the predominant character of the magazine. As we see it there are only two possible methods by which such evidence could be supplied, viz., by establishing that the quantity of the objectionable material exceeds that which is unobjectionable, or by showing subjectively that the magazine as a whole derives its character from specified objectionable features. If the quantitative method is used it is at once obvious that there is insufficient evidence since at the most only about 2% of all the material contained in the 11 issues was seriously questioned. Presumably then the Postmaster General relies on the subjective method in his attempt to find evidence to support the order. But even on this basis there is no evidence to show that the magazine as a whole is predominantly given over to matter which, because of its allegedly questionable moral character, is not public information, literature or art.

The Postmaster General's brief relies, first of all, on the testimony of Mr. Gingrich, editor of Esquire, to supply such evidence. It is contended that the fact that 12 years ago, prior to its commencement as a magazine of general circulation, Esquire was a medium for advertising men's attire and, as such, was devoted primarily to masculine tastes and had a "stag party type of treatment" (R. 1160). We agree with the clear implication in the opinion of the Court below that such testimony hardly constitutes substantial evidence that a magazine is predominantly devoted to indelicate and unseemly ends (R. 1993).

The Postmaster General's brief next points to testimony of Mr. Gingrich that Esquire attracted imitators which, however, placed their emphasis on so-called "leg art, sex jokes, chorus girls, gold-diggers and that sort of thing" (R. 1284). Certainly evidence as to what imitators of one phase of a magazine were doing is not evidence of the predominant character of that magazine. Moreover, we regard the Postmaster General's reliance upon such evidence as indicative of his lack of fairness for he appears in this respect ready and willing to condemn Esquire not for what it did but because of what its imitators did.

The next type of evidence which the Postmaster General relies upon is equally insufficient and equally indicative of his lack of fairness. That evidence has to do with testimony about the sale of "Varga Girl," calendars, playing cards, and other merchandise which are sold as a separate part of the business of Esquire, Inc. and which are advertised from time to time in its magazine. Obviously such evidence has no relevancy whatsoever to the dominant characteristic of the magazine. Presumably the reference to it in the Postmaster General's brief is designed to give rise to the idea that the predominant purpose of Esquire

Magazine is to sell calendars, playing cards, cook books and jig saw puzzles rather than to publish a magazine of general appeal. We believe the mere statement of the idea is sufficient to demonstrate its lack of substance. And it may be noted that the Postmaster General overlooks the fact that it has never even been claimed in this case that Esquire is designed "primarily for advertising" (R. 26, 1976).

Likewise without merit is the argument in the Postmaster General's brief that the revocation order is supported by evidence because in past years Esquire allegedly has been guilty of publishing obscene matter. We have pointed out above that this argument involves a clear breach of the Postmaster General's solemn stipulation in pretrial proceedings that he would not defend his order on the ground of obscenity but its more indefensible aspect lies in the fact that it would lead the Court to believe (contrary to the fact) that on frequent occasions in the past Esquire has been tried and found guilty of obscenity. Actually, the instances alluded to are occasions when the Postmaster General has objected to items in the publication and *charged* that they were obscene. No hearing or determination on the propriety of such charges was ever had. Instead Esquire, in a spirit of cooperation, undertook on such occasions to attempt to make changes to suit the Postmaster General and for a substantial period submitted its magazine in advance for his consideration. In retrospect, the efforts of Esquire to cooperate with the Postmaster General were doubtless unwise. But the foregoing, plus the circumstances that many other magazines became subject to this type of pre-editing,[32] highlight the insidious character

[32]Counsel for the Postmaster General admitted: "And pretty soon we had over sixty questionable publications that we were supposed to examine and give a sort of pre-edit on." (R. 1772).

of the Postmaster General's program to attain a position where he can censor in advance all periodical publications. The circumstances show beyond question that to uphold the revocation order would result in a dictatorship of the Post Office Department over the public press.

Finally, the Postmaster General's brief refers, rather apologetically in one concluding paragraph, to the testimony of the nine witnesses who testified before the Hearing Board on behalf of the Post Office Department. None of of these witnesses gave any testimony which could be considered substantial evidence to support the revocation order. The substance of the testimony of these witnesses was that certain of the cited items were indelicate and in bad taste. Even as to that, about two thirds of all the items complained of received the unqualified approval of one or more of the Postmaster General's own witnesses (R. 1837).

As to whether the magazine or the cited material were "literature" or "art," not one Post Office witness was even asked the question. The only testimony from Post Office witnesses which bore on the Fourth Condition at all had to do with "public information" but not once was any witness asked the unqualified question of whether the magazine or the cited items came within this category (See R. 1569, 1595, 1635, 1639, 1658-9, 1663, 1703-5, 1724).

Moreover, in appraising the magazine and determining its predominant character it must, of course, be considered as a whole and not by reference to particular items which are selected as objectionable. See *United States* v. *Ulysses*, 72 F. (2d) 705 (C. C. A. 2nd, 1934), *Turner* v. *United States*, 35 F. (2d) 25 (C. C. A. 8th, 1929). But not one of the Post Office witnesses had read all the issues, or even all of any one issue, and most of them had spent only a

few minutes looking at the items which counsel for the Post Office particularly objected to:

(1) Peter Marshall frankly conceded that his examination of the issues of the magazine "was rather cursory" and that he hadn't read all of any article (R. 1584). This witness deplored "the trend of modern times as detrimental to the morals of our nation" (R. 1585) and stated "that womanhood had definitely been lowered by the achievement of equality with men" (R. 1586);

(2) Solomon Metz, despite the fact that he hadn't read all of the articles or even a single article in its entirety (R. 1599, 1624), was ready to accuse Esquire of "preparing the ground for the downfall of our democratic system" (R. 1595). He admitted that he was willing "to pass judgment on a magazine without reading anything in it and looking only at the pictures" (R. 1624);

(3) John W. Rustin admitted that he had not read any of the issues in their entirety (R. 1677) and testified merely that some of the pictures were not information of a public character in the sense that he would not want them available to his 15-year old daughter (R. 1659);

(4) Thomas Verner Moore testified, not that the content of the magazine was not information of a public character, but that in his opinion it was not "proper for dissemination throughout the nation" (R. 1724). The testimony of this witness is a good example of the meaningless character of the evidence which is relied

upon by the Postmaster General. He admitted that he had not read Esquire "all the way through" (R. 1732); that he had not even read all of any one issue (R. 1755). He finally testified:

> "Q. Well, your purpose was to see if you couldn't find anything obscene, wasn't it?
>
> "A. Naturally yes, that is what I was to testify on. I was not testifying on the literary value of the other articles" (R. 1727).

This witness never heard of such authors as Sholem Asch, Theodore Dreiser, John Dos Passos, John Steinbeck, Ernest Hemingway, Maurice Maeterlinck, Maxim Gorky and other well-known Esquire authors (R. 1726). He spent a total of two or three hours examining the material on the basis of which he read a prepared statement on the English obscenity law, long since discredited, and discussed some of the material complained of (R. 1717-1723);

(5) Mrs. Harvey W. Wiley, whose testimony revealed that she had not read a single article or story in its entirety in any one of the 11 issues (R. 1694) and that her study of the magazine was limited to glancing at 6 issues for a total of 12 minutes (R. 1696);

(6) Edwin Holt Hughes, who admitted that he had not read the issues in their entirety and that he spent about 15 minutes looking at the issues (R. 1709);

(7) John Keating Cartwright, who admitted that he had not read any of the articles in their entirety (R. 1559) and had spent about 60 minutes on the 11 issues (R. 1558);

(8) Chester W. Holmes, who testified that he had not read all of the articles (R. 1650) but that his examination was merely to "thumb through casually" (R. 1641); and

(9) Benjamin Karpman, who admitted that he had not read any of the issues in their entirety but had just glanced through them (R. 1548). He testified "I could not commit myself as to the issues as a whole. It may be that 99% is perfect. Again 50% may be good and 50% bad, and then the position might be reversed" (R. 1549).

The foregoing shows that not one of the witnesses who testified for the Post Office as to one or more of the 85 pages complained of had read a single issue of Esquire in its entirety and only a few of them had even read all of the items asserted to be objectionable. Obviously, there can be no evidence to the effect that the primary or predominant content of Esquire is not public information, art or literature from the Post Office witnesses, none of whom had read even a substantial part of the content of a single issue.

Moreover, the Postmaster General's own Hearing Board found no evidence of any non-compliance with the Fourth Condition—not even the single dissenting member. The conclusion is inescapable that the Postmaster General has strained not only in his construction of the statute but also in his construction of the evidence and that the revocation order is completely unsupported by evidence under any construction of the statute.

CONCLUSION

THE JUDGMENT BELOW SHOULD BE AFFIRMED.

Respectfully submitted,

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January 9, 1946.

FILE COPY

Office - Supreme Court, U. S.
FILED
Oct. 22
SEP 30 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 399

ROBERT HANNEGAN, Postmaster General of the United States,

Petitioner,

vs.

ESQUIRE, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF IN SUPPORT THEREOF

AMERICAN CIVIL LIBERTIES UNION.
Amicus Curiae.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 399

ROBERT HANNEGAN, Postmaster General of the United States,

Petitioner,

vs.

ESQUIRE, INC.

Motion for Leave to File Brief as *Amicus Curiae*

May it Please the Court:

The undersigned, as counsel for the American Civil Liberties Union, respectfully moves this Honorable Court for leave to file the accompanying brief in this case as *amicus curiae*. The consent of the petitioner to the filing of this brief has been obtained. Attorney for the respondent has failed to grant his consent.

Special reasons in support of this motion are set out in the accompanying brief.

October 1, 1945.

ARTHUR GARFIELD HAYS,
Counsel for American Civil Liberties Union, Amicus Curiae.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 399

ROBERT HANNEGAN, Postmaster General of the United States,

Petitioner,

vs.

ESQUIRE, INC.

BRIEF IN SUPPORT OF MOTION

Interest of the American Civil Liberties Union

The American Civil Liberties Union is a nationwide, non-profit organization, whose members are laymen and lawyers interested in the preservation of the fundamental personal rights guaranteed to individuals by the Constitution of the United States and of the various states.

We are filing a memorandum on the petition for a writ of certiorari because of the extraordinary importance of this case. By a new and unique construction of an innocent-looking provision in the postal laws, the Postmaster General has here started a new policy, apparently to be widely applied, of restricting the circulation of literature through the mails in accordance with his personal opinion of its value. If this construction should be

1. Post Office Order No. 23,459, p. 5.

sustained and the Postmaster General should be thus vested with despotic powers of control over access to the mails, then freedom of circulation—which is essential to freedom of the press—will be seriously impaired.

While the opinion of the Court of Appeals, directing the lower court to enjoin the Post Office Department from enforcing its order of deprivation, unqualifiedly rejected the latitudinarian interpretation of his own censorial powers made by the Postmaster General, it proceeded on the level of moral instruction rather than constitutional argument. Consequently it did little to settle the vexing and important question of how far Congress has gone or may constitutionally go in vesting in the Postmaster General the power to allocate differential postal rates to periodicals in light of his judgment as to their literary merits or moral correctness. Moreover, as is pointed out in the Government's petition for a writ of certiorari, there is a considerable variance between the area of discretion held by the Court of Appeals to be Constitutionally delegable to the Postmaster General and the area permitted to be delegated in a number of older decisions by this Court.

We are supporting the Government's application for writ of certiorari, although we believe the order of the court below should be sustained, because we think this Court should take this opportunity to clarify the important constitutional questions involved in this case and to review the positions expressed in a different context, twenty-four years ago in *U. S. ex rel. Milwaukee Social Democratic Pub. Co.* v. *Burleson*, 255 U. S. 407.

Reasons for Granting the Writ

An authoritative decision by this Court of the constitutional questions (and the corollary questions of statu-

tory construction) posed by this case is important to ensure that the traditional American doctrine of freedom of the press shall not be vitiated by administrative indirection. It is established that neither the Postmaster General nor any other governmental official may constitutionally impose any direct previous restraint on the freedom of circulation of periodicals. However, the Postmaster General maintains that Section 14 of the Postal Classification Act (39 U.S.C. 226) requires him to admit to the especially cheap second class of mailable matter only those periodicals which make a "special contribution to the general welfare" (Post Office Order No. 23,459, p. 10).

Realistically speaking, deprivation of a periodical's second class mailing privilege greatly impairs its ability to compete effectively with other periodicals for the public's interest. It follows that deprivation of a periodical's second class entry because of the content of prior issues —the gravamen of the Postmaster General's order of revocation of ESQUIRE's entry—constitutes the imposition of a brutally effective, albeit an indirect, previous restraint on freedom of circulation.

The decision of this Court in *United States ex rel. Milwaukee Social Democratic Publishing Company* v. *Burleson*, 255 U. S. 407 (over the vigorous dissents of Mr. Justice Holmes and Mr. Justice Brandeis), establishes that the Postmaster General is not precluded by the First Amendment from withdrawing a second class entry when past issues of the affected periodical have contained non-mailable matter. See also the dissenting opinion of Mr. Justice Holmes in *Leach* v. *Carlile*, 258 U. S. 138, 140. The court below adroitly distinguished the *Burleson* case, *supra*, in a footnote on the ground that the revocation of a second class entry there involved was predicated upon previous publication of non-mailable matter.

We do not think this Court should permit freedom of circulation to depend upon so gossamer a thread. We think that this Court should avail itself of this opportunity to reconsider the doctrines enunciated in the majority opinion in the *Burleson* case and earlier cases,[2] particularly in the light of its more recent pronouncements in other civil liberties cases.[3] We urge, therefore, that the writ of certiorari prayed for be granted.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

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NORMAN WILLIAMS, JR.,
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GURNEY EDWARDS,
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Of Counsel.

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2. See *e.g. Ex Parte Jackson*, 96 U. S. 727; *In Re Rapier*, 143 U. S. 110; *Public Clearing House* v. *Coyne*, 194 U. S. 497.

3. As *e.g. Near* v. *Minn.*, 283 U. S. 697. The constitutional questions here invoked are admirably stated in the Brandeis-Holmes dissents in the *Burleson* case.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 399

ROBERT E. HANNEGAN, as Postmaster General of the United States,

Petitioner,

vs.

ESQUIRE, INC.,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE

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SUPREME COURT OF THE UNITED STATES

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No. 399

ROBERT E. HANNEGAN, as Postmaster General of the United States,

vs. *Petitioner,*

ESQUIRE, INC.,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION AS AMICUS CURIAE

The American Newspaper Publishers Association submits this brief as Amicus Curiae in the above entitled cause in support of respondent's position.

Statement of the Case

In the interest of brevity the Amicus Curiae relies upon the statement of the case as set forth in the brief of respondent herein.

Interest of the Amicus Curiae

The American Newspaper Publishers Association is a membership corporation organized and existing under the laws of the State of New York. Membership in the Association is confined to publishers of daily and or Sunday newspapers. This membership embraces more than 700 newspaper publishers whose publications represent in excess of eighty per cent of the total daily and Sunday circulation of newspapers published in this country and all of which mail their publications at the second class mailing rates under the conditions prescribed therefor in the statute.

The Association is vitally interested in a clarification by this Court of the fundamental issue in this case, namely, the right of the Postmaster General to exclude from the second class mailing privilege any publication, which, in his opinion, does not make a "special contribution to the public welfare." By this arbitrary action the Postmaster General has constituted himself the censor of all publications which go through the mails at the second class mailing rate.

Argument

Point I. The Court of Appeals correctly held that the Postmaster General had exceeded his authority and had constituted himself a censor in determining that Esquire Magazine was not entitled to the second class mailing privilege.

The statute involved in this controversy (20 Stat. 359, 39 U. S. C. 226) provides:

> "Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second class are as follows: * * * Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to litera-

ture, the sciences, art, or some special industry, and having a legitimate list of subscribers * * *."

At the hearing on the right of Esquire to continue to enjoy the second class mailing privilege it was charged that the right should be revoked because Esquire failed to meet the Fourth condition. Counsel for Esquire introduced expert testimony on the contents of the magazine which showed that it meets the reasonable requirements of this statute.

The majority of the Hearing Board specifically found that the publication had not failed to comply with the Fourth condition (R. 1839).

Yet Postmaster General Walker revoked the second class privilege on the ground that the magazine did not comply with the Fourth condition because it did not make a "special contribution to the public welfare" (R. 1863).

In so holding, the Postmaster General, in effect, wrote another condition into the statute. It has been specifically held that he cannot do this. In *Payne* v. *Railway Publishing Co.*, 20 App. D. C. 581, writ of error dismissed 192 U. S. 602 (1904), the court held that the Postmaster General could not add the requirement "current news" to the enjoyment of the second class mailing privilege because it is not competent for him to add anything to the statute or to take anything away from it.

In issuing the Esquire order Postmaster General Walker indicated that he took this action because he felt that it was contrary to public interest to allow this publication to enjoy the second class mailing privilege. The court in the case cited above pointed out that "it is not the province of the Postmaster General to remedy the evil, if evil there is, by a postal regulation, or by unwarranted interpretation of the law" (20 App. D. C. at pages 597-598).

It is obvious that the District Court upheld the order of the Postmaster General because it too felt that this action was in the public interest. However, it is no more the province of the courts than it is of the Postmaster General to establish the standards it feels a publication should meet in order to enjoy the second class mailing privilege. Congress, and Congress alone, has the authority to establish the requirements of the second class mailing entry.

Moreover, as the Court of Appeals pointed out, public interest would not be served by permitting the Postmaster General to issue such orders. Postmaster General Walker by his order in this case established himself as the censor of publications which meet the statutory requirements for the second class mailing privilege. This privilege is an important factor in the ability of a publication to compete with publications of a similar character. Under the order herein, a publication may be singled out and deprived of its second class mailing entry not because it is unmailable, but because, in the opinion of the Postmaster General, it does not make a "special contribution to the public welfare". His order constitutes a threat to all publications using the mails because, if upheld by the courts, it subjects their editorial policies to the approval of the Postmaster General. As the Court of Appeals said, "It is inconceivable that Congress intended to delegate such powers to an administrative official or that the exercise of such power, if delegated, could be held constitutional."

The inherent danger in granting the Postmaster General such power is obvious.

There are over 25,000 newspapers and magazines now admitted to the second class mailing privilege. No one man, no one group of men controls the policies of any large proportionate number of them, whether newspapers in the weekly, semi-weekly, tri-weekly, daily or daily and Sun-

day fields, or whether magazines published weekly, monthly, quarterly or occasionally. In their editorial columns they represent every shade of opinion. In their news or information columns they bring to the people of this country information from every source in the world. The same is true of their entertainment sections. In fact, the publications of this country are as varied as the American scene itself.

The Court of Appeals gave examples to "illustrate the intellectual standards required for the kind of censorship exercised in this case." If an official is to be granted control over opinion, he should possess special qualifications for this task. Yet the office of the Postmaster General is a peculiarly political one. Since the turn of the century no President has named as Postmaster General any person who did not actively participate in the campaign for the successful nominee. The Postmaster General who issued this order is not an exception. He was long treasurer of the Democratic National Committee and also served as chairman of that Committee. His predecessor as Postmaster General was chairman in 1932 and following the victory in that campaign he was appointed Postmaster General in 1933. He continued to serve in both capacities throughout the 1936 campaign. The present Postmaster General, who has been substituted as petitioner in the present case, was chairman of the Democratic National Committee in the last national campaign and still holds the chairmanship.

While the statute contains no authority for such an assertion of power as had been made by petitioner herein, this Amicus Curiae insists that no public official could be vested with the power to bar a publication from the mails on the ground that in his sole opinion it does not make a "special contribution to the public welfare" and then prevent review of such an order by the courts.

As Madison said of our free press guaranty:

> "* * * the great and essential rights of the people are secured against legislative as well as executive ambition. They are secured, not by laws paramount to prerogative, but by constitutions paramount to law. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also * * *" Report on the Virginia Resolutions, Letters and Other Writings of James Madison, 1865, Vol. IV, p. 543.

Long before the ratification of our First Amendment England had abolished both censorship and licensure of the press. Since the ratification of the First Amendment there has been no reported case until the decision of the District Court in which our courts have upheld the contention of any public official in this country that he has power to exercise a previous restraint upon publications through the exercise of censorship. This Court held such censorship unconstitutional in *Near* v. *Minnesota*, 283 U. S. 697 (1931).

The decision of the Circuit Court of Appeals holding the order invalid because it was not within the authority of the Postmaster General and because it violated the guaranties of the First Amendment should be affirmed.

Point II. The action of the Postmaster General in the present case was arbitrary and capricious.

A review of the facts in this case reveals that the action of the Postmaster General throughout this proceeding has been arbitrary and capricious.

Although hearings began on October 19, 1943, it was not until October 25 that counsel for the Post Office Department made clear its contention that the publication did not comply with the Fourth condition. This was a complete reversal of the position outlined in a letter of October 8

in which counsel for the Department had stated "I shall not contend in the hearing aside from the non-mailable obscenity angle that the publication does not comply with the Fourth condition of the Second-Class Act" (R. 603-604).[1]

The Postmaster General gave respondent the hearing guaranteed it by 31 Stat. 1107, 39 U. S. C. 232. He then overruled and reversed the findings of his self-appointed Hearing Board. Thus, he gave respondent a hearing in form but denied it in substance.

Furthermore, the Postmaster General has reversed his position on the right of the courts to review his action in this case. In his order, he expressed some doubt as to his authority to revoke the privilege in this case and stated "it is for our courts to say what this statute means and what limits and restrictions there are upon the use of the second-class mail privilege" (R. 1861). He postponed the effective date of the order for 60 days "In order to provide the publication ample opportunity to appeal this order to a court of competent jurisdiction to fully review and settle this matter * * *" (R. 1865). Then, in paragraph 32 of his answer to the amended complaint in the District Court, he contended that in determining that the magazine did not meet the Fourth condition he was exercising a judicial or quasi-judicial discretion and that the exercise of his judgment and discretion was not subject to review or control by the courts.

---

[1] Were this an issue of obscenity and not one of censorship this Amicus Curiae would not be before this Court. However, the issue of obscenity was disposed of at the hearing and is not relied upon in any sense of the word by the petitioner herein having been expressly stipulated out of the case (R. 1892). Rather, the sole ground upon which petitioner relies is his assertion of the power to censor the press through a previous determination by him that a publication must make a "special contribution to the public welfare" before it can be distributed through the mails at the second class rate.

It is clear that this determination was not made "in good faith and in the exercise of a reasonable discretion" as petitioner contended.

As hereinbefore pointed out the Postmaster General did not make a determination of facts within limits set out by Congress. Rather he exceeded his statutory authority. Therefore, the District Court erred in sustaining the order as "the act of an executive officer charged with the performing of a given duty."

This order was subject to review by the courts. The Court of Appeals correctly set it aside as beyond any statutory authority and as repugnant to the guaranty of a free press embraced in the First Amendment to the Constitution.

Conclusion

WHEREFORE, it is respectfully submitted that this Court should affirm the order of the Court of Appeals setting aside the order in controversy.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

No. 399

ROBERT E. HANNEGAN, AS POSTMASTER GENERAL OF THE UNITED STATES,

Petitioner,

vs.

ESQUIRE, INC.,

Respondent.

BRIEF OF THE READER'S DIGEST ASSOCIATION, INC., AS AMICUS CURIAE

ROBERT E. COULSON,
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FORBES D. SHAW,
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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1945

No. 399

ROBERT E. HANNEGAN, AS POSTMASTER GENERAL OF THE UNITED STATES,
Petitioner,
vs.
ESQUIRE, INC.
Respondent.

BRIEF OF THE READER'S DIGEST ASSOCIATION, INC., AS AMICUS CURIAE

Preliminary Statement

The issue in the present proceeding is whether the Postmaster General, under the Act of March 3, 1879, Section 14 (20 Stat. 359); 39 U. S. C. § 226 may withdraw the second-class entry of "Esquire" magazine on the ground that "Esquire" fails to conform to the fourth condition of Section 14 because, in his opinion, it makes no "special contribution to the public welfare" (Order of the Postmaster General No. 23459, dated December 30, 1943, p. 10). The Postmaster General has stated that, if his interpretation of the statute above referred to is sustained, he will seek to withdraw the second-class mailing rights of other popular magazines (Annual Report of the Postmaster General for the Fiscal Year Ended June 30, 1943, p. 8).

The Reader's Digest Association, Inc. is the owner and publisher of the monthly magazine "The Reader's Digest", which has a large circulation in the United States. Copies of each issue of "The Reader's Digest" are sent to many subscribers throughout the country by mail as second-class matter. A substantial part of each issue of "The Reader's Digest" has been devoted to condensations or digests of literary material which has appeared in other magazines, including "Esquire". Since no objective criterion exists or can be devised for determining what material available for publication would constitute a "special contribution to the public welfare", it is quite probable that "The Reader's Digest" has published and will in the future publish condensations or digests of articles from other magazines which in the opinion of the Postmaster General might fail from time to time to meet the standard he has suggested of constituting a "special contribution to the public welfare".

As a matter of editorial policy, "The Reader's Digest" seeks to present to its subscribers each month a cross-section of well written and interesting literary material on various subject matters currently engaging public interest. In selecting articles from other magazines to be digested and included in its pages, "The Reader's Digest" is solely concerned with the literary merit of the particular article and the relation of its subject matter to current public interest, and not with the general editorial pattern of the magazine from which the material is taken. If, however, the power claimed by the Postmaster General, under his interpretation of the statute, were sustained, it would become a matter of direct concern to "The Reader's Digest" whether the use of any literary material from a magazine which had been deprived by the Postmaster General of second-class entry, might jeopardize the second-class entry of "The Reader's Digest".

By reason of the foregoing, The Reader's Digest Association, Inc. has a vital interest in the outcome of this proceeding, in contesting the asserted right of the Postmaster General to impose additional qualifications or conditions for second-class entry not set forth or contemplated by Section 14 of the Act of March 3, 1879, and in asking this Court to clearly define the limitations upon and the consequences of the exercise by the Postmaster General of such powers as he may be held to possess under that Act.

Pursuant to Rule 27 of the General Rules of this Court, the parties hereto by their counsel have consented to the filing of this brief.

Argument

Summary of Argument

Two basic questions are presented by this case:

A. Did Congress intend to give the Postmaster General the power to determine *on a qualitative basis* what publications should be permitted second-class rates because they disseminated "information of a public character" or were "devoted to literature, the sciences, arts, or some special industry"; and

B. If Congress did so intend, is the fourth condition of Section 14 of the Postal Classification Act of 1879 constitutional.

It is the position of The Reader's Digest Association, Inc. that:

1. The fourth condition of Section 14 is stated in broad generic terms not susceptible to the construction that Congress thereby intended to delegate to the Postmaster General plenary power to set up qualitative standards as to what constitutes public information, literature, the sciences or the arts, and that, if the language used is at all ambiguous, the

legislative history of the Act and its administrative interpretation support this contention.

2. If Congress intended by the fourth condition of Section 14 to classify publications on the basis of quality rather than kind, the Act is unconstitutional as a delegation of power to an executive officer without providing adequate standards for its exercise, and (since such power is that of economic death to a publication without justification under any overriding consideration of the national welfare) as an abridgment of freedom of the press.

I.

Congress did not intend by the fourth condition of Section 14 of the Postal Classification Act of 1879 to give the Postmaster General the power to classify publications on the basis of the quality of their content.

The Postmaster General appears to have derived his conclusion that the condition that a publication "must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry" to be entitled to entry as second-class mail means that such publication "is under a positive duty to contribute to the public good and the public welfare" [1] from a misconception of the meaning of the language of this Court in *Milwaukee Publishing Company* v. *Burleson*, 255 U. S. 407 (1920), in which the Court, referring to the second-class mailing privilege, said (p. 410):

> "* * * It is a frank extension of special favors to publishers because of the special contribution to the public welfare which Congress believes is derived from the newspaper and other periodical press. * * *"

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[1] Order No. 23459 of the Postmaster General, dated December 30, 1943, R. 1877, 1883.

The fact that the Court spoke of favors to "*publishers*" because of the special contribution to the public welfare believed to be made by the "*press*", a comprehensive term for all publishers, was not noted by the Postmaster General. But obviously the Court did not attribute to Congress the somewhat naive belief that every publication would contribute to the public welfare nor is there any suggestion that the Court believed that Congress intended that only such publications as were affirmatively found to do so should be carried at second-class rates.[2] The language quoted from the *Burleson* case plainly does not support the Postmaster General's position that he has been delegated the power to grant or refuse life to periodicals[3] on the basis of his conception of their value to the public. If such power exists, it must be found in the language of the fourth condition of Section 14.

The words of the fourth condition relied on by the Postmaster General are broad, general terms. Only two qualifying expressions are used. Information must be "of a public character", which means no more than that it must be information of interest to a substantial number of people, a condition which, if not fulfilled by the publisher, will soon result, without the necessity of deliberation by the Postmaster General, in his publication's having no "legitimate"

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[2] Representative Money, member of the House Committee on the Post Office and Post Roads and sponsor of the bill which was later enacted as the Act of March 3, 1879, recognized that some publications which enjoyed the second-class rates were devoted to "gossip and the scandal of the hour" and of little educational value. Congressional Record, Volume VIII, 1879, pages 693, 2135. It is significant that there is no indication whatsoever of any intention to exclude such periodicals from the second-class rates.

[3] The Postmaster General's argument that no question of censorship is involved because "Esquire" can be mailed at third-class rates is without substance. To deprive a periodical of second-class rates deprives it of competitive facilities essential to circulation and hence to freedom of publication. See *Ex parte Jackson*, 96 U. S. 727, 733 (1877).

list of subscribers" and in other respects failing to meet the conditions of Section 14. The qualification of being devoted to "some special industry" was no doubt inserted as an extension of the second-class rates to trade journals and magazines which might be of interest only to specialists in that field,[4] for a publication dealing with the subject of industry as a whole would plainly be publishing "information of a public character" and require no such additional qualifying language.

The word "literature" may have different meanings to different people. Literature in its broad sense constitutes "the written or printed productions of the human mind collectively",[5] but, more narrowly, productions "marked by elevation, vigor, and catholicity of thought, by fitness, purity, and grace of style, and by artistic construction".[6] Only a small part of the mass of writings currently published could possibly be called literature in the narrower sense and only in unusual cases would two people agree as to which of such writings did so qualify.

Similarly "science" in its broad sense is "the sum of universal knowledge",[7] including theology, philosophy, economics, and political science in which conclusions cannot always be verified, but in its narrower sense it may apply only to "knowledge gained by exact observation and correct thinking, especially as methodically formulated and arranged in a rational system."[7]

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[4] Similarly, the second-class rates apply to publications of benevolent and fraternal societies, institutions of learning, trade unions, and professional, literary, historical or scientific societies (Act of Aug. 24, 1912, c. 389, § 1, 37 Stat. 550; 39 U. S. C., § 229).

[5] Funk & Wagnalls New Standard Dictionary of the English Language, 1938, p. 1446.

[6] Funk & Wagnalls New Standard Dictionary of the English Language, 1938, p. 1446.

[7] Funk & Wagnalls New Standard Dictionary of the English Language, 1938, p. 2193.

The debate as to what constitutes "art" is, of course, endless and inconclusive, and the ancient cliché, "I don't know much about art, but I know what I like," is perhaps the fundamental principle of criticism of "art", used in its narrow sense as applicable to certain approved examples of the fine arts. But broadly "art" is "skill in applying knowledge or ability to the accomplishment of a concrete purpose"[8] and embraces not only skilled work in the fine arts (whether or not it meets with the approval of critics) but in the useful, industrial and mechanic arts as well.

It is apparent that if, as we believe, Congress intended the language of the fourth condition to be construed broadly, the entire field of public human expression is covered and the Postmaster General's duties are limited to determining whether the formal objective standards set by the first three conditions are complied with and the relatively simple questions as to whether the publication must be excluded as "designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

It is inconceivable that Congress used the words "literature, the sciences, arts" in a restricted sense with the intention of conferring on the Postmaster General the enormous and insuperably difficult task of determining what constitutes devotion to a narrow but undefined conception of literature, science or art with no better standard than his idea of what is good for the public, which is, in the last analysis, simply that of the art critic who knows what he likes.

If Congress did intend a departure of such magnitude from its previous practice, it would surely have stated its intention plainly and the debates in Congress and committee reports would contain some reference to it.

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[8] Funk & Wagnalls New Standard Dictionary of the English Language, 1938, p. 159.

Legislative history of the fourth condition of Section 14 of the Postal Classification Act of 1879

The plain language of the statutes enacted prior to the Act of March 3, 1879 shows that Congress intended to grant low rates to all periodicals which could bring themselves within a class determined by objective standards.

Section 22 of the Act of February 20, 1792 (1 Stat. 238) provided the lower rates for "all newspapers". Section 22 of the Act of May 8, 1794 (1 Stat. 362) included in the lower rates "magazines and pamphlets". Section 20 of the Act of March 3, 1863 (12 Stat. 705) provided: "The second class embraces all mailable matter exclusively in print, and regularly issued at stated periods, without addition by writing, mark or sign." Revised Statutes (1878), Section 3877, provided: "Mailable matter of the second class shall embrace all matter exclusively in print, and regularly issued at stated periods from a known office of publication, without addition by writing, mark, or sign."

The following statement made on the floor of the House by Representative Money, sponsor of the bill, shows that Section 14 of the Act of March 3, 1879 did not add to the Postmaster General's powers:[9]

> "I now, Mr. Speaker, address myself to the bill under consideration, * * *.
>
> "This is nothing but a simplification of the postal code. *There are no new powers granted to the Department by this bill, none whatever.* The only feature which has met with any considerable opposition in the bill is one requiring registration for public

[9] Section 17 of the bill then being considered by the House contained the identical language which was later enacted as the fourth condition of Section 14 of the Act of March 3, 1879. Congressional Record, Vol. VIII, 1879, p. 2136.

journals. * * * In regard to that matter, there is no additional grant of power to any postmaster or to the Post-Office Department by this section." [10] (Italics supplied).

In the first part of the foregoing statement Mr. Money obviously referred to the bill *as a whole*.

The registration provisions of the bill were opposed on the ground that they might be the inception of a censorship of the press (Congressional Record, Vol. VIII, 1879, p. 2137) and were deleted from the bill (*id.*, pp. 2137, 2138). The elimination of these purely administrative provisions in order to safeguard against censorship is inconsistent with the claim of the Postmaster General that other provisions of the bill then under consideration granted to him practically unlimited power to deny to periodicals, which in his opinion did not contribute to the public welfare, facilities essential to circulation and hence to freedom of publication. See *Ex parte Jackson*, 96 U. S. 727, 733 (1877).

Administrative history of the fourth condition of Section 14 of the Postal Classification Act of 1879

For more than 63 years and until the institution of the present proceeding no Postmaster General has asserted the claim that he is called upon to judge publications which apply for second-class entry upon the basis of the quality of their content. This alone, while not conclusive, is quite persuasive that no such power or duty exists. During this period, in 1906 and again in 1911, Congress authorized the appointment of two Commissions to examine the subject of second-class mail.

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[10] Congressional Record, Vol. VIII, 1879, p. 2134.

The first Commission reported[11] that there was "practically no form of expression of the human mind that can not be brought within the scope of" the language of the fourth condition and that the statute "defines not by qualities but by purposes, and the purpose described is so broad as to include everything and exclude nothing".

The second Commission concluded that:

> " * * * the experience of the post office has shown the impossibility of making a satisfactory test based upon literary or educational values. To attempt to do so would be to set up a censorship of the press. Of necessity the words of the statute—'devoted to literature, the sciences, arts, or some special industry'—must have a broad interpretation.[12]

Faced with the administrative interpretation of the Post Office Department and the conclusions of its Commissions, Congress has taken no action. Its failure to do so over such a long period is strong proof that the Postmaster General was never intended to have the power he has so belatedly attempted to grasp.

The fourth condition of Section 14 of the Postal Classification Act of 1879 must be construed in relation to other provisions of the laws relating to the Postal Service.

Section 14 of the Postal Classification Act of 1879, including the fourth condition thereof, forms an integral part of legislation relating to the Postal Service. An examination of this legislation shows that, except where matter is made nonmailable, it provides objective tests for the Postmaster General to apply in classifying mailable matter and does not anywhere authorize him to accept or reject a pub-

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[11] House Document No. 608, Postal Commission, 1906-07, 59th Cong., 2d Sess., pp. xxxvi-xxxvii.

[12] House Document No. 559, Postal Commission, 1911-12, 62d Cong., 2d Sess., p. 142.

lication which meets such tests because of his subjective conclusions on the quality of its content.

Thus the Postal Laws make a clear division between "mailable" and "nonmailable" matter and divide the former into four general classes to which different rates are applicable. The four classes are generally described as "First, written matter; Second, periodical publications; Third, miscellaneous printed matter * * *; Fourth, merchandise and other mailable matter weighing not less than eight ounces * * *." (Act of Mar. 3, 1879, c. 180, § 7, 20 Stat. 358; Act of Feb. 28, 1925, c. 368, §§ 206, 207, 43 Stat. 1067; 39 U. S. C., § 221).

Having established the general categories of mailable matter, the specific classes are described with more particularity but always in concrete, objective terms.

The first class embraces "letters, postal cards, and all matters wholly or partly in writing", except as otherwise provided. (Act of Mar. 3, 1879, c. 180, § 8, 20 Stat. 358; 39 U. S. C., § 222).

Embraced by the second class are "all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions * * *" of Sections 12 and 14. (Act of Mar. 3, 1879, c. 180, § 10, 20 Stat. 359; 39 U. S. C., § 224). Section 12 provides for the examination of second-class matter and the payment of a higher rate of postage for any matter inserted therein which belongs in a different class. (Act of Mar. 3, 1879, c. 180, § 12, 20 Stat. 359; 39 U. S. C., § 225). The conditions of Section 14 contain requirements with respect to regularity and periodicity of issuance, bearing a date of issue and numbering of issues; issuance from a known office of publication; format of the periodical; and the existence of a public who have subscribed for the periodical at more than a nominal rate. (Act of Mar. 3, 1879, c. 180, § 14, 20 Stat. 359; Act of June 11, 1934, c.

443, 48 Stat. 928; 39 U. S. C., § 226). The determination as to whether a publication meets these requirements involves purely factual questions capable of ascertainment without resort to the ill-defined realm of personal opinion.[13]

It is submitted that the language of the Fourth condition of Section 14, if given its natural meaning as a broad statement of the purposes for which periodicals entitled to second-class rates are published, is in harmony with the other sections of the Postal Law relating to classification and with the objectively ascertainable classification standards they provide. If, on the other hand, this language must be construed as conditioning second-class entry on fulfilling certain undefined and undefinable standards of quality of content, it is a startling departure from the approach and philosophy of Congress as shown in the surrounding context and the other sections of the laws relating to the Postal Service.

When Congress has chosen to give the Postmaster General initial power to determine what may or may not be carried in the mail, it has been in relation to such matters as obscenity, libel, sedition and fraud in which overriding considerations of the public welfare justify some interference with freedom of speech and of the press. The delegation of power in such cases is for the purpose of preventing a definite harm to the public and not for that of selecting, among a mass of material of varying degrees of merit, such reading matter as is deemed to be for the public good. In each such case the power has been given clearly and unambiguously and the area within which it may be exercised has

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[13] The standards for entry as third-class matter (Act of Feb. 28, 1925, c. 368, § 206(a), 43 Stat. 1067; Act of April 27, 1937, c. 141, 50 Stat. 119; 39 U. S. C., § 235) and fourth-class matter (R. S., § 3879, Act of June 8, 1896, c. 370, 29 Stat. 262; Act of Aug. 24, 1912, c. 389, § 8, 37 Stat. 557; Act of Feb. 28, 1925, c. 368, § 207(a), 43 Stat. 1067; 39 U. S. C., § 240) are similarly simple and objective

been sharply defined and restricted.[14] It is impossible to believe that Congress inserted the fourth condition of Section 14 in a statute providing objectively ascertainable classifications for mailable matter with the intention of granting the Postmaster General unlimited personal power to dictate the current reading matter of the people.

II.

If Congress intended by the fourth condition of Section 14 of the Postal Classification Act of 1879 to classify publications on the basis of quality rather than kind, the Act is unconstitutional as a delegation of power to an executive officer without providing adequate standards for its exercise and as an abridgment of freedom of the press.

From what has been said under Point I, it is manifest that, if the language of the fourth condition of Section 14 is to be construed narrowly so as to restrict entry in the second class to such periodical publications as conform to a standard based on quality of content, no such standard has been defined by Congress and, because of the nature of the subject matter, no reasonably definite and precise standard can be established.

Obviously a standard consisting of the uncontrolled mental conclusions of one official[15] as to what in the realm

[14] For example see Act of Mar. 4, 1909, c. 321, § 211, 35 Stat. 1129 as amended, 18 U. S. C. § 334 (obscenity); Act of Mar. 4, 1909, c. 321, § 212, as amended, 35 Stat. 1129, 18 U. S. C., § 335 (libel); Act of Mar. 4, 1909, c. 321, § 215, 35 Stat. 1130, 18 U. S. C., § 338, Act of Mar. 2, 1889, c. 393, § 4, 25 Stat. 874, 39 U. S. C., § 256 (fraud); Act of June 15, 1917, c. 30, Title XII, §§ 1-3, 40 Stat. 230, 18 U. S. C., §§ 343-345 (sedition).

[15] It is to be noted that in the present case the Postmaster General reversed the decision of his own Hearing Board (R. 1856-65).

of public information, literature, art and science contributes to the public welfare is no standard at all, but an attempt by Congress to delegate a power it did not itself have, a power which no one could exercise wisely since no one is wise enough to do so. In the hands of the wisest it would constitute an enlightened tyranny over the press; in less scrupulous hands it would become a medium for arbitrary and capricious suppression of freedom of speech and for channeling public thought to reach political ends.

Suppose a Postmaster General held that detective story magazines made no "special contribution to the public welfare". He might sincerely hold that opinion. Yet as a matter of common knowledge highly regarded justices of this Court are sometimes seen riding a train during recess time, deeply immersed in detective stories as a welcome relief from too close attention to legal tomes during a session of the Court. Practically, only the American reading public has a right to determine (subject to the established exceptions as to obscenity, libel, sedition and fraud) what types of reading matter contribute to the public welfare.

Even if Congress itself had the right to make such determination, it could not delegate it without providing standards for its exercise. *Yakus* v. *United States*, 321 U. S. 414 (1944); *Bowles* v. *Willingham*, 321 U. S. 503 (1944). Since no such right exists, the attempt to exercise it would be an abridgment of freedom of the press[18] and void under the First Amendment to the Constitution. In the words of Mr.

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[18] A periodical cannot exist competitively without second-class entry. Loss of second-class entry is loss of freedom of circulation which is encompassed within the constitutional guarantee of freedom of the press. *Ex parte Jackson*, 96 U. S. 727, 733 (1877); *Grosjean* v. *American Press Co.*, 297 U. S. 233 (1936); *Lovell* v. *Griffin*, 303 U. S. 444 (1938).

Justice Jackson in his concurring opinion in *Thomas* v. *Collins*, 323 U. S. 516, 545 (1945):

> "But it cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us. * * * "

Conclusion

Sir Congress did not intend by the fourth condition of Section 14 of the Postal Classification Act of 1879 to set up the Postmaster General as guardian of the Nation's thought with power to decree that the public should read in the periodical press only what he found suitable for its welfare, and, since, if any such intent is imputed to Congress, the Act is an unconstitutional attempt to delegate power without providing sufficient standards and an abridgment of freedom of speech and of the press in violation of the First Amendment to the Constitution, it is respectfully submitted that the decision of the Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

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FORBES D. SHAW,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 399.

ROBERT E. HANNEGAN, as Postmaster General of the United States,

Appellant,

—against—

ESQUIRE, INC.,

Appellee.

APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA.

BRIEF OF THE AUTHORS' LEAGUE OF AMERICA, INC., *AMICUS CURIAE.*

AUTHORS' LEAGUE OF AMERICA, INC.,
Amicus Curiae,

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BRIEF OF THE AUTHORS' LEAGUE OF AMERICA, INC., *AMICUS CURIAE.*

THE AUTHORS' LEAGUE OF AMERICA, INC., respectfully files this brief *amicus curiae* by stipulation of the parties. The Authors' League, organized in 1912, now encompasses in its membership almost all of the professional writers of America. It represents a total membership (exclusive of motion picture writers) of approximately 5500 authors.

The League is deeply concerned in the proceedings taken by the Postmaster General inasmuch as his construction of the second-class mail statute, if sustained, establishes him as the censor whom authors must satisfy in their writings intended for periodical publication. It is not the fortunes specifically of

Esquire Magazine which interest the League nor whether this or any other magazine is "mailable" within the terms of statutes which exclude objectionable matter from the mails, but the larger issue of the right of control over publications by the sole censorship of an appointed public official. This is intolerable in the American scene.

The authors of America must not be condemned to such restraint as is made possible by the original ruling below. To hold that a writer must mention nothing that might be noxious to the Postmaster General is to condemn him to falseness. Not so is literature developed.

All authors have an interest in the freedom of circulation through the mails of periodicals at the only practicable rate, since whether one writes in the form of drama, narrative or otherwise, there is a potentiality of periodical publication in serial or other form. The works of many of our foremost writers scientific, economic, political as well as fictional and *belles lettres* appear as much in periodical publications as in other form.

The Authors' League of America has ever been alert to intervene when censorship of literary material seemed indicated by administrative or legislative action. We are aware of no prior activity quite so portentous of evil as the effort in this case through Federal action to control the writings which the American public may read.

It was recently said:

> "The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other in-

strumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250.

The position taken by the Postmaster General and judicially sanctioned by the District Court endangers the freedom of the press; this restraint, as was indicated in the *Grosjean* case, cannot be regarded otherwise than with concern.

In September 1943 the magazine Esquire was by written notice required to show cause why its mailing privileges should not be revoked upon the ground that nine (later amended to eleven) cited issues contained certain specified matter of an obscene, lewd, and lascivious character and "other matter of a similar or related nature"; and because of the inclusion of such obscene matter, the magazine had not fulfilled the qualifications for second-class mailing privileges since it was an unmailable publication. The proceedings were instituted, therefore, solely on the issue of obscenity.

Section 232 of the Postal Service Law (39 U. S. C.) provides that when a publication has once been accorded second-class mailing privileges, such shall not be revoked until a hearing has been granted to the parties. Esquire was granted a hearing not only on the charge of obscenity but also on a further charge, asserted for the first time in the course of the hearing, that even if not obscene, the magazine did not comply with the conditions of the second-class mailing statute. It would seem reasonable to infer that since upon

such hearing the accused periodical was acquitted on both counts, the second-class privilege would not be withdrawn. But no. The hearings terminated in a report and recommendation in which the majority of the Board held that the charges made were not supported in fact or in law and that the periodical was not obscene, fully complied with all conditions of the statute and was therefore entitled to retain its privileges.

Notwithstanding the report of the majority of his own Board which had heard the testimony of some forty-eight witnesses and examined over two hundred exhibits during a 17-day trial, the Postmaster General chose to hold, upon a completely novel theory and on his own administrative fiat that the magazine is not entitled to second-class privileges.

An analysis of the Postmaster General's order of December 30, 1943, indicates an absurd and inconsistent position. If a piece of mail is "non-mailable" within the language of the statute because of obscenity, it may not be carried or delivered at all by the Post Office. In his order, the Postmaster General stated that certain writings and pictures contained in the issues of Esquire, though admittedly not obscene, were nevertheless, in his opinion, vulgar, and that, therefore, all future issues are not to be permitted second-class mailing privileges (5587-5593)* In short, some of the material, it is said, is improper at second-class rates; at higher rates it is unobjectionable. When such writings and pictures, said the order, become a systematic feature, they should not be entitled to the cheaper rate of postage. This

* References in parentheses contained herein are, unless otherwise indicated to folios of the printed transcript.

would appear, therefore, to be not a question of morals but of money.

The Postmaster General's theory is that periodicals enjoying second-class privileges must establish themselves not only as strictly within the provisions of the statute granting such privileges but also within what he deems to have been the underlying though inexpressed purpose of Congress when it passed the statute in 1879.

The statutory provision called in question here is the Fourth condition appearing in section 226 of the Postal Service Law (39 U. S. C.), which is as follows:

> "It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers."

It will be remembered that the proceeding began with a citation charging the periodical with non-mailability under obscenity statute (35 Stat. 1129) and claiming it is not entitled to second-class privileges in that the issues contained non-mailable obscene matter. The hearing having gone against the Postmaster General, he changed his theory:

> "A publication to enjoy these unique mailing privileges and special preferences is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. *It is under a positive duty to contribute to the public good and the public welfare*" (5588).

The Postmaster General rules therefore that because of the presence of some material which he deems vulgar and risque (but not too much so), the magazine

does not establish itself as one "originated and published for the dissemination of information of a public character or devoted to literature," etc. The proceedings terminated therefore, not as they commenced with a charge of non-mailability on the ground of obscenity, but with a request for additional postage (if the magazine wishes to continue in business) because of the (to him) distasteful items appearing in the publication.

The vice of this proceeding from the standpoint of the Authors' League is that a single individual, a Postmaster General, endowed by his creator with no supernatural talents, undertakes to pass judgment on the literary and artistic value of matter appearing in the public press. No testimony in the record supports his determination since (1) the issue of "contribution to public good" was not introduced into the case until after the hearing board had found in favor of the magazine, and (2) *not a single one of the government witnesses had completely read a single issue of the magazine* and in most part they had read but a few pages or in some instances only looked at a few pictures, which they testified were objectionable. Out of almost 2000 pages of material, but 90 items appearing on 86 pages were even complained of. Of these 90 items, 60 were approved as unobjectionable by one or more of the government witnesses. Of the 38 witnesses called by the publisher not one condemned any of the items as obscene or seriously objectionable although some witnesses frankly questioned the good taste of one or two items.

There seems to have been given in the District Court a judicial sanction to the power of censorship assumed by the Postmaster General.

Thus it was said:

> "May the Postmaster General, therefore, have not been warranted in his conclusion that the literature referred to was literature of desirable type of an educational value?" (p. 1969).

and again:

> "A cannibal of the South Seas has no conscientious scruples about catching, beheading and barbecuing, as it were, the child of his neighbor. There may be many contributing causes to the delinquency of youth, but may not the Postmaster General have reasonably had in mind that of literature as one? And did not the authors of the measure enacted by Congress have in mind good literature?" (p. 1969).

The Postmaster General thus had the court's approval of his free exercise of determination whether periodicals submitted to him contain "literature of desirable type of an educational value" and "good literature".

The District Court quoted from the order of the Postmaster General (p. 1964 Joint Appendix—Vol. 4) a statement to the effect that since the proceeding involves the use of second class mailing privileges, there is not involved the question of non-mailability as first, third or fourth class mail matter, nor the right of freedom of speech or of freedom of the press.

The constitutional objection to the action taken cannot be disposed of thus cavalierly as will be more fully discussed herein. The retention of the privileges under some other classification does not save the action from condemnation, if the appellant is entitled to second class privileges. *Lovell* v. *City of Griffin, Ga.*, 303 U. S. 444.

Said Judge Davidson:

> "There is a very decided difference between grouping and classification and that of censoring" (p. 1973).

If so, what is it? If the Postmaster, as censor, disapproves, he classifies a periodical out of existence. Is he any the less a censor for the circuitousness of his process?

McGuffy's Readers of the 1870's were suggested as the standard intended by Congress for the guidance of the Postmaster General. The Readers, it will be noted, were not assigned to the cheaper rates of the second class, but the higher rates of the third. There is nothing in the record or in history which establishes that Congress intended the second class rates to apply only to periodical publications which extol the homely virtues.

The District Court, it seems to us, failed to give proper consideration to the fact that the action here taken by the Postmaster General is in the nature of his personal amendment of the statute in circumstances where the Congress has, as a matter of record, refused to change it, and to give due thought to the constitutional invasion of the rights of the appellee.

POINT I.

If the Postmaster General's order of December 30, 1943 is sustained, he becomes established as a censor with "vague and absolute authority"* over the moral and literary value of newspapers and periodicals.

Under the Postmaster General's proposed procedure, he may distinguish between good literature (that which he deems to be for the public welfare) and bad literature (that which in his opinion fails to contribute to the public good); and to admit only the "better" at the lower rate. It is established by high and distinguished authority that this cannot be done. Indeed the office of the Attorney General of the United States has expressly condemned such practice.

The Attorney General, acting as counsel for the Postmaster in the case of *Houghton* v. *Payne*, 194 U. S. 88, stated in his brief to this Court:

> "In establishing the rate for 'newspapers and other periodical publications' *Congress was not seeking to discriminate between good literature and bad literature or to establish a censorship of the press with prizes for merit.* The thing it had in mind was not the goodness or badness of the information disseminated but the instrumentalities by which that dissemination might be accomplished. It was not thinking of the accumulated stores of 'sound or pure literature' in the vast libraries of the world, but it was thinking of how the mind of an enquiring and progressive

* This expression is taken from the opinion of Mr. Justice Brandeis in *U. S. ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407.

people might be kept abreast of the times in all departments of human thought and activity. Congress did not stand hesitating between a good and a bad newspaper." (Italics supplied.)

A Congressional Commission appointed in 1911, known as the Hughes Commission, filed its report on Feb. 2, 1912 with Congress. Mr. Justice Hughes, then an Associate Justice of this Court, headed the Commission. The question of second-class mailing privileges was the sole subject of the Commission's survey, investigation and findings. We may well assume that the investigation was painstaking and thorough and that any Commission which included, besides Justice Hughes, President Lowell of Harvard and Harry A. Wheeler, President of the Association of Commerce of the City of Chicago, would not have overlooked the feasibility of making distinctions among classes of periodicals enjoying second-class privileges if indeed such a solution were within the realm of possibility. The Commission's report was clear, honest and forthright. It recommended no tortuous distinction between one type of literature and another, but on the contrary, sweepingly set aside such possibility as a solution. Said the Committee:

"The low rate has helped to stimulate an enormous mass of periodicals, many of which are of little utility for the cause of popular education. Others are of excellent quality, but the experience of the post office has shown the impossibility of making a satisfactory test based upon literary or educational values. *To attempt to do so would be to set up a censorship of the press.* Of necessity the words of the statute 'devoted to literature, the sciences, arts, or some special in-

dustry"—must have a broad interpretation." (Italics supplied.)*

The Commission said that the educational purpose had been accomplished only in part and that "it is wholly impractical to make a low rate for publications with a considerable educational value and a higher rate for the rest" (p. 95), and at page 96 of the report:

> "The commission is further of the opinion that it would be a mistake to discriminate between newspapers and magazines or other periodicals. *So far as educational value is concerned, no satisfactory distinction can be made.*" (Italics supplied.)**

The effort or attempt to regulate the reading and entertainment of the public has often been undertaken by self-appointed crusaders whose passion for authority was greater than that for liberty. No one will assert that Congress can establish a Board of Censors to whom writers and speakers must submit their material before publishing it; and no one will assert that obscene matter may be published with impunity; yet it is unthinkable that any one person should be per-

* House Document No. 559, Postal Commission 1911-12, 62nd Congress, 2nd Session, "Report of Commission on Second-Class Matter", p. 142.

** The earlier Postal Commission of 1906-07 in their report on second class privileges spoke in much the same vein saying: "The prime defect in the statute is, then, that it defines not by qualities but by purposes, *and the purpose described is so broad as to include everything and exclude nothing.*

"*With the exception of a few instances where the publication has been excluded because the information was deemed not to be public, no periodical has ever been classified by the application of tests of this kind. Any attempt to apply them generally would simply end in a press censorship*" (pp. xxxvi-xxxvii). (Italics supplied.)

mitted to indulge a passion for authority by assuming the right to precensor public utterances.

In the course of the years, individuals and groups have made themselves obnoxious to their intelligent contemporaries and ridiculous to future generations by banning works which are established if not as classics, then as shining and brilliant pieces of literature, accepted as such by the test of time. The available list of such works is too large to repeat here, but among them are:

Homer's "Odyssey"; Cervantes' "Don Quixote"; La Fontaine's "Fables"; Defoe's "Robinson Crusoe"; Shakespeare's "Venus and Adonis"; Bizet's "Carmen"; Ibsen's "Ghosts"; Bronte's "Jane Eyre"; Zola's "Nana"; Hawthorne's "The Scarlet Letter"; Hardy's "Tess of the D'Urbervilles"; Cabell's "Jurgen"; Sherwood Anderson's "Many Marriages"; Browning's "Aurora Leigh"; Maeterlinck's "Mona Vanna"; Flaubert's "Madame Bovary"; Tolstoy's "Kreutzer Sonata"; Strauss's "Salome"; Shaw's "Man and Superman"; Gilbert and Sullivan's "Mikado".

Always those who condemn such work have minds rooted in the past. Morals are a question of custom, time and place. The crusading censors merely disagree with the mores of the day and will not tolerate that times and customs change. Perhaps in the nature of things and in the absence of a more inspired method there is no way but by a jury submission to pass on charges of illegal publications expressly excluded from the mails under criminal statutes, but there is and can be no question of the wholly abhorrent impropriety of permitting any person in his

own uncontrolled discretion to condemn and stifle a publication. However able and competent the Postmaster General is, what equipment has he or had his predecessors or will his successors in office have to look into the minds of the millions and to determine the effect which the reading of a given work will have, and then decide whether the effect is good or bad? The order of the Postmaster General when stripped of confusing verbiage is reduced to the simple proposition that he thinks the magazines are, though not really obscene, nevertheless nearly so and therefore not for the public good *at second-class rates.*

When confronted with the question of what is and what is not obscene, there is of course no easy answer. Judge Learned Hand in *United States* v. *Kennerley*, 209 Fed. 119, 121, venturing a definition later accepted by the Court of Appeals (*Parmalee* v. *United States*, 113 Fed. (2nd) 729) and by the 2nd Circuit (*United States* v. *Ulysses*, 72 Fed. (2nd) 705) said:

> "If there be no abstract definition, such as I have suggested, should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? * * *
>
> "Nor is it an objection, I think, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent. * * *"

In an early English decision, *Regina* v. *Hicklin*, L. R. 3 Q. B. 360 (1868) it was said:

> "An obscene book is one which has the tendency to deprave and corrupt those whose minds were open to immoral influences and into whose hands the publication might fall."

But this old English doctrine was properly rejected by our courts and is not the law of our land, a fact largely unknown to, or intentionally disregarded by, the government witnesses upon the hearings herein. An enlightened age pays a greater respect to the advancement of literature and art and subordinates the shielding of the moronic mind to the public good. Thus Judge Learned Hand in *United States* v. *Levine*, 83 Fed. (2nd) 156, 157 said:

> "This earlier doctrine necessarily presupposed that the evil against which the statute is directed so much outweighs all interests of art, letters or science, that they must yield to the mere possibility that some prurient person may get a sensual gratification from reading or seeing what to most people is innocent and may be delightful or enlightening. No civilized community not fanatically puritanical would tolerate such an imposition, and we do not believe that the courts that have declared it, would ever have applied it consistently. * * *"

The Congress of 1879 which passed the act under which the Postmaster is proceeding did not undertake to the power he assumes. The act defines the periodicals which *shall* be entitled to the second-class privilege; another Congressional Act condemns, as unmailable, lewd and obscene material. The Postmaster General arrogates unto himself the right to

create a hybrid publication not condemned by Congress as non-mailable and not excluded by the Statute setting forth conditions for enjoyment of the second-class privilege. He creates a new category of mail matter, namely, a "nearly obscene non-second-class periodical" and says in substance this periodical has a bad moral effect if mailed at second-class rates but not if mailed as merchandise at a higher rate. Indeed non-mailable matter is not defined by any separate statute at all; certain material is declared non-mailable in the same statutes which makes mailing of such matter a criminal offense. For example, it is a criminal offense to send obscene literature through the mail and thereby the material becomes non-mailable.

Now it is said that a periodical which lends itself to a certain type of humor, art and story (not obscene), should be denied its second-class rate (the rate which Congress has said periodicals *shall* enjoy) because in the Postmaster General's view it is "not being originated and published for the dissemination of information of a public character, or devoted to literature, * * *" (557a). In other words because of the inclusion of some material, less than five percent, which the Postmaster says is "non-public good" literature and art, the magazine cannot be found to be originated and published for the dissemination of information of a public character or devoted to literature, etc.

A perfectly mailable, non-obscene periodical* thus becomes merchandise not entitled to be mailed as a periodical merely because some very small part of its

* Upon the pre-trial proceedings in the District Court, counsel for the Postmaster General stipulated that the Postmaster General does not defend this action on the grounds either (1) that Esquire is obscene within the provisions of 18 U. S. C. 334; or (2) that it is non-mailable under that or any other statute.

content does not measure up to the Postmaster General's personal standards of what contributes "to the public good and the public welfare."

That the periodical Esquire enjoys a high degree of literary standing is established in the record on file. It commands sufficient respect among leaders of the literary world to have merited contributions by such writers as, among others, Theodore Dreiser, John Dos Passos, Lord Dunsany, Lion Feuchtwanger, Ernest Hemingway, F. Scott Fitzgerald, Maxim Gorky, D. H. Lawrence, Maurice Maeterlinck, Thomas Mann, Andre Maurois, Franz Molnar, Luigi Pirandello, Jacob Wassermann, Thomas Wolfe and Arnold Zweig; and art by George Bellows, Thomas Benton, Alexander Brook, James Chapin, Salvador Dali, William J. Glackens, Rockwell Kent, George Luks, Reginald March, Henry Varnum Poor, Diego Rivera, John Sloan and Eugene Speicher.

A tabulation of the text features of 11 issues shows 85 articles on subjects of current interest, of which 62 concern the war effort; 59 short articles on a variety of subjects; 73 fiction shorts; 57 sports articles or stories; 22 articles on personalities; 24 war action paintings; 11 colored photographs of dogs and birds; 11 sets of paintings, prints and drawings from well-known galleries; 27 colored photographs of motion picture personalities; 14 colored photographs of stage performers; 27 paintings and drawings with fashion treatment; and 23 paintings of the "Varga girl".

There was an analysis of ten issues of the magazine testified to by Lloyd H. Hall, head of the Editorial Analysis Bureau. The Bureau classifies, primarily for the information of national advertisers, the editorial material contained in some thirty of the leading magazines of the country (3057-8). He found 11

of the editorial content devoted to fiction, 37% to matters of general interest, approximately 9% to matters of cultural interest, approximately 8% to wearing apparel and accessories, almost 3% to travel and transportation, 10% to sports, 2½% to food, 7% to amusement, 4% to foreign and international affairs, 4½% to national affairs. Mr. Reeves Lewenthal, President of the Associated American Artists, concluded that each of the eleven issues had substantial art content of high value. Mr. Henry L. Mencken, an author and director of the Baltimore Sun, testified as to the high literary merit of the magazine and reputation of the authors. Mr. William Jacobs, President of the Presbyterian College of South Carolina, thought the periodical had contributed constructively toward the encouragement of clean sports. Dr. Fred S. Siebert, Director of the School of Journalism of the University of Illinois, said the magazine is made up largely, if not chiefly, of information of a public character. Dr. Luchs, Pastor of the Ohio University Presbyterian Church, testified as to the excellence of some of the material which the Government witnesses condemned and as to the magazine's compliance with the requirements of the statute. Mr. Louis J. Croteau, Executive Officer and Secretary of the New England Watch and Ward Society, an organization which Mr. Croteau describes as being sometimes referred to as the outstanding censorship organization in the country, and which examines each year about eight hundred to nine hundred different issues of magazines, declared that Esquire had been examined as part of the functions of his organization and that the magazine was never condemned or declared to be obscene with respect to any part of any one of the issues under examination.

nor had the Watch and Ward Society ever received a complaint against Esquire. Other noted persons who gave the magazine a clean bill of health before the Board included: Dr. William Allen Neilson, President Emeritus of Smith College, Associate Editor of the Harvard Classics and Editor-in-Chief of Webster's New International Dictionary; Major John L. Griffith, Athletic Commissioner of the "Big Ten"; Miss Mary Ellen Chase, Professor of English Literature at Smith College; George Jean Nathan, outstanding author, editor and dramatic critic; Felix M. Morley, President of Haverford College, Haverford, Pa.; J. Hals Gulick, Headmaster of Proctor Academy, Andover, New Hampshire; Miss Marjorie Hope Nicolson, former Dean of Smith College; Drs. Kenneth A. Tillotson and Clements C. Fry, psychiatrists, and advisers to the student health department of Harvard and Yale Universities, respectively; Miss Josephine Mixer Gleason, Associate Professor of Psychology at Vassar College; Dr. Hedley S. Dimock, Dean of George Williams (Y. M. C. A.) College; and Dr. Aaron Eiseman, Chaplain of the Florence Crittenton League.

The impropriety of condemning a work because some selected content is deemed objectionable by a censor, has often been pointed out in obscenity cases.

In *United States v. One Book Entitled "Ulysses"*, 72 Fed. 2d, 705, 707, Judge Augustus N. Hand said:

> "The question in each case is whether a publication *taken as a whole* has a libidinous effect."

and again:

> "'No work may be judged from a selection of such paragraphs alone. Printed by themselves they might, as a matter of law, come within the prohibition of the statute. So might a similar

> selection from Aristophanes, or Chaucer, or Boccaccio, or even from the Bible.' The book, however, must be considered broadly as a whole. We think Judge Andrews was clearly right and that the effect of the book as a whole is the test."

Judge Hand was quoting from an opinion of Judge Andrews in the New York Court of Appeals in the case of *Halsey v. New York Society for the Suppression of Vice*, 234 N. Y. 1.

At page 708 in the "*Ulysses*" case, Judge Hand said:

> "The foolish judgments of Lord Eldon about one hundred years ago, proscribing the works of Byron and Southey and the finding by the jury under a charge in Lord Denman that the publication of Shelley's 'Queen Mab' was an indictable offense are a warning to all who have to determine the limits of the field within which authors may exercise themselves."

And so the sensibilities of the Postmaster General must not be permitted to prevail; to him was not delegated the power to change public standards of right or wrong in literature.

If the appellant's procedure receives this Court's sanction, there is danger to the authors of America that they must conform their writings to the standard of morals not of the day or of the enlightened public, but of an appointed official. To prevent this retrogression to another age, we appeal to the Court for a condemnation of the Postmaster General's order.

The government argued that the words "information of a public character" have a broader significance and it was said that the words "public good", "efficient educators" and "useful knowledge" should

somehow be read into the statute and that the Postmaster General must be allowed to determine whether or not the magazine is so designed (5294-5297, 5318). But Congress did not say so, and when, at least twice, Congressional Commissions were set up to look into the matter and advise Congress, no change in this regard was even intimated; indeed since the enactment of the law in 1879 not a word of the law in question was changed in so far as concerns the type of public information, literature, art or science required under the Fourth condition.

When one of appellant's predecessors in the past tried to add conditions to this same statute and to read into the statute provisions not contained therein, the Court of Appeals declared such procedure invalid and said:

> "By Act of Congress, March 3, 1879 C. 180, 20 Stat. 355, Congress has not committed to the Postmaster the matter of determining what should be carried in the mails as second class matter and what as matter of third class, but has reserved to itself that power exclusively, itself making the classification; and it is not competent for the Postmaster General to add anything to the statute or take anything away from it."

Payne v. U. S. ex rel., National Railway Publishing Co., 20 App. D. C. 581; followed in *Payne v. U. S. ex rel. Railway List Co.*, 20 App. D. C. 601, and certiorari dismissed on motion of Postmaster General (1904), *Payne v. U. S. ex rel., National Railway Publishing Co.*, 192 U. S. 602.

Who shall judge whether or not a given publication is "devoted to literature?" The word "literature" has

been variously defined. George E. Woodberry in the "The Appreciation of Literature" defines it thus:

> "Literature is an art of expression. The material which it employs is experience: or, in other words, literature is the expression of life."

And Cardinal Newman (The Idea of a University) said:

> "By Letters or Literature is meant the expression of thought in language, where by 'thought' I mean the ideas, feelings, views, reasonings and other operations of the human mind."

It is significant that the Congressional Postal Commission of 1906 in considering the question had less difficulty than the Postmaster General in finding an answer. On page xxxvi of its report (Report of Postal Commission, 1906; Govt. Printing Office 1907) it said:

> "There is practically no form of expression of the human mind that can not be brought within the scope of 'public information', 'literature, the sciences, art, or some special industry'. It would have been just as effective and just as reasonable for the statute to have said, 'devoted to the interests of humanity', or 'devoted to the development of civilization', or 'devoted to human intellectual activity'.
>
> "The prime defect in the statute is, then, that it defines not by qualities but by purposes, and the purpose described is so broad as to include everything and exclude nothing."

Congress received this report and remained satisfied with the statute although advised by its Commission of such broad scope of the language. The Postmaster General assumes an amendment to the statute

by which the meaning, accepted for almost seventy years, is modified to include an additional condition, namely, that *all* of the content of the magazine must be devoted to literature, the sciences or arts and it must contain nothing which offends the sensibilities of the current incumbent. These things are insidious. If now we allow that he may determine the magazine to be non-mailable as second-class because some of the articles and pictures are in his opinion not for the public good, we will open the door to his free appraisal of the material for other qualities which will be alleged to be undesirable. Suppose a magazine prints articles or stories held by him to be so lacking in merit, so wholly uninspired as to be of no "public good"; or so pointless as to be of no service or value to any reader; why may he not say that this also is not what was intended by Congress and the periodical should not be granted the second-class rate? Or, may he not go so far as to rule out periodicals that attack the administration then in office as "not for the public good and welfare"?

No survey has ever been made so far as we know, psychological or otherwise, as to the effect upon the reader of matter claimed to be objectionable. Apparently the Government knows of none. Perhaps it is impossible. It is accepted that the test for obscenity is whether the matter offends the mores of the times. But is there a standard by which this test may be applied? A large scale poll or survey by experts might possibly indicate something. It hardly would be in the category of substantial proof. Such polls introduced in the present case vindicated the publication completely. The blustering assertions of the present appellant, however, do not go for proof. And above all, no man in the land has either the personal equipment or the public's authority to pass judgment.

POINT II.

The Postmaster General's order is a denial of the freedom of the press and a deprivation of rights without due process of law; it is a usurpation of the powers of Congress.

If the deprivation of the right to publish a given periodical is unconstitutional, the refusal to it of the second class mailing privilege is equally so. Both Mr. Justice Brandeis and Mr. Justice Holmes stated that the right to the use of the mails is a part of free press and that the withdrawal of second class postal rights would deprive many publishers of their property without due process of law. (*U. S. ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407, 430.) These things were said in the dissenting opinion in a case where the action of the Postmaster General was upheld by the majority on the ground that the exclusion of the newspaper was justified because unmailable under a war time measure, *i. e.*, the Espionage Act.

The use of the postal service has been held to be a property right. (*Hoover* v. *McChesney*, 81 Fed. 472.) Calhoun in Congress in 1836 said:

> "The object of publishing is circulation; and to prohibit circulation is in effect to prohibit publication * * * and the prohibition of one may as effectually suppress such communication as the prohibition of the other and of course would effectually interfere with the freedom of the press and be equally unconstitutional."

In the recent case of *Lovell* v. *City of Griffin, Ga.*, 303 U. S. 444, a statute which prohibited distribution of

literature within the city limits was held invalid despite the fact that obviously other forms of circulation were free to the publishers.

Freedom of publication includes freedom of circulation and an unjustified restriction or limitation upon freedom of circulation is unconstitutional. It is therefore not so, as is contended by the Postmaster General, that freedom of speech or freedom of press is not involved because the work is admitted as First, Third or Fourth Class Matter (P. 1878 Joint Appendix, Vol. 4).

It is common knowledge that the deprivation of Second Class mailing privileges is tantamount to a denial of any mailing privileges in respect to most of the periodicals now circulating, because of the excessive additional financial burden which would be imposed. The imposition of such burden, as the imposition of the tax in *Grosjean* v. *American Press Co., infra,* abridges the freedom of the press. The difference in the instant case is conceded to be over a half million dollars a year.

The refusal of second class mailing privilege is, for purposes of testing the constitutionality of the process, a refusal of the right of publication.

It is already established that before there can be denial of the right of speech or press guaranteed in the First and Fourteenth Amendments of the Federal Constitution, there must appear to be a clear and present danger that the words which are to be prohibited will bring about the substantive evils that Congress has the right to prevent. (*Schenck* v. *United States*, 297 U. S. 47.)

In *Bridges* v. *California*, 314 U. S. 252, the Court said (p. 262) that the "clear and present danger"

language of the *Schenck* case has afforded a practical guidance in a great variety of cases in which the scope of constitutional protection of freedom of expression was an issue. It has been utilized in passing on the constitutionality of convictions under the Espionage Act, *Schenck* v. *U. S.*, *supra*; under a Criminal Syndicalism Act, *Whitney* v. *California*, 274 U. S. 357; under an Anti-Insurrection Act, *Herndon* v. *Lowry*, 301 U. S. 242; and for breach of peace at common law, *Cantwell* v. *Connecticut*, 310 U. S. 296.

Since it is required to establish "clear and present danger" before the press may be restricted, even in statutes aimed at such potential harm to public welfare as Criminal Syndicalism and Insurrection, it is inconceivable that this guiding principle shall be ignored in the Postmaster General's "quasi objectionable" periodical.

In the *Bridges* case (p. 262) it was said:

> "Moreover the likelihood, however great, that a substantive evil will result, cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantive'. Brandeis, J., concurring in *Whitney* v. *California*, *supra*, 274 U. S. at page 374, 47 S. Ct. at page 647, 71 L. Ed. 1095; it must be 'serious'. Id., 274 U. S. at page 376, 47 S. Ct. at page 648, 71 L. Ed. 1095. And even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider* v. *State*, 308 U. S. 147, 161, 60 S. Ct. 146, 151, 84 L. Ed. 155."

This Court said further that what finally emerges from the "clear and present danger" rule is a work-

ing principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished (p. 263). And again, at page 263:

> "Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally.
>
> "It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

Now this guiding principle indicates the vice of what has been done here. The right to further use of this very substantial form of distribution is denied not because it is manifest that a clear and present danger that a substantive and serious evil will result, but because the appointed official does not deem the contents of the condemned periodical to be for the public good.

Nor is it of any importance in the constitutional aspect of the case, whether or not a periodical is less than what one may fairly call "good literature". It is of grave importance to consider what might be done if this process receives final judicial sanction.

Mr. Justice Murphy said, in *Thornhill* v. *State of Ala.*, 310 U. S. 88, at page 97:

> "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting

to license the dissemination of ideas. *Schneider v. State*, 308 U. S. 147, 162-165, 60 S. Ct. 146, 151-152, 84 L. Ed. 155; *Hague v. C. I. O.*, 307 U. S. 496, 516, 59 S. Ct. 954, 964, 83 L. Ed. 1423; *Lovell v. Griffin*, 303 U. S. 444, 451, 58 S. Ct. 666, 668, 82 L. Ed. 949."

and again:

"It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near v. Minnesota*, 283 U. S. 697, 51 S. Ct. 625, 630, 75 L. Ed. 1357. One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it. *Lovell v. Griffin*, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949; *Hague v. C. I. O.*, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423. A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press."

The Court said further that the existence of a statute which lends itself to harsh and discriminatory enforcement by prosecuting officials results in restraint on all freedom of discussion. And so here an interpretation of the powers of the Postmaster General which would enable him to indulge in discriminatory enforcement would likewise be a restraint on freedom of the press.

Again, in the *Thornhill* case, at page 98:

"Where regulations of the liberty of free discussion are concerned, there are special reasons for

observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. *Stromberg* v. *California*, 283 U. S. 359, 368, 51 S. Ct. 532, 535, 75 L. Ed. 1117, 73 A. L. R. 1484; *Schneider* v. *State*, 308 U. S. 147, 155, 162, 163, 60 S. Ct. 146, 151, 84 L. Ed. 155. Compare *Lanzetta* v. *New Jersey*, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888."

We may alternately consider the Postmaster General's act either an attempt to exercise police power over publications with whose editorial content he is in disagreement, or an effort to increase the revenue of the Post Office Department. In either case his approach is not a legal one. If there is to be an increase of the rates or a reclassification it must be done by Congress. If there is to be an extension of the obscenity laws it must be by legislative action; but beyond everything, there must not be, now or ever, a single official empowered to censor the written or spoken word for any purpose or in any guise.

POINT III.

The legislative, administrative and judicial history of the postal law and its enforcement establishes that it is not now within the province of the Court to reinterpret it.

The history of the statute briefly is this: The first act for special rates for newspapers was passed in 1792 (1 Stat. 328). Magazines were added in 1794 (1 Stat. 362). In 1825 magazine rates were adjusted and again in 1827. There were various changes in

rates between 1845 and 1879. In 1863 for the first time mailable matter was divided into classes, the second of which was "regular printed matter" which included all mailable matter exclusively in print issued at stated periods. The present classification of mail matter was enacted in 1879. Rates were changed in 1884 and again in 1885 and in 1894 the definition of publications was enlarged to include those of certain associations. However, never in the history of the department from the outset was any distinction made between respective types of literature, good, bad or indifferent.

Mr. Edwin C. Madden, then Assistant Postmaster General, in his remarks to the Postal Commission of 1906 said:

> "What does the law mean by 'devoted to literature'? If we were to hold that the term 'devoted to literature' means that the publication shall be devoted to the subject of literature, and not merely to contain literature itself, imagine the result. A great number of our best magazines would be subject to exclusion. Nevertheless that is exactly the construction that is placed upon the other three provisions, namely, the sciences, arts or some other special industry. One devoted to the sciences discusses medicine, for instance, one devoted to the arts discusses music, etc., and one devoted to some special industry discusses matters relating to that industry. One supposed to be devoted to literature is admitted to this class upon its containing literature itself without any discussion on the subject at all."

Mr. Madden said that if the head of a department finds administrative difficulties, he should endeavor

to have the defects removed and that it was in this spirit that the department had asked for the creation of a commission to look into the whole subject. This, it will be noted, was the Congressional Committee which ultimately reported to Congress and based upon its report, Congress concluded that no change should be made in the statutory enactment (Hearings before Postal Commission of 1906, p. 29). But the Postmaster General, by the presently adopted procedure, asks the Court by judicial interpretation to do what Congress apparently has declined to do. The Commission of 1906 concluded in its report (Government Printing Office 1907) that every form of expression of the human mind comes within the scope of public information, literature, the sciences, art, etc., and that any attempt to apply qualitative tests generally would end in a press censorship. Mr. Madden suggested to Congress that the element of currency in a magazine as an essential characteristic be spelled out by amendment of the Statute. He said:

> "The requirement of currency is something that can be enforced administratively. While the Post-Office cannot really determine whether the matter is literature or not, without the necessity of becoming a censor of its quality, it can determine with ease whether or not it is current."

Chairman Madden had six suggestions for a proposed new Bill. The only new idea advanced was that the periodical should be originated and published for the dissemination of *current* public information or the presentation, discussion or treatment of *current* topics in relation to the sciences, arts or some special industry and must not consist wholly or substantially of fiction. Congress adopted none of

the suggestions except a proposal that a Postal Commission be appointed. Thereupon the Commission, known as the Hughes Commission, heretofore referred to, was appointed. The Hughes Commission, as already appears, found it impossible to make a satisfactory test based upon literary or educational value and declared any such attempt would be a censorship of the press. The Commission felt that under these circumstances the solution would be an increase in charge for second-class mail in order that a more equitable adjustment would be made.

There was no intimation that the law was being violated by the admission of any periodicals not of a given standard of literary merit, or containing in part material of questionable public good.

It is apparent, therefore, that Congress is completely advised of conditions existing in the field of second-class mail matter. It has from time to time made such changes and modifications as it thought appropriate. It has drawn a sharp line against obscenity by providing for the criminal prosecution of those who send such material through the mail and declared the material itself to be non-mailable. It has never seen fit to say that the second-class privilege is to be withdrawn from magazines which, in the Postmaster General's opinion, contain matter which is, in some small part, vulgar or in bad taste.

After the report of the Hughes Commission was filed there was a meeting before the House Committee on Post Offices and Post Roads on February 9th and 10th, 1914. The Chairman said he thought there ought to be a short hearing in connection with the hearings already held on the subject, and the report of the Hughes Commission on the question "so that we can understand better what ought to be done".

In all this there was not one word of reclassification. In this connection Postmaster Burleson wrote to Mr. Jonathan Berne, Jr., Chairman of the Joint Committee, on January 13th, 1914, recommending an increase from one to two cents per pound.

In 1898 there was before the House of Representatives the so-called Loud Bill (HR 5359), whose intended purpose was to force out of the second-class mailing privileges certain publications. Mr. Jeremiah D. Botkin, opposing it (March 3rd, 1898), spoke of "low grade literature in the form of cheap papers, etc." The Loud Bill never became law.

The Congressional intent was indicated by the brief of the Attorney General filed on March 7th, 1904 (heretofore referred to), in the case of *Houghton v. Payne*, 194 U. S. 88; where he said:

> *"We confidently submit that what Congress consistently had in mind in the creating of this privileged class of publications was the universally recognized, commonly accepted and perfectly well understood periodical of every day speech.* All argument based upon the value and high standing of the Riverside Literature Series is wholly beside the mark.
>
> "As we have already attempted to show, by the same token which admits them, all other books good, bad and indifferent, may be admitted. The Postmaster General would have no more right to admit the Riverside Series of Literature on account of its literary value than he would have the right to exclude these publications on the ground of want of literary value." (Italics supplied.)

For sixty-seven years the second-class mailing privilege has been accorded periodicals on the basis of

their adherence to the conditions outlined in Section 226 of the Postal Service Law (39 U. S. C.). Never in the history of the Law and its administration so far as Post Office Department witnesses could recall, has it ever been contended that mailable material may not be forwarded under second-class privileges because the Postmaster General considered its content not of sufficiently high merit to justify the privilege. This may sound baldly stated, but there can be no doubt that it fairly represents the Postmaster General's action. He said in his order that the magazine is not being published for the dissemination of information of a public character, nor has it been devoted to literature, etc., within the meaning of the section, in that it has included as a policy, a few items allegedly skirting close to the edge of obscenity. We do not believe we are misstating the case, therefore, in saying that he has denied the second-class privilege because he considered some of the contents of the magazine not unlawful, but distasteful to him. Note that the Board appointed by him did not find them either unlawful or distasteful.

The absurdity to which the contended interpretation would lead is manifest. It is as though the Court were asked to add to the statute the words "if the publication contains matter not obscene, but nearly so, it may be mailed only under the first, third or fourth class, and the Postmaster General shall have the sole right to pass judgment on the material". The prospect is staggering.

It is settled that statutes long interpreted in a given way and more particularly statutes so administered by those charged with executive duties, are to be interpreted in accordance with established construction. So the Circuit Court in *United States* v.

Chicago, St. Paul, Minneapolis Railway, 43 F. 2nd. 300, 306, said:

> "We should be reluctant to overturn a long standing department construction, presumably known to the legislative department which has made no amendments to the act, seeking to make it applicable to the practice now challenged in this action."

The Supreme Court in *United States v. Jackson*, 280 U. S. 183, 193, said:

> "It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently given to a statute by the Executive Department charged with its administration."

In another case it was said that only compelling language would under such circumstances warrant the rejection of a construction so long and so generally accepted, and in particular where an overturning of the practice would have such far reaching consequences; *Maynard v. Elliott*, 283 U. S. 273, 277.

There should not be permitted an amendment by administrative fiat or even by judicial interpretation by which something new will be added and the Postmaster General empowered to make a personal selection, out of the 25,000 magazines (Par. 22, Answer), of such as in his opinion are sometimes guilty of bad taste, and, acting as accuser, judge and jury, condemn them to death.

In the instant case the Postmaster General does not dispute that the conditions are met, except that in his opinion a periodical does not establish itself as one originated for the dissemination of information of a

public character, etc., unless its content is for the public good and contains no distasteful matter. It is common knowledge that the second-class privilege is and has been freely given over the years in complete disregard of the merit of content. Should Congress wish to amend the Act in this respect that would be its privilege. Should the Attorney General find need to prosecute a periodical for sending obscene matter through the mail, that would be his duty. It is not the function of the Postmaster General to interfere with either.

CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

THE AUTHOR'S LEAGUE OF AMERICA, INC.,
Amicus Curiae.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 399.

ROBERT E. HANNEGAN, as Postmaster General of the United States,

Appellant,

—against—

ESQUIRE, INC.,

Appellee.

APPEAL FROM A JUDGMENT OF THE UNITED STATES COURT OF APPEALS, DISTRICT OF COLUMBIA.

BRIEF OF THE AUTHORS' LEAGUE OF AMERICA, INC., *AMICUS CURIAE.*

AUTHORS' LEAGUE OF AMERICA, INC.,
Amicus Curiae,

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BRIEF OF THE AUTHORS' LEAGUE OF AMERICA, INC., *AMICUS CURIAE.*

THE AUTHORS' LEAGUE OF AMERICA, INC., respectfully files this brief *amicus curiae* by stipulation of the parties. The Authors' League, organized in 1912, now encompasses in its membership almost all of the professional writers of America. It represents a total membership (exclusive of motion picture writers) of approximately 5500 authors.

The League is deeply concerned in the proceedings taken by the Postmaster General inasmuch as his construction of the second-class mail statute, if sustained, establishes him as the censor whom authors must satisfy in their writings intended for periodical publication. It is not the fortunes specifically of

Esquire Magazine which interest the League nor whether this or any other magazine is "mailable" within the terms of statutes which exclude objectionable matter from the mails, but the larger issue of the right of control over publications by the sole censorship of an appointed public official. This is intolerable in the American scene.

The authors of America must not be condemned to such restraint as is made possible by the original ruling below. To hold that a writer must mention nothing that might be noxious to the Postmaster General is to condemn him to falseness. Not so is literature developed.

All authors have an interest in the freedom of circulation through the mails of periodicals at the only practicable rate, since whether one writes in the form of drama, narrative or otherwise, there is a potentiality of periodical publication in serial or other form. The works of many of our foremost writers scientific, economic, political as well as fictional and *belles lettres* appear as much in periodical publications as in other form.

The Authors' League of America has ever been alert to intervene when censorship of literary material seemed indicated by administrative or legislative action. We are aware of no prior activity quite so portentous of evil as the effort in this case through Federal action to control the writings which the American public may read.

It was recently said:

> "The newspapers, magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other in-

strumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." *Grosjean* v. *American Press Co.*, 297 U. S. 233, 250.

The position taken by the Postmaster General and judicially sanctioned by the District Court endangers the freedom of the press; this restraint, as was indicated in the *Grosjean* case, cannot be regarded otherwise than with concern.

In September 1943 the magazine Esquire was by written notice required to show cause why its mailing privileges should not be revoked upon the ground that nine (later amended to eleven) cited issues contained certain specified matter of an obscene, lewd, and lascivious character and "other matter of a similar or related nature"; and because of the inclusion of such obscene matter, the magazine had not fulfilled the qualifications for second-class mailing privileges since it was an unmailable publication. The proceedings were instituted, therefore, solely on the issue of obscenity.

Section 232 of the Postal Service Law (39 U. S. C.) provides that when a publication has once been accorded second-class mailing privileges, such shall not be revoked until a hearing has been granted to the parties. Esquire was granted a hearing not only on the charge of obscenity but also on a further charge, asserted for the first time in the course of the hearing, that even if not obscene, the magazine did not comply with the conditions of the second-class mailing statute. It would seem reasonable to infer that since upon

such hearing the accused periodical was acquitted on both counts, the second-class privilege would not be withdrawn. But no. The hearings terminated in a report and recommendation in which the majority of the Board held that the charges made were not supported in fact or in law and that the periodical was not obscene, fully complied with all conditions of the statute and was therefore entitled to retain its privileges.

Notwithstanding the report of the majority of his own Board which had heard the testimony of some forty-eight witnesses and examined over two hundred exhibits during a 17-day trial, the Postmaster General chose to hold, upon a completely novel theory and on his own administrative fiat that the magazine is not entitled to second-class privileges.

An analysis of the Postmaster General's order of December 30, 1943, indicates an absurd and inconsistent position. If a piece of mail is "non-mailable" within the language of the statute because of obscenity, it may not be carried or delivered at all by the Post Office. In his order, the Postmaster General stated that certain writings and pictures contained in the issues of Esquire, though admittedly not obscene, were nevertheless, in his opinion, vulgar, and that, therefore, all future issues are not to be permitted second-class mailing privileges (5587-5593)* In short, some of the material, it is said, is improper at second-class rates; at higher rates it is unobjectionable. When such writings and pictures, said the order, become a systematic feature, they should not be entitled to the cheaper rate of postage. This

* References in parentheses contained herein are, unless otherwise indicated to folios of the printed transcript.

would appear, therefore, to be not a question of morals but of money.

The Postmaster General's theory is that periodicals enjoying second-class privileges must establish themselves not only as strictly within the provisions of the statute granting such privileges but also within what he deems to have been the underlying though unexpressed purpose of Congress when it passed the statute in 1879.

The statutory provision called in question here is the Fourth condition appearing in section 226 of the Postal Service Law (39 U. S. C.), which is as follows:

> "It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers."

It will be remembered that the proceeding began with a citation charging the periodical with non-mailability under obscenity statute (35 Stat. 1129) and claiming it is not entitled to second-class privileges in that the issues contained non-mailable obscene matter. The hearing having gone against the Postmaster General, he changed his theory:

> "A publication to enjoy these unique mailing privileges and special preferences is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. *It is under a positive duty to contribute to the public good and the public welfare*" (5588).

The Postmaster General rules therefore that because of the presence of some material which he deems vulgar and risque (but not too much so), the magazine

does not establish itself as one "originated and published for the dissemination of information of a public character or devoted to literature," etc. The proceedings terminated therefore, not as they commenced with a charge of non-mailability on the ground of obscenity, but with a request for additional postage (if the magazine wishes to continue in business) because of the (to him) distasteful items appearing in the publication.

The vice of this proceeding from the standpoint of the Authors' League is that a single individual, a Postmaster General, endowed by his creator with no supernatural talents, undertakes to pass judgment on the literary and artistic value of matter appearing in the public press. No testimony in the record supports his determination since (1) the issue of "contribution to public good" was not introduced into the case until after the hearing board had found in favor of the magazine, and (2) *not a single one of the government witnesses had completely read a single issue of the magazine* and in most part they had read but a few pages or, in some instances only looked at a few pictures, which they testified were objectionable. Out of almost 2000 pages of material, but 90 items appearing on 86 pages were even complained of. Of these 90 items, 60 were approved as unobjectionable by one or more of the government witnesses. Of the 38 witnesses called by the publisher not one condemned any of the items as obscene or seriously objectionable although some witnesses frankly questioned the good taste of one or two items.

There seems to have been given in the District Court a judicial sanction to the power of censorship assumed by the Postmaster General.

Thus it was said:

> "May the Postmaster General, therefore, have not been warranted in his conclusion that the literature referred to was literature of desirable type of an educational value?" (p. 1969).

and again:

> "A cannibal of the South Seas has no conscientious scruples about catching, beheading and barbecuing, as it were, the child of his neighbor. There may be many contributing causes to the delinquency of youth, but may not the Postmaster General have reasonably had in mind that of literature as one? And did not the authors of the measure enacted by Congress have in mind good literature?" (p. 1969).

The Postmaster General thus had the court's approval of his free exercise of determination whether periodicals submitted to him contain "literature of desirable type of an educational value" and "good literature".

The District Court quoted from the order of the Postmaster General (p. 1964 Joint Appendix—Vol. 4) a statement to the effect that since the proceeding involves the use of second class mailing privileges, there is not involved the question of non-mailability as first, third or fourth class mail matter, nor the right of freedom of speech or of freedom of the press.

The constitutional objection to the action taken cannot be disposed of thus cavalierly as will be more fully discussed herein. The retention of the privileges under some other classification does not save the action from condemnation, if the appellant is entitled to second class privileges. *Lovell* v. *City of Griffin, Ga.*, 303 U. S. 444.

Said Judge Davidson:

> "There is a very decided difference between grouping and classification and that of censoring" (p. 1973).

If so, what is it? If the Postmaster, as censor, disapproves, he classifies a periodical out of existence. Is he any the less a censor for the circuitousness of his process?

McGuffy's Readers of the 1870's were suggested as the standard intended by Congress for the guidance of the Postmaster General. The Readers, it will be noted, were not assigned to the cheaper rates of the second class, but the higher rates of the third. There is nothing in the record or in history which establishes that Congress intended the second class rates to apply only to periodical publications which extol the homely virtues.

The District Court, it seems to us, failed to give proper consideration to the fact that the action here taken by the Postmaster General is in the nature of his personal amendment of the statute in circumstances where the Congress has, as a matter of record, refused to change it, and to give due thought to the constitutional invasion of the rights of the appellee.

POINT I.

If the Postmaster General's order of December 30, 1943 is sustained, he becomes established as a censor with "vague and absolute authority"* over the moral and literary value of newspapers and periodicals.

Under the Postmaster General's proposed procedure, he may distinguish between good literature (that which he deems to be for the public welfare) and bad literature (that which in his opinion fails to contribute to the public good); and to admit only the "better" at the lower rate. It is established by high and distinguished authority that this cannot be done. Indeed the office of the Attorney General of the United States has expressly condemned such practice.

The Attorney General, acting as counsel for the Postmaster in the case of *Houghton* v. *Payne*, 194 U. S. 88, stated in his brief to this Court:

> "In establishing the rate for 'newspapers and other periodical publications' *Congress was not seeking to discriminate between good literature and bad literature or to establish a censorship of the press with prizes for merit.* The thing it had in mind was not the goodness or badness of the information disseminated but the instrumentalities by which that dissemination might be accomplished. It was not thinking of the accumulated stores of 'solid or pure literature' in the vast libraries of the world, but it was thinking of how the mind of an enquiring and progressive

* This expression is taken from the opinion of Mr. Justice Brandeis in *U. S. ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407.

people might be kept abreast of the times in all departments of human thought and activity. Congress did not stand hesitating between a good and a bad newspaper." (Italics supplied.)

A Congressional Commission appointed in 1911, known as the Hughes Commission, filed its report on Feb. 2, 1912 with Congress. Mr. Justice Hughes, then an Associate Justice of this Court, headed the Commission. The question of second-class mailing privileges was the sole subject of the Commission's survey, investigation and findings. We may well assume that the investigation was painstaking and thorough and that any Commission which included, besides Justice Hughes, President Lowell of Harvard and Harry A. Wheeler, President of the Association of Commerce of the City of Chicago, would not have overlooked the feasibility of making distinctions among classes of periodicals enjoying second-class privileges if indeed such a solution were within the realm of possibility. The Commission's report was clear, honest and forthright. It recommended no tortuous distinction between one type of literature and another, but on the contrary, sweepingly set aside such possibility as a solution. Said the Committee:

"The low rate has helped to stimulate an enormous mass of periodicals, many of which are of little utility for the cause of popular education. Others are of excellent quality, but the experience of the post office has shown the impossibility of making a satisfactory test based upon literary or educational values. *To attempt to do so would be to set up a censorship of the press.* Of necessity the words of the statute 'devoted to literature, the sciences, arts, or some special in-

dustry"—must "have a broad interpretation." (Italics supplied.)*

The Commission said that the educational purpose had been accomplished only in part and that "it is wholly impractical to make a low rate for publications with a considerable educational value and a higher rate for the rest" (p. 95), and at page 96 of the report:

> "The commission is further of the opinion that it would be a mistake to discriminate between newspapers and magazines or other periodicals. *So far as educational value is concerned, no satisfactory distinction can be made.*" (Italics supplied.)**

The effort or attempt to regulate the reading and entertainment of the public has often been undertaken by self-appointed crusaders whose passion for authority was greater than that for liberty. No one will assert that Congress can establish a Board of Censors to whom writers and speakers must submit their material before publishing it; and no one will assert that obscene matter may be published with impunity; yet it is unthinkable that any one person should be per-

---

* House Document No. 559, Postal Commission 1911-12, 62nd Congress, 2nd Session, "Report of Commission on Second-Class Matter", p. 142.

** The earlier Postal Commission of 1906-07 in their report on second class privileges spoke in much the same vein saying: "The prime defect in the statute is, then, that it defines not by qualities but by purposes, *and the purpose described is so broad as to include everything and exclude nothing.*

"*With the exception of a few instances where the publication has been excluded because the information was deemed not to be public, no periodical has ever been classified by the application of tests of this kind. Any attempt to apply them generally would simply end in a press censorship*" (pp. xxxvi-xxxvii). (Italics supplied.)

mitted to indulge a passion for authority by assuming the right to precensor public utterances.

In the course of the years, individuals and groups have made themselves obnoxious to their intelligent contemporaries and ridiculous to future generations by banning works which are established if not as classics, then as shining and brilliant pieces of literature, accepted as such by the test of time. The available list of such works is too large to repeat here, but among them are:

Homer's "Odyssey"; Cervantes' "Don Quixote"; La Fontaine's "Fables"; Defoe's "Robinson Crusoe"; Shakespeare's "Venus and Adonis"; Bizet's "Carmen"; Ibsen's "Ghosts"; Bronte's "Jane Eyre"; Zola's "Nana"; Hawthorne's "The Scarlet Letter"; Hardy's "Tess of the D'Urbervilles"; Cabell's "Jurgen"; Sherwood Anderson's "Many Marriages"; Browning's "Aurora Leigh"; Maeterlinck's "Mona Vanna"; Flaubert's "Madame Bovary"; Tolstoy's "Kreutzer Sonata"; Strauss's "Salome"; Shaw's "Man and Superman"; Gilbert and Sullivan's "Mikado".

Always those who condemn such work have minds rooted in the past. Morals are a question of custom, time and place. The crusading censors merely disagree with the mores of the day and will not tolerate that times and customs change. Perhaps in the nature of things and in the absence of a more inspired method there is no way but by a jury submission to pass on charges of illegal publications expressly excluded from the mails under criminal statutes, but there is and can be no question of the wholly abhorrent impropriety of permitting any person in his

own uncontrolled discretion to condemn and stifle a publication. However able and competent the Postmaster General is, what equipment has he or had his predecessors or will his successors in office have to look into the minds of the millions and to determine the effect which the reading of a given work will have, and then decide whether the effect is good or bad? The order of the Postmaster General when stripped of confusing verbiage is reduced to the simple proposition that he thinks the magazines are, though not really obscene, nevertheless nearly so and therefore not for the public good *at second-class rates.*

When confronted with the question of what is and what is not obscene, there is of course no easy answer. Judge Learned Hand in *United States* v. *Kennerley*, 209 Fed. 119, 121, venturing a definition later accepted by the Court of Appeals (*Parmalee* v. *United States*, 113 Fed. (2nd) 729) and by the 2nd Circuit (*United States* v. *Ulysses*, 72 Fed. (2nd) 705) said:

> "If there be no abstract definition, such as I have suggested, should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now? * * *
>
> "Nor is it an objection, I think, that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject-matter is left to the gradual development of general notions about what is decent. * * *"

In an early English decision, *Regina* v. *Hicklin*, L. R. 3 Q. B. 360 (1868) it was said:

> "An obscene book is one which has the tendency to deprave and corrupt those whose minds were open to immoral influences and into whose hands the publication might fall."

But this old English doctrine was properly rejected by our courts and is not the law of our land, a fact largely unknown to, or intentionally disregarded by, the government witnesses upon the hearings herein. An enlightened age pays a greater respect to the advancement of literature and art and subordinates the shielding of the moronic mind to the public good. Thus Judge Learned Hand in *United States* v. *Levine*, 83 Fed. (2nd) 156, 157 said:

> "This earlier doctrine necessarily presupposed that the evil against which the statute is directed so much outweighs all interests of art, letters or science, that they must yield to the mere possibility that some prurient person may get a sensual gratification from reading or seeing what to most people is innocent and may be delightful or enlightening. No civilized community not fanatically puritanical would tolerate such an imposition, and we do not believe that the courts that have declared it, would ever have applied it consistently. * * *"

The Congress of 1879 which passed the act under which the Postmaster is proceeding did not undertake to the power he assumes. The act defines the periodicals which *shall* be entitled to the second-class privilege; another Congressional Act condemns, as unmailable, lewd and obscene material. The Postmaster General arrogates unto himself the right to

create a hybrid publication not condemned by Congress as non-mailable and not excluded by the Statute setting forth conditions for enjoyment of the second-class privilege. He creates a new category of mail matter, namely, a "nearly obscene non-second-class periodical" and says in substance this periodical has a bad moral effect if mailed at second-class rates but not if mailed as merchandise at a higher rate. Indeed non-mailable matter is not defined by any separate statute at all; certain material is declared non-mailable in the same statutes which makes mailing of such matter a criminal offense. For example, it is a criminal offense to send obscene literature through the mail and thereby the material becomes non-mailable.

Now it is said that a periodical which lends itself to a certain type of humor, art and story (not obscene), should be denied its second-class rate (the rate which Congress has said periodicals *shall* enjoy) because in the Postmaster General's view it is "not being originated and published for the dissemination of information of a public character, or devoted to literature, * * *" (5572). In other words because of the inclusion of some material, less than five percent, which the Postmaster says is "non-public good" literature and art, the magazine cannot be found to be originated and published for the dissemination of information of a public character or devoted to literature, etc.

A perfectly mailable, non-obscene periodical* thus becomes merchandise not entitled to be mailed as a periodical merely because some very small part of its

* Upon the pre-trial proceedings in the District Court, counsel for the Postmaster General stipulated that the Postmaster General does not defend this action on the grounds either (1) that Esquire is obscene within the provisions of 18 U. S. C. 334; or (2) that it is non-mailable under that or any other statute.

content does not measure up to the Postmaster General's personal standards of what contributes "to the public good and the public welfare."

That the periodical Esquire enjoys a high degree of literary standing is established in the record on file. It commands sufficient respect among leaders of the literary world to have merited contributions by such writers as, among others, Theodore Dreiser, John Dos Passos, Lord Dunsany, Lion Feuchtwanger, Ernest Hemingway, F. Scott Fitzgerald, Maxim Gorky, D. H. Lawrence, Maurice Macterlinck, Thomas Mann, Andre Maurois, Franz Molnar, Luigi Pirandello, Jacob Wassermann, Thomas Wolfe and Arnold Zweig; and art by George Bellows, Thomas Benton, Alexander Brook, James Chapin, Salvador Dali, William J. Glackens, Rockwell Kent, George Luks, Reginald March, Henry Varnum Poor, Diego Rivera, John Sloan and Eugene Speicher.

A tabulation of the text features of 11 issues shows 85 articles on subjects of current interest, of which 62 concern the war effort; 59 short articles on a variety of subjects; 73 fiction shorts; 57 sports articles or stories; 22 articles on personalities; 24 war action paintings; 11 colored photographs of dogs and birds; 11 sets of paintings, prints and drawings from well-known galleries; 27 colored photographs of motion picture personalities; 14 colored photographs of stage performers; 27 paintings and drawings with fashion treatment; and 23 paintings of the "Varga girl".

There was an analysis of ten issues of the magazine testified to by Lloyd H. Hall, head of the Editorial Analysis Bureau. The Bureau classifies, primarily for the information of national advertisers, the editorial material contained in some thirty of the leading magazines of the country (3057-8). He found 11

of the editorial content devoted to fiction, 27% to matters of general interest, approximately 9% to matters of cultural interest, approximately 8% to wearing apparel and accessories, almost 3% to travel and transportation, 10% to sports, 2½% to food, 7% to amusement, 4% to foreign and international affairs, 4½% to national affairs. Mr. Reeves Lowenthal, President of the Associated American Artists, concluded that each of the eleven issues had substantial art content of high value. Mr. Henry L. Mencken, an author and director of the Baltimore Sun, testified as to the high literary merit of the magazine and reputation of the authors. Mr. William Jacobs, President of the Presbyterian College of South Carolina, thought the periodical had contributed constructively toward the encouragement of clean sports. Dr. Fred S. Siebert, Director of the School of Journalism of the University of Illinois, said the magazine is made up largely, if not chiefly, of information of a public character. Dr. Eachs, Pastor of the Ohio University Presbyterian Church, testified as to the excellence of some of the material which the Government witnesses condemned and as to the magazine's compliance with the requirements of the statute. Mr. Louis J. Croteau, Executive Officer and Secretary of the New England Watch and Ward Society, an organization which Mr. Croteau describes as being sometimes referred to as the outstanding censorship organization in the country, and which examines each year about eight hundred to nine hundred different issues of magazines, declared that Esquire had been examined as part of the functions of his organization and that the magazine was never condemned or declared to be obscene with respect to any part of any one of the issues under examination.

nor had the Watch and Ward Society ever received a complaint against Esquire. Other noted persons who gave the magazine a clean bill of health before the Board included: Dr. William Allen Neilson, President Emeritus of Smith College, Associate Editor of the Harvard Classics and Editor-in-Chief of Webster's New International Dictionary; Major John L. Griffith, Athletic Commissioner of the "Big Ten"; Miss Mary Ellen Chase, Professor of English Literature at Smith College; George Jean Nathan, outstanding author, editor and dramatic critic; Felix M. Morley, President of Haverford College, Haverford, Pa.; J. Halsey Gulick, Headmaster of Proctor Academy, Andover, New Hampshire; Miss Marjorie Hope Nicolson, former Dean of Smith College; Drs. Kenneth J. Tillotson and Clements C. Fry, psychiatrists and advisers to the student health department of Harvard and Yale Universities, respectively; Miss Josephine Mixer Gleason, Associate Professor of Psychology at Vassar College; Dr. Hedley S. Dimock, Dean of George Williams (Y. M. C. A.) College; and Dr. Aaron Eisenman, Chaplain of the Florence Crittenton League.

The impropriety of condemning a work because some selected content is deemed objectionable by a censor, has often been pointed out in obscenity cases.

In *United States* v. *One Book Entitled "Ulysses"*, 72 Fed. 2d. 705, 707, Judge Augustus N. Hand said:

> "The question in each case is whether a publication *taken as a whole* has a libidinous effect."

and again:

> "'No work may be judged from a selection of such paragraphs alone. Printed by themselves they might, as a matter of law, come within the prohibition of the statute. So might a similar

> selection from Aristophanes, or Chaucer, or Boccaccio, or even from the Bible. The book, however, must be considered broadly as a whole.' We think Judge Andrews was clearly right and that the effect of the book as a whole is the test."

Judge Hand was quoting from an opinion of Judge Andrews in the New York Court of Appeals in the case of *Halsey v. New York Society for the Suppression of Vice*, 234 N. Y. 1.

At page 708 in the "*Ulysses*" case, Judge Hand said:

> "The foolish judgments of Lord Elden about one hundred years ago, proscribing the works of Byron and Southey and the finding by the jury under a charge by Lord Denman that the publication of Shelley's 'Queen Mab' was an indictable offense are a warning to all who have to determine the limits of the field within which authors may exercise themselves."

And so the sensibilities of the Postmaster General must not be permitted to prevail; to him was not delegated the power to change public standards of right or wrong in literature.

If the appellant's procedure receives this Court's sanction, there is danger to the authors of America that they must conform their writings to the standard of morals not of the day or of the enlightened public, but of an appointed official. To prevent this retrogression to another age, we appeal to the Court for a condemnation of the Postmaster General's order.

The government argued that the words "information of a public character" have a broader significance and it was said that the words "public good", "efficient educators" and "useful knowledge" should

somehow be read into the statute and that the Postmaster General must be allowed to determine whether or not the magazine is so designed (5294-5297, 5318). But Congress did not say so, and when, at least twice, Congressional Commissions were set up to look into the matter and advise Congress, no change in this regard was even intimated; indeed since the enactment of the law in 1879 not a word of the law in question was changed in so far as concerns the type of public information, literature, art or science required under the Fourth condition.

When one of appellant's predecessors in the past tried to add conditions to this same statute and to read into the statute provisions not contained therein, the Court of Appeals declared such procedure invalid and said:

> "By Act of Congress, March 3, 1879 C 180, 20 Stat. 355, Congress has not committed to the Postmaster the matter of determining what should be carried in the mails as second class matter and what as matter of third class, but has reserved to itself that power exclusively, itself making the classification; and it is not competent for the Postmaster General to add anything to the statute or take anything away from it."

Payne v. *U. S. ex rel., National Railway Publishing Co.*, 20 App. D. C. 581; followed in *Payne* v. *U. S. ex rel. Railway List Co.*, 20 App. D. C. 601, and certiorari dismissed on motion of Postmaster General (1904), *Payne* v. *U. S. ex rel., National Railway Publishing Co.*, 192 U. S. 602.

Who shall judge whether or not a given publication is "devoted to literature?" The word "literature" has

been variously defined. George E. Woodberry in the "The Appreciation of Literature" defines it thus:

> "Literature is an art of expression. The material which it employs is experience; or, in other words, literature is the expression of life."

And Cardinal Newman (The Idea of a University) said:

> "By Letters or Literature is meant the expression of thought in language, where by 'thought' I mean the ideas, feelings, views, reasonings and other operations of the human mind."

It is significant that the Congressional Postal Commission of 1906 in considering the question had less difficulty than the Postmaster General in finding an answer. On page xxxvi of its report (Report of Postal Commission, 1906; Govt. Printing Office 1907) it said:

> "There is practically no form of expression of the human mind that can not be brought within the scope of 'public information', 'literature, the sciences, art, or some special industry'. It would have been just as effective and just as reasonable for the statute to have said, 'devoted to the interests of humanity', or 'devoted to the development of civilization', or 'devoted to human intellectual activity'.
>
> "The prime defect in the statute is, then, that it defines not by qualities but by purposes, and the purpose described is so broad as to include everything and exclude nothing."

Congress received this report and remained satisfied with the statute although advised by its Commission of such broad scope of the language. The Postmaster General assumes an amendment to the statute

by which the meaning, accepted for almost seventy years, is modified to include an additional condition, namely, that *all* of the content of the magazine must be devoted to literature, the sciences or arts and it must contain nothing which offends the sensibilities of the current incumbent. These things are insidious. If now we allow that he may determine the magazine to be non-mailable as second-class because some of the articles and pictures are in his opinion not for the public good, we will open the door to his free appraisal of the material for other qualities which will be alleged to be undesirable. Suppose a magazine prints articles or stories held by him to be so lacking in merit, so wholly uninspired as to be of no "public good"; or so pointless as to be of no service or value to any reader; why may he not say that this also is not what was intended by Congress and the periodical should not be granted the second-class rate? Or, may he not go so far as to rule out periodicals that attack the administration then in office as "not for the public good and welfare"?

No survey has ever been made so far as we know, psychological or otherwise, as to the effect upon the reader of matter claimed to be objectionable. Apparently the Government knows of none. Perhaps it is impossible. It is accepted that the test for obscenity is whether the matter offends the mores of the times. But is there a standard by which this test may be applied? A large scale poll or survey by experts might possibly indicate something. It hardly would be in the category of substantial proof. Such polls introduced in the present case vindicated the publication completely. The blustering assertions of the present appellant, however, do not go for proof. And above all, no man in the land has either the personal equipment or the public's authority to pass judgment.

POINT II.

The Postmaster General's order is a denial of the freedom of the press and a deprivation of rights without due process of law; it is a usurpation of the powers of Congress.

If the deprivation of the right to publish a given periodical is unconstitutional, the refusal to it of the second class mailing privilege is equally so. Both Mr. Justice Brandeis and Mr. Justice Holmes stated that the right to the use of the mails is a part of free press and that the withdrawal of second class postal rights would deprive many publishers of their property without due process of law. (*U. S. ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407, 430.) These things were said in the dissenting opinion in a case where the action of the Postmaster General was upheld by the majority on the ground that the exclusion of the newspaper was justified because unmailable under a war time measure, *i. e.*, the Espionage Act.

The use of the postal service has been held to be a property right. (*Hoover* v. *McChesney*, 81 Fed. 472.) Calhoun in Congress in 1835 said:

> "The object of publishing is circulation; and to prohibit circulation is, in effect to prohibit publication * * * and the prohibition of one may as effectually suppress such communication as the prohibition of the other and of course would effectually interfere with the freedom of the press and be equally unconstitutional."

In the recent case of *Lovell* v. *City of Griffin, Ga.*, 303 U. S. 444, a statute which prohibited distribution of

literature within the city limits was held invalid despite the fact that obviously other forms of circulation were free to the publishers.

Freedom of publication includes freedom of circulation and an unjustified restriction or limitation upon freedom of circulation is unconstitutional. It is therefore not so, as is contended by the Postmaster General, that freedom of speech or freedom of press is not involved because the work is admitted as First, Third or Fourth Class Matter (R. 1878 Joint Appendix, Vol. 4).

It is common knowledge that the deprivation of Second Class mailing privileges is tantamount to a denial of any mailing privileges in respect to most of the periodicals now circulating, because of the excessive additional financial burden which would be imposed. The imposition of such burden, as the imposition of the tax in *Grosjean v. American Press Co., infra*, abridges the freedom of the press. The difference in the instant case is conceded to be over a half million dollars a year.

The refusal of second class mailing privilege is, for purposes of testing the constitutionality of the process, a refusal of the right of publication.

It is already established that before there can be denial of the right of speech or press guaranteed in the First and Fourteenth Amendments of the Federal Constitution, there must appear to be a clear and present danger that the words which are to be prohibited will bring about the substantive evils that Congress has the right to prevent. (*Schenck v. United States*, 297 U. S. 47.)

In *Bridges v. California*, 314 U. S. 252, the Court said (p. 262) that the "clear and present danger"

language of the *Schenck* case has afforded a practical guidance in a great variety of cases in which the scope of constitutional protection of freedom of expression was an issue. It has been utilized in passing on the constitutionality of convictions under the Espionage Act, *Schenck v. U. S.*, *supra*; under a Criminal Syndicalism Act, *Whitney v. California*, 274 U. S. 357; under an Anti-Insurrection Act, *Herndon v. Lowry*, 301 U. S. 242; and for breach of peace at common law, *Cantwell v. Connecticut*, 310 U. S. 296.

Since it is required to establish "clear and present danger" before the press may be restricted, even in statutes aimed at such potential harm to public welfare as Criminal Syndicalism and Insurrection, it is inconceivable that this guiding principle shall be ignored in the Postmaster General's "quasi objectionable" periodical.

In the *Bridges* case (p. 262) it was said:

> "Moreover the likelihood, however great, that a substantive evil will result, cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantive'. Brandeis, J., concurring in *Whitney v. California*, *supra*, 274 U. S. at page 374, 47 S. Ct. at page 647, 71 L. Ed. 1095; it must be 'serious', Id., 274 U. S. at page 376, 47 S. Ct. at page 648, 71 L. Ed. 1095. And even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider v. State*, 308 U. S. 147, 161, 60 S. Ct. 146, 151, 84 L. Ed. 155."

This Court said further that what finally emerges from the "clear and present danger" rule is a work-

ing principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished (p. 263). And again, at page 263:

> "Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally.
>
> "It prohibits any law 'abridging the freedom of speech, or of the press.' It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

Now this guiding principle indicates the vice of what has been done here. The right to further use of this very substantial form of distribution is denied not because it is manifest that a clear and present danger that a substantive and serious evil will result, but because the appointed official does not deem the contents of the condemned periodical to be for the public good.

Nor is it of any importance in the constitutional aspect of the case, whether or not a periodical is less than what one may fairly call "good literature". It is of grave importance to consider what might be done if this process receives final judicial sanction.

Mr. Justice Murphy said, in *Thornhill v. State of Ala.*, 310 U. S. 88, at page 97:

> "Proof of an abuse of power in the particular case has never been deemed a requisite for attack on the constitutionality of a statute purporting

to license the dissemination of ideas. *Schneider v. State*, 308 U. S. 147, 162-165, 60 S. Ct. 146, 151-152, 84 L. Ed. 155; *Hague v. C. I. O.*, 307 U. S. 496, 516, 59 S. Ct. 954, 964, 83 L. Ed. 1423; *Lovell v. Griffin*, 303 U. S. 444, 451, 58 S. Ct. 666, 668, 82 L. Ed. 949."

and again:

"It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion. See *Near v. Minnesota*, 283 U. S. 697, 51 S. Ct. 625, 630, 75 L. Ed. 1357. One who might have had a license for the asking may therefore call into question the whole scheme of licensing when he is prosecuted for failure to procure it. *Lovell v. Griffin*, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949; *Hague v. C. I. O.*, 307 U. S. 496, 59 S. Ct. 954, 83 L. Ed. 1423. A like threat is inherent in a penal statute, like that in question here, which does not aim specifically at evils within the allowable area of State control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press."

The Court said further that the existence of a statute which lends itself to harsh and discriminatory enforcement by prosecuting officials results in restraint on all freedom of discussion. And so here an interpretation of the powers of the Postmaster General which would enable him to indulge in discriminatory enforcement would likewise be a restraint on freedom of the press.

Again, in the *Thornhill* case, at page 98:

"Where regulations of the liberty of free discussion are concerned, there are special reasons for

observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression. *Stromberg* v. *California*, 283 U. S. 359, 368, 51 S. Ct. 532, 535, 75 L. Ed. 1117, 73 A. L. R. 1484; *Schneider* v. *State*, 308 U. S. 147, 155, 162, 163, 60 S. Ct. 146, 151, 84 L. Ed. 155. Compare *Lanzetta* v. *New Jersey*, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888."

We may alternately consider the Postmaster General's act either an attempt to exercise police power over publications with whose editorial content he is in disagreement, or an effort to increase the revenue of the Post Office Department. In either case his approach is not a legal one. If there is to be an increase of the rates or a reclassification it must be done by Congress. If there is to be an extension of the obscenity laws it must be by legislative action; but beyond everything, there must not be, now or ever, a single official empowered to censor the written or spoken word for any purpose or in any guise.

POINT III.

The legislative, administrative and judicial history of the postal law and its enforcement establishes that it is not now within the province of the Court to reinterpret it.

The history of the statute briefly is this: The first act for special rates for newspapers was passed in 1792 (1 Stat. 328). Magazines were added in 1794 (1 Stat. 362). In 1825 magazine rates were adjusted and again in 1827. There were various changes in

rates between 1845 and 1879. In 1863 for the first time mailable matter was divided into classes, the second of which was "regular printed matter" which included all mailable matter exclusively in print issued at stated periods. The present classification of mail matter was enacted in 1879. Rates were changed in 1884 and again in 1885 and in 1894 the definition of publications was enlarged to include those of certain associations. However, never in the history of the department from the outset was any distinction made between respective types of literature, good, bad or indifferent.

Mr. Edwin C. Madden, then Assistant Postmaster General, in his remarks to the Postal Commission of 1906 said:

> "What does the law mean by 'devoted to literature'? If we were to hold that the term 'devoted to literature' means that the publication shall be devoted to the subject of literature, and not merely to contain literature itself, imagine the result. A great number of our best magazines would be subject to exclusion. Nevertheless that is exactly the construction that is placed upon the other three provisions, namely, the sciences, arts or some other special industry. One devoted to the sciences discusses medicine, for instance, one devoted to the arts discusses music, etc., and one devoted to some special industry discusses matters relating to that industry. One supposed to be devoted to literature is admitted to this class upon its containing literature itself without any discussion on the subject at all."

Mr. Madden said that if the head of a department finds administrative difficulties, he should endeavor

to have the defects removed and that it was in this spirit that the department had asked for the creation of a commission to look into the whole subject. This, it will be noted, was the Congressional Committee which ultimately reported to Congress and based upon its report, Congress concluded that no change should be made in the statutory enactment (Hearings before Postal Commission of 1906, p. 29). But the Postmaster General, by the presently adopted procedure, asks the Court by judicial interpretation to do what Congress apparently has declined to do. The Commission of 1906 concluded in its report (Government Printing Office 1907) that every form of expression of the human mind comes within the scope of public information, literature, the sciences, art, etc., and that any attempt to apply qualitative tests generally would end in a press censorship. Mr. Madden suggested to Congress that the element of currency in a magazine as an essential characteristic be spelled out by amendment of the Statute. He said:

> "The requirement of currency is something that can be enforced administratively. While the Post-Office cannot really determine whether the matter is literature or not, without the necessity of becoming a censor of its quality, it can determine with ease whether or not it is current."

Chairman Madden had six suggestions for a proposed new Bill. The only new idea advanced was that the periodical should be originated and published for the dissemination of *current* public information or the presentation, discussion or treatment of *current* topics in relation to the sciences, arts or some special industry and must not consist wholly or substantially of fiction. Congress adopted none of

the suggestions except a proposal that a Postal Commission be appointed. Thereupon the Commission known as the Hughes Commission, heretofore referred to, was appointed. The Hughes Commission, as already appears, found it impossible to make a satisfactory test based upon literary or educational value and declared any such attempt would be a censorship of the press. The Commission felt that under these circumstances the solution would be an increase in charge for second-class mail in order that a more equitable adjustment would be made.

There was no intimation that the law was being violated by the admission of any periodicals not of a given standard of literary merit, or containing in part material of questionable public good.

It is apparent, therefore, that Congress is completely advised of conditions existing in the field of second-class mail matter. It has from time to time made such changes and modifications as it thought appropriate. It has drawn a sharp line against obscenity by providing for the criminal prosecution of those who send such material through the mail and declared the material itself to be non-mailable. It has never seen fit to say that the second-class privilege is to be withdrawn from magazines which, in the Postmaster General's opinion, contain matter which is, in some small part, vulgar or in bad taste.

After the report of the Hughes Commission was filed there was a meeting before the House Committee on Post Offices and Post Roads on February 9th and 10th, 1914. The Chairman said he thought there ought to be a short hearing in connection with the hearings already held on the subject, and the report of the Hughes Commission on the question "so that we can understand better what ought to be done".

In all this there was not one word of reclassification. In this connection Postmaster Burleson wrote to Mr. Jonathan Bernie, Jr., Chairman of the Joint Committee, on January 13th, 1914, recommending an increase from one to two cents per pound.

In 1898 there was before the House of Representatives the so-called Loud Bill (HR 5359), whose intended purpose was to force out of the second-class mailing privileges certain publications. Mr. Jeremiah D. Botkin, opposing it (March 3rd, 1898), spoke of "low grade literature in the form of cheap papers, etc." The Loud Bill never became law.

The Congressional intent was indicated by the brief of the Attorney General filed on March 7th, 1904 (heretofore referred to), in the case of *Houghton* v. *Payne*, 194 U. S. 88; where he said:

> "*We confidently submit that what Congress consistently had in mind in the creating of this privileged class of publications was the universally recognized, commonly accepted and perfectly well understood periodical of every day speech.* All argument based upon the value and high standing of the Riverside Literature Series is wholly beside the mark.
>
> "As we have already attempted to show, by the same token which admits them, all other books good, bad and indifferent, may be admitted. The Postmaster General would have no more right to admit the Riverside Series of Literature on account of its literary value than he would have the right to exclude these publications on the ground of want of literary value." (Italics supplied.)

For sixty-seven years the second-class mailing privilege has been accorded periodicals on the basis of

their adherence to the conditions outlined in Section 226 of the Postal Service Law (39 U. S. C.). Never in the history of the Law and its administration so far as Post Office Department witnesses could recall, has it ever been contended that mailable material may not be forwarded under second-class privileges because the Postmaster General considered its content not of sufficiently high merit to justify the privilege. This may sound baldly stated, but there can be no doubt that it fairly represents the Postmaster General's action. He said in his order that the magazine is not being published for the dissemination of information of a public character, nor has it been devoted to literature, etc., within the meaning of the section, in that it has included as a policy, a few items allegedly skirting close to the edge of obscenity. We do not believe we are misstating the case, therefore, in saying that he has denied the second-class privilege because he considered some of the contents of the magazine not unlawful, but distasteful to him. Note that the Board appointed by him did not find them either unlawful or distasteful.

The absurdity to which the contended interpretation would lead is manifest. It is as though the Court were asked to add to the statute the words "if the publication contains matter not obscene, but nearly so, it may be mailed only under the first, third or fourth class, and the Postmaster General shall have the sole right to pass judgment on the material". The prospect is staggering.

It is settled that statutes long interpreted in a given way and more particularly statutes so administered by those charged with executive duties, are to be interpreted in accordance with established construction. So the Circuit Court in *United States* v.

Chicago, St. Paul, Minneapolis Railway, 43 F. 2nd. 300, 306, said:

> "We should be reluctant to overturn a long standing department construction, presumably known to the legislative department which has made no amendments to the act, seeking to make it applicable to the practice now challenged in this action."

The Supreme Court in *United States* v. *Jackson*, 280 U. S. 183, 193, said:

> "It is a familiar rule of statutory construction that great weight is properly to be given to the construction consistently given to a statute by the Executive Department charged with its administration."

In another case it was said that only compelling language would under such circumstances warrant the rejection of a construction so long and so generally accepted, and in particular where an overturning of the practice would have such far reaching consequences; *Maynard* v. *Elliott*, 283 U. S. 273, 277.

There should not be permitted an amendment by administrative fiat or even by judicial interpretation by which something new will be added and the Postmaster General empowered to make a personal selection, out of the 25,000 magazines (Par. 22, Answer), of such as in his opinion are sometimes guilty of bad taste, and, acting as accuser, judge and jury, condemn them to death.

In the instant case the Postmaster General does not dispute that the conditions are met, except that in his opinion a periodical does not establish itself as one originated for the dissemination of information of a

public character, etc., unless its content is for the public good and contains no distasteful matter. It is common knowledge that the second-class privilege is and has been freely given over the years in complete disregard of the merit of content. Should Congress wish to amend the Act in this respect that would be its privilege. Should the Attorney General find need to prosecute a periodical for sending obscene matter through the mail, that would be his duty. It is not the function of the Postmaster General to interfere with either.

CONCLUSION.

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

No. 399

ROBERT E. HANNEGAN, as Postmaster General of the United States,

Petitioner

against

ESQUIRE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

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IN THE

Supreme Court of the United States

No. 399

ROBERT E. HANNEGAN, as Postmaster General of the United States,

Petitioner,

against

ESQUIRE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

Statement of the Case

This case involves an action to enjoin the enforcement of, and to have declared invalid, an order dated and filed December 30, 1943, made by petitioner's predecessor as Postmaster General of the United States, and revoking the second-class mailing privileges of Esquire Magazine. On July 27, 1944, the United States District Court for the District of Columbia entered a final judgment which dismissed the complaint on the merits, 55 F. Supp. 1015. The Court of Appeals for the District of Columbia reversed, 151 F. (2d) 49, and the Post Office has brought the question up before this Court.

Interest of the American Civil Liberties Union

The American Civil Liberties Union is a nationwide, non-profit organization, whose members are lawyers and

laymen interested in the protection and strengthening of the fundamental personal rights guaranteed to individuals by the Constitution of the United States and by those of the various states.

We have filed a brief because of the extraordinary importance of this case. By a new and unique construction of an innocent-looking provision in the postal laws, the Postmaster General[1] has here started a new policy, apparently to be widely applied, of restricting the circulation of literature through the mails in accordance with his personal opinion of its value. If this construction should be sustained and the Postmaster General should be thus vested with despotic powers of control over access to the mails, then freedom of circulation—which is essential to freedom of the press—will be seriously impaired.

Statute and Order Involved

The issue presented to the Court herein is primarily as to the extent of the petitioner's authority under the second-class mailing statute, 39 U.S.C.A. Sections 224, 226. For convenience, we reprint the entire statute at this point.

> Section 224. "Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections 225 and 226 of this title."
>
> Section 226. "Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second class are as follows: First. It must regularly be issued at stated inter-

1. The term refers to the office, not necessarily to a personality. When so treated, the actions of former Postmaster General Frank C. Walker are considered also those of the incumbent.

vals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second. It must be issued from a known office of publication. Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publication. Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry and having a legitimate list of subscribers. Nothing herein contained shall be so construed as to admit to the second class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

In the order No. 23459 of December 30, 1943, revoking *Esquire's* second-class mailing privileges, Postmaster General Walker stated the Post Office's current interpretation of the fourth condition in Section 226.

"In arriving at a determination in this particular type of proceeding it is necessary that the Postmaster General recognize the nature, conditions and result of these unique second-class mail privileges because they have been established and are supported and maintained by the people of the United States.

"In nature they are true privileges, specifically called and referred to as such by the postal statutes, and stated by the Supreme Court to be "* * * justified as part of the "historic policy of encouraging by low postal rates the dissemination of current intelligence". It is a frank extension of special favors to publishers because of the special contribution to the public welfare which Congress believes is derived from the newspaper and other periodical press."[2]

2. *Milwaukee Pub. Co. v. Burleson*, 255 U. S. 407, 410.

"Furthermore, to assure that a contribution of that precise character is in fact made, Congress has required that to enjoy these privileges and preferences the publication as a fourth condition 'must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry.'[3] . . .

"There are good reasons for this jealous regard by Congress of these extraordinary privileges. . . .

"The plain language of this statute does not assume that a publication must in fact be 'obscene' within the intendment of the postal obscenity statutes before it can be found not to be 'originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry'.

"Writings and pictures may be indecent, vulgar, and risque and still not be obscene in a technical sense. Such writings and pictures may be in that obscure and treacherous borderland zone where the average person hesitates to find them technically obscene, but still may see ample proof that they are morally improper and not for the public welfare and the public good. When such writings or pictures occur in isolated instances their dangerous tendencies and malignant qualities may be considered of lesser importance.

"When, however, they become a dominant and systematic feature they most certainly cannot be said to be for the public good, and a publication which uses them in that manner is not making the 'special contribution to the public welfare' which Congress intended by the Fourth condition.

"A publication to enjoy these unique mail privileges and special preferences is bound to do more than refrain from disseminating material which is

3. Section 14, Act of March 3, 1879 (20 Stat. 359; 39 U.S.C. 226).

obscene or bordering on the obscene. It is under a positive duty to contribute to the public good and the public welfare.

* * *

"Whatever the featured and dominant pictures, prose, verse and systematic innuendos of this publication may be, they surely are not 'information of a public character' or 'literature, the sciences, arts or some special industry'."

In brief, then, *Esquire* is to lose the use of the second-class rates because the Postmaster General thinks it is quasi-obscene and is not impressed with its literary value.

In this connection the Postmaster General has been equally explicit in announcing the start of a campaign to remove from the second-class rolls many other periodicals not in accord with his literary tastes. In his *Annual Report* for the year ended June 30, 1943, he stated:

"The Department has given continued attention to the character of those publications referred to in my report of last year as being of doubtful eligibility to the second-class postage privilege—a privilege which costs all the taxpayers many millions of dollars a year.

"It is not believed, however, that our citizens then were or now are willing to pay through general taxation part of the postage on magazines which violate the obscenity or the sedition statutes, or which cannot by any stretch of the imagination be construed as published to elevate the mind, or improve public thought, or disseminate information of a public character. The freedom of the press is not here involved. It is a question of correct classification of mail matter under the law.

"It is a duty of the Postmaster General, and a difficult one, to determine whether a publication is

> worthy of the second-class mail privilege. When mistakes through laxity are made the general public pays through taxation. There are differences of opinion among good people as to whether certain publications cater to those who seek impure intellectual pleasures, and whether they endeavor to differentiate between 'mirth and indecency' and 'wit and licentiousness.' Publishers of such magazines as a rule go as far as they dare, hoping they will not be called to account under the laws against obscenity."

In the *Esquire* order, a further indication of the same campaign appears:

> "If this theory is applied, it means that a large number of publications and periodicals of the editorial, fiction and humorous classes, which even though educational, innocent, delightful and entertaining, would not be permitted to use the second-class mailing privileges because they are substantially devoted to literature or art of a classical or high artistic quality."

Summary of Argument

For the following reasons we believe this Court should uphold the Court of Appeals in invalidating petitioner's order of revocation and granting the injunction prayed for by respondent:

1. The so-called "privilege doctrine"—upon which the order attacked herein is based—is an indefensible anachronism in constitutional law.

2. Possession of the second-class mailing privilege[4] is essential to a periodical's ability to circulate

4. We assume it is not necessary to argue with the Postmaster General that use of this term in a popular sense does not imply agreement with all the implications of the so-called "privilege doctrine". But compare the second paragraph of the order as quoted above.

freely and to compete on fair terms for the public's interest, and therefore to the freedom of the press.

3. The Postmaster General's order revoking *Esquire's* right to use of the second-class mailing rates is unconstitutional.

4. The order revoking *Esquire's* second-class mailing privilege transcends the authority vested in the Postmaster General by the federal postal statutes.

5. This Court has plenary power to review the petitioner's construction of the second-class mailing statute. Since the controversy at bar involves fundamental individual liberties, petitioner's determinations on questions of fact are not entitled to the presumption of finality usually attached to administrative findings.

POINT I

The so-called "privilege doctrine"—upon which the order attacked herein is based—is an indefensible anachronism in constitutional law.

In Postmaster General Walker's opinion, accompanying and purporting to justify the order barring *Esquire* from the second-class rates, the order is grounded expressly on the theory that use of the second-class rates is an "extraordinary privilege". By this language the Postmaster General reaffirmed the so-called "privilege doctrine" *i.e.*, that Congress has plenary control over the mails and can grant or withhold access to the mails on any terms it sees fit—and incidentally brought that doctrine over into the question of mail classification. The

order's reliance for this point on *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407,[5] is equally clear. While we are convinced that this Court could invalidate the Postmaster General's order on narrower grounds, e. g., because it exercises authority not conferred by the statute and because it is not supported by the facts adduced at the administrative hearings, it is clear that the Court cannot *uphold* the Postmaster General's order and the District Court—particularly on any theory of administrative finality—without accepting and reaffirming the "privilege doctrine". Since the Post Office has raised the question directly in this way, and indicated that it is planning a censorship campaign in reliance on the "privilege doctrine", we believe it is incumbent on this Court to reassay the validity of this theory.

While the constitutional guarantees of free expression have existed all through our history, their implementation by a spirit of active judicial enforcement and a series of specific rules has been primarily a development of the last twenty-five years. During this period the courts have repeatedly recognized that, in addition to safeguarding individual rights, the constitutional guarantees of freedom of speech and the press serve to protect the public's interest in the spread of free discussion and the evaluation of differing points of view. Thus it is no longer simply a question of balancing the individual's (or a periodical's) rights against those of the state; instead, in analyzing any claim for limiting free expression, the alleged evil must be balanced against both the individual's right to speak and the public's interest in hearing all that is to be said.

5. Cited herein also as *Milwaukee Publishing Co.* v. *Burleson* and referred to as the *Burleson* case.

A review of the judicial criteria developed since the first World War to evaluate the constitutional validity of state and federal limitations on free expression will indicate some more specific rules for analyzing these cases. First, the usual presumptions in favor of the constitutionality or legality of official action have in practice, if not fully in theory, been moderated and practically discarded in this field. See *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4; *Schneider* v. *State*, 308 U. S. 147; *Stromberg* v. *California*, 283 U. S. 359; *Lovell* v. *City of Griffin*, 303 U. S. 444; *Thomas* v. *Collins*, 323 U. S. 516; Lusky, *Minority Rights and the Public Interest* (1942), 52 Yale L. Journal 1. Second, legislation or administrative regulations which are worded so broadly that they can be construed to restrict admittedly proper discussion, along with discussion which may be subject to regulation, have been held to be invalid on their face. *Stromberg* v. *California*, *supra*; *Lovell* v. *City of Griffin*, *supra*; *Thornhill* v. *Alabama*, 310 U. S. 88, 96-98; *Taylor* v. *Mississippi*, 319 U. S. 583. Third, there must be a close connection between the speech and the evils in question: it has been generally held that, in order to justify a limitation on the expression of ideas, it must be shown that some evils within the reach of preventive governmental power would be *likely* to arise as an *immediate result* of the statements in question—the so-called "clear and present danger rule". *Schenck* v. *United States*, 249 U. S. 47; *Whitney* v. *California*, 274 U. S. 357, 377 (concurring opinion by Mr. Justice Brandeis); *Herndon* v. *Lowry*, 301 U. S. 242; *Bridges* v. *California*, 314 U. S. 252; *Thomas* v. *Collins*, *supra*. The fourth consideration—and this is often considered as another part of the "clear and present danger" rule—is the seriousness of the danger; in cases

where some sort of harm is admittedly likely to occur as a result of untrammeled discussion, before a restraint may be exercised it must also be shown that the evil is so serious or the possibility of subsequent redress so futile as to overbalance the public interest in the free dissemination of ideas. *Near* v. *Minnesota*, 283 U. S. 697; *United States* v. *Carolene Products Co.*, *supra*; *Schneider* v. *State*, *supra*; *Bridges* v. *California*, *supra*; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624.

The wide extent and pervasive spirit of the judicial outlook which has been developed since 1920 in these "civil liberties cases" can only be appreciated by a brief review of the treatment accorded specific problems. The most striking evidence of the change has appeared in this Court's willingness to change its approach on apparently settled problems. Thus in at least two important instances the decisions in recent years have run directly contrary to those made in the early 1900's.

1. In *Patterson* v. *Colorado*, 205 U. S. 454, a proceeding involving charges of contempt of court, doubts were expressed as to whether any federal judicial safeguards existed to protect free discussion against interference by state government. But in *Gitlow* v. *New York*, 268 U. S. 652, and in *Fiske* v. *Kansas*, 274 U. S. 380, the Fourteenth Amendment was invoked to provide just such a protection. And in *Bridges* v. *California*, *supra*, the guarantee of the Fourteenth Amendment was specifically applied to restrict liability for statements which were the subject of a contempt proceeding in a state court.

2. In *Davis* v. *Massachusetts*, 167 U. S. 43, it was held that there was no constitutional right to make speeches in municipal parks. But in *Hague* v. *CIO*, 307

U. S. 496, the Fourteenth Amendment was found to protect freedom of speech in city streets and parks against arbitrary curtailment.

The recent vigilance shown by this Court to protect intellectual freedom has been exemplified in decisions dealing with a wide variety of types and media of communications. In the case of statements which allegedly endangered military morale, it was first and eloquently indicated that safeguards existed against arbitrary restrictions. *Schenck* v. *United States, supra; Abrams* v. *United States,* 250 U. S. 616, 624; *Gilbert* v. *Minnesota,* 254 U. S. 325, 334. See *Hartzel* v. *U. S.*, 322 U. S. 680, and *Baumgartner* v. *U. S.*, 322 U. S. 665. Speeches advocating violent overthrow of the government have been held subject to restraint only where there was actual danger of insurrection. And an attempt to prohibit speech systematically exercised to defame a religious group, without involving an immediate danger of violence, was overruled in *Cantwell* v. *Connecticut,* 310 U. S. 296. Advocacy of trade union organization by speeches, peaceful picketing, and similar devices has been recognized as a constitutionally protected form of free speech, in *Thomas* v. *Collins, supra, Thornhill* v. *Alabama, supra,* and *A. F. of L.* v. *Swing,* 312 U. S. 321. The analogous right of assembly was vigorously upheld in *DeJonge* v. *Oregon,* 299 U. S. 353.

Freedom of the press has also been specifically protected against governmental curtailment under the new approach. *Near* v. *Minnesota, supra; Grosjean* v. *American Press Company,* 297 U. S. 233. And a particularly strict opposition was voiced in these cases against any form of previous restraint on publication or circulation. The distribution of leaflets has been accorded a similar

right of freedom from restraint on circulation. *Lovell* v. *City of Griffin, supra; Schneider* v. *State, supra; Murdock* v. *Pennsylvania,* 319 U. S. 105; *Martin* v. *City of Struthers,* 319 U. S. 141; *Douglas* v. *City of Jeannette,* 319 U. S. 157. In fact, the new approach has already been applied, universally and without exception, in judicial protection of free expression in all the major media of communication—except for two, motion pictures and the mails, in which the question has not been passed on by this Court since 1920. See *Associated Press* v. *United States,* 65 Sup. Ct. 1416; *Columbia Broadcasting System* v. *United States,* 316 U. S. 407; *National Broadcasting Company* v. *United States,* 319 U. S. 190.[6]

The new judicial attitude of active protection of civil liberties has already invaded two spheres in which the federal government had traditionally been held to possess "plenary powers"—the question of deportation from the country of aliens and of imported literature, on the ground of supposed undesirability. In this realm of intellectual mercantilism, the time-honored policy of administrative finality has been forced to yield, and this Court has recently enforced a strict construction of the relevant statutory provisions in naturalization and deportation proceedings. *Bridges* v. *Wixon,* 89 L. Ed. 1489; *Baumgartner* v. *United States,* 322 U. S. 665; *Schneiderman* v. *United States,* 320 U. S. 118; *Kessler* v. *Strecker,* 307 U. S. 22. Similarly, in the lower federal courts, the power of the customs officials under 46 Stat. 680, 19 U.S.C.A. Section 305, to ban the importation of books into the United States because of "obscenity" has been strictly construed. *United States* v. *One Book Called "Ulysses",* 5 F. Supp.

6. But compare *Mutual Film Corp.* v. *Industrial Comm. of Ohio,* 236 U. S. 230; *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407.

182, aff'd, 72 F. (2d) 705; *Parmelee* v. *United States*, 113 F. (2d) 729.

It is difficult seriously to suggest today that the mails are not an equally important medium for the dissemination of intelligence. Yet a strikingly anachronistic contrast to the tenor and philosophy of the above cases appears in the present state of the law governing communication through the use of the mails. Actually this is hardly surprising; for the doctrine controlling this field was settled in the late nineteenth century, in a group of fraud and lottery cases. And, because of this circumstance that no important cases involving exclusion from the mails have arisen since the early 1920's, the postal powers have never been examined broadly in the light of the policy of wide judicial protection of freedom of communication, as embodied in recent interpretations of the First Amendment.

It should be remembered that the Postmaster General's order under attack herein, and the opinion of the District Court, are both clearly predicated on the so-called "privilege doctrine". Unquestionably the older fraud and lottery cases, and one leading wartime case, contain language which give this theory an almost unlimited scope. But a resumé of the history of the "privilege doctrine" will suffice to indicate that the Postmaster General has here sought to extend his powers to a degree hitherto unprecedented, far beyond what has been actually decided in previous cases. More fundamentally, we contend that the whole doctrine is an outmoded concept which cannot survive direct judicial re-examination.

We begin with a short historical summary. The extent of the postal power was almost completely ignored at the

Constitutional Convention, and only the slightest attempt was made to control the content of the mails until after the Civil War. But in the 1860's and 1870's lotteries and fraudulent promotion schemes became a serious problem on a national scale, and these operated through the use of the mails. Accordingly, statutes were passed excluding from the mails any *specific individual* material used in connection with any lottery enterprise or any scheme to defraud, 15 Stat. 196; 17 Stat. 323. At about the same time, a statute was adopted excluding from the mails obscene material, 13 Stat. 507.

It was against this background that the "privilege doctrine" appeared and grew. When promoters of shady schemes challenged the restrictive statutes, this Court gave them short shrift. In *Ex parte Jackson*, 96 U. S. 727, the first important case, a promoter challenged the statute excluding lottery material from the mails. The Court stated broadly and without any further analysis that the power to establish a postal system and the "right to designate what shall be carried necessarily involves the right to determine what shall be excluded" (96 U. S. at 732). However, the Court immediately added important limitations on this unnecessarily latitudinous language. In discussing the relation between freedom of the press and the right of access to the mails, the Court declared:

> "Liberty of circulating is as essential to that freedom as liberty of publication, indeed, without that circulation, the publication would be of little value.
>
> "The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mailable mat-

7. See Rogers, *The Postal Power of Congress* (1916) (John Hopkins University Studies, Series XXXIV No. 2); Deutsch, *Freedom of the Press and the Mails* (1938), 36 Mich. L. Review 703.

> ter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail." (96 U. S. at 732-733.)

The Court then added that free access to the mails was not necessary, since other means of circulation were available. Thus it is clear that even the *Jackson* case took note of the possible conflict between Post Office regulations and freedom of communications, and unhesitatingly preferred the latter.

In succeeding cases, this doctrine—that the use of the mails was a privilege which could be extended or withheld by the government on any grounds whatever—was often repeated, without any real analysis or much mention of the freedom-of-the-press caveat of the *Jackson* case. *In re Rapier*, 143 U. S. 110, again involved denial of the mails to lottery material. In *Public Clearing House* v. *Coyne*, 194 U. S. 497, involving an obviously fraudulent scheme, the Court stated that "the legislative body in thus establishing a postal service may annex such conditions to it as it chooses" (194 U. S. at 506), and sanctioned postal refusal to deliver the mail in question. Once again the language was broader than the question at bar required. See also *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94.

The first World War provided the first extensive examples of exclusion from the mails of matter because its intellectual content was found undesirable. The Espionage Act of 1917, 40 Stat. 219, 230, 50 U.S.C.A. Section 33, 18 U.S.C.A. Section 343, defined three types of seditious material, and declared that such matter was unmailable. The Post Office's whole policy in administering this section must be considered in the light of the wartime hysteria existing at that time, and resulted in some remarkable in-

terdictions; Veblen's *Imperial Germany and the Industrial Revolution* was recommended for general reading by George Creel and then excluded from the mails, and an issue of the *Nation* was actually excluded by the Postmaster General for criticizing Samuel Gompers.

The leading case arose amid this atmosphere, but on a different point. Some issues of the *Milwaukee Leader*, a Socialist publication, were found unmailable and excluded. The Postmaster General then proceeded on this basis to take action against all *future* issues—and he did this by revoking the *Leader's* second-class mailing permit. In *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407, the Supreme Court sanctioned this action. First, to set the background, the "privilege doctrine" was accepted by a statement that the government has a "practically plenary power over the mails." (255 U. S. at 411.) Second, the Court apparently—though this is not entirely clear—accepted the Postmaster General's extraordinary theory that, since one issue had been excluded from the mails, the *Leader* did not meet the requirements of being *regularly issued* under the second condition of the second-class mailing statute. Then the Court proceeded to analyze the terms on which Congress intended to grant access to the mails, by a combined consideration of the Espionage Act and the second-class mailing statute. Third—and this is the basic confusion introduced by the *Burleson* case—it was assumed that by passing both acts, Congress intended to assimilate the criteria for mailability under the Act of 1917 into the requirements for the second-class rates under the Act of 1879. In other words, if a particular number of a periodical was thought to be wholly non-mailable, the Postmaster General would now have his choice of suspending it from the mails or of withdrawing the second-class entry. No

evidence was presented in support of this bit of synthetic interpretation. Fourth, the theory was announced that, if a periodical had repeatedly published material thought to violate the Espionage Act, the purpose of the two acts was to deny the periodical future access to the second-class rates—on the ground that a presumption had been adopted that such action would continue.

The *Burleson* case has striking weaknesses, both as constitutional law and statutory construction. First, it is charged with the hysteria of that time; at one point the majority opinion (seven to two) actually denounced the publisher for undertaking the litigation because it was "futile". Second, as pointed out in vigorous dissents by Mr. Justices Brandeis and Holmes, the majority opinion failed to recognize that, under modern conditions a free press could not exist without access to the mails and the use of the second-class rate. Third, as Mr. Justice Holmes succinctly pointed out, "The question of the rate has nothing to do with the question whether the matter is mailable." (255 U. S. at 437.) And the definition of "mailable matter of the second class", as given in 39 U.S.C.A. Sections 224 and 226 and quoted on page 2, *supra*, appears complete in itself. Fourth, in contrast to the basic conclusion that the Espionage Act was intended to authorize permanent exclusion from the second-class rate, the legislative history of the Act itself is perfectly clear that in Congress the provisions for taking action under the statute were expressly limited to a single issue. As originally introduced, the Act made a specific provision for permanent exclusion from the mails of periodicals found to violate the Act. But, when it was brought to the floor of the House, Representative Volstead (acting as its floor manager) explained that the committee had purposely deleted these provisions:

> "The only power we left in the bill over the mails gives the postmasters the right to exclude treasonable or anarchistic matter—exclude that particular edition, the particular article." (55 Cong. Rec. 1607.)

It is thus perfectly clear that, under the Espionage Act, as in the case of all other statutes involving exclusion from the mails, Congress intended that action taken against alleged violators should be limited to excluding the particular matter found objectionable. No presumption was ever adopted in any Act that alleged violations would continue, and thus justify exclusion of future issues.

A little later, *Leach* v. *Carlile*, 258 U. S. 138, again presented the question of the extent to which previous restraints could be imposed over access to the mails. In dissenting from the prevailing treatment of the fraud order statute, frankly rooted on the "privilege doctrine", Mr. Justice Holmes commented:

> "there are considerations against it that seem to me never to have been fully weighed and that I think it my duty to state." (258 U. S. at 140.)

No major Supreme Court cases on exclusion from the mails have come up since the Supreme Court divided sharply in the *Burleson* and *Leach* cases. (For a few lower court opinions in the 1920's, see *A.C.L.U.* v. *Kiely*, 40 F. (2d) 451; *Gitlow* v. *Kiely*, 44 F. (2d) 227, aff'd 49 F. (2d) 1077, cert. den., 284 U. S. 648.) However, three recent decisions by the Court of Appeals for the District of Columbia have indicated sharp disagreement with the prevailing "privilege doctrine," and—relying heavily on the *Burleson* and *Leach* dissents—developed an approach more into line with the tenor of other recent cases. *Pike* v. *Walker*, 121 F. (2d) 37; *Consumers Union* v. *Walker*, 145 F. (2d)

33; *Esquire* v. *Walker*, 151 F. (2d) 49. Yet the old "privilege" decisions remain, and the Post Office is happily seeking out their broadest possible implications. It can hardly be said that this is a satisfactory state of the law.

Two leading features of recent Post Office censorship policy thus date from the action taken in the *Burleson* case; first, the inauguration—when Congress had expressly amended the statute to limit exclusion (as in all other statutes) to particular issues found objectionable—of a policy of imposing previous restraints over the mails by permanent exclusion of periodicals; and, second, a further confusion between the requirements for mailability and for the second-class rates. The *Esquire* case, and the Postmaster General's statement quoted on pages 4 and 5 *supra*, bear eloquent witness to the considerable extension, and the prospective further extension, of this policy. Now for the first time, under the Postmaster General's "special contribution" theory, a magazine's freedom of circulation would depend upon its appealing to the Postmaster General's ideas on literary merit and public welfare. And, when the Postmaster General begins his campaign against a magazine whose contributors include (and depends for his proof on witnesses who have never heard of) Dreiser, Hemingway, Steinbeck, Maeterlinck, or Gorky (R. 1726)—the future outlook is not promising.

Since the Post Office has seen fit to raise and press the question in this way, we feel that the situation calls for a re-examination of the "privilege doctrine". Of course, it is clear that, after excision of the "privilege doctrine", Congress will retain some power to exclude specific matter from the mails, as from other forms of communication, on the analogy of the police power—on a showing of imminent and serious danger to public morals or safety. In fact the decisions—as distinguished from

the language—of the earlier cases need not be disturbed at all. But the "privilege doctrine", and the system of previous restraints set up in the confusion of the *Burleson* case, cannot survive judicial re-examination.

As has been well said, the dissents of Justices Brandeis and Holmes in the *Burleson* case contained the first explicit attempt to "brush away" the "web of unreality" of the "privilege doctrine". Frankfurter, *Mr. Justice Holmes and the Supreme Court* (1938) 57. The present case calls for the translation of those classic dissents into law.

POINT II

Possession of the second class mailing privilege is essential to a periodical's ability to circulate freely and to compete on fair terms for the public's interest, and therefore to freedom of the press.

In his order of revocation, the Postmaster General took the position that, since the other classes of mail, as well as all non-governmental means of transportation, are still left open to *Esquire*, deprivation of the second class privileges raises no question of freedom of speech or freedom of the press. (Order No. 23459, p. 2.)

This contention ignores the realities of the conditions under which newspapers and magazines are circulated. In his answers (Par. 22), petitioner admitted that more than 25,000 periodicals have established second class entries. Examination of a chart entitled *Comparison of Magazine Circulations for First Six Months 1942-1943* prepared by the Popular Science Publishing Company, as an aid to advertisers, reveals that in both years compre-

hended in the study, more than 50% of the total circulation of 76 leading weekly, bi-weekly and monthly magazines comprised subscription sales.[8] For the most part, such subscription sales were distributed through use of the second class mailing privilege.

We think it is too plain to require detailed demonstration that when a periodical loses its second class mailing privileges, its ability to compete effectively with other periodicals for the public's interest is greatly impaired.[9] Petitioner in his order of revocation frankly conceded that the costs of circulation are greatly increased if a publication is forced to use some other class of the mails. The problem is particularly acute in the case of small town or rural newspapers. As Professor Zechariah Chafee pointed out in his classic book, *Freedom of Speech* (1919), at page 144:

> "A newspaper editor fears being put out of business by the administrative denial of the second-class mailing privilege much more than the prospect of prison subject to a jury trial."

As the Court of Appeals for the District of Columbia stated in *Pike* v. *Walker*, 121 F. (2d) 37 at 39:

> "Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare."

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8. In 1943 total circulation for the group of magazines included in the study was 65,596,394. Of this total, 34,222,345 represented subscriptions, in almost all cases distributed through the mails. The comparable figures for 1942 were 63,428,602 total circulation, and 34,622,332 subscription sales.

9. On pp. 9-11 of Plaintiff's brief in the District Court, a description is given of the extent to which *Esquire* would be affected if petitioner's order of revocation remained in effect.

It is of course true that the United States is not obligated to continue to maintain the subsidy to periodical circulation embodied in second class rates. But it is equally plain that so long as the privilege is maintained, denial thereof inflicts an unfair competitive disadvantage on publishers, which cannot be justified unless required by the clear mandate of the statute. Worse than that, the unjust deprivation of the second class privileges of a particular periodical has the effect of curtailing freedom of the press by reducing the possibility that the public will be able to enjoy the opportunity to read the particular views of a given publisher, at a reasonable subscription price.[10] Hence there is a clear requirement that as between publishers the administration of the second class rates must be conducted without discrimination. As Mr. Justice Brandeis pointed out in his dissenting opinion in the *Burleson* case:

> "It is argued that although a newspaper is barred from the second-class mail, liberty of circulation is not denied; because the first and third-class mail and also other means of transportation are left open to a publisher. Constitutional rights should not be frittered away by arguments so technical and unsubstantial. • • • But to carry newspapers generally at a sixth of the cost of the service and to deny that service to one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge seriously freedom of expression • • ?".
>
> "The contention that, because the rates are non-compensatory, use of the second-class mail is not a

10. The second class rate subsidy has been intended to benefit the rural population by giving publishers an inducement to distribute widely their papers for popular consumption and education. See 8 Cong. Rec. 2135.

right but a privilege which may be granted or withheld at the pleasure of Congress, rests upon an entire misconception, when applied to individual members of a class. The fact that it is largely gratuitous makes clearer its position as a right; for it is paid for by taxation." (255 U. S. at 431, 433.)

POINT III

The Postmaster General's order revoking Esquire's right to the use of the second-class mailing rates is unconstitutional.

We have already shown that, as a practical matter and under modern conditions, a periodical's freedom depends upon equal access to the second-class mailing rate. In the present proceeding the Postmaster General by order suspended *Esquire's* second-class mailing rights for all future issues regardless of content, because of his personal belief—not even shared by his own appointed Hearing Board—that past issues have not made a "special contribution to the public welfare."

In other words, the Postmaster General construes the statute as empowering him to extend access to second-class rates to those periodicals which he finds contribute to the "public welfare" and to deny it to those which he finds do not so contribute. Similarly, the District Judge would set the Postmaster General up as a super-literary critic, for he thought that, to be eligible, a publication must consist of "good literature", which should "possess merit" and be of desirable type of an educational value"—and, perhaps, that it may not be a cause of juvenile delinquency. 55 F. Supp. at 1019-1020.

The constitutional question raised here is best appreciated by treating the Postmaster General's construction

of the statute as if it were in fact a restatement of the text of the law. The statute would thus read:

> "literature which, in the opinion of the Postmaster General, makes a special contribution to the public welfare"

is entitled to second-class mailing rates.

In other words, the Postmaster General construes the statute as empowering him to extend the right to use second-class rates to those periodicals which he finds contribute to the "public welfare" and to deny it to those which he finds do not so contribute. And the District Judge in terms would set him up as a super-literary critic. Since no definition of the "public welfare" or "information of a public character" is contained in the statute, it is clear that the Postmaster General believes he has been vested with an unlimited power to discriminate between periodicals. The only touchstone for the right to use second-class rates would be that provided by the Postmaster General's personal likes and dislikes. As it can hardly be expected that successive Postmaster Generals would have the same literary tastes or the same conception of the "public interest", the publishing business and the existence of any periodical would be reduced to subjection to the whims and fancies of changing holders of a highly political office. In such a situation publishers could hardly avoid constantly thinking of the dangers of offending those controlling the life of their business, and acting accordingly. It is difficult to imagine any situation, conceivable in this country, which would be less favorable to the continued development of a vigorous and independent press.

We now propose to show that such a law—and therefore an order presupposing one—would be unconstitutional because:

1. It violates directly nearly all the basic rules of civil liberties law that have been laid down by this Court in interpreting the guarantees of the First and Fourteenth Amendments.

2. It is an unwarranted previous restraint on freedom of circulation, in violation of the First Amendment.

3. It involves an unlawful delegation of power—and, moreover, is void for vagueness and authorizes discrimination between individuals, in violation of the Fifth Amendment.

(a) The Postmaster General's extraordinary interpretation of the statute violates nearly all the basic tests used by this Court in interpreting the guarantees of the First and Fourteenth Amendments.

After the intellectual blind imposed by the "privilege doctrine" is removed, it requires only brief discussion to show that the order here involved runs directly *contra* to most of the basic tests and requirements used in connection with freedom of communication, as discussed on pages 9 and 10, *supra*.

Perhaps first of all, civil liberties law requires a public official attempting to restrict freedom of communication to show extraordinarily strong reasons for his action, in order to overcome what is as a practical matter a presumption against constitutionality. See *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 N. Y.; *Schneider* v. *State*, 308 U. S. 147; *Stromberg* v. *California*; 282 U. S. 359; *Lovell* v. *City of Griffin*, 303 U. S. 444; *Thomas* v. *Collins*, 323 U. S. 516. Far from fulfilling this requirement, the proceedings in this case provide a perfect illustration of the absurdity and indignity to which the government always subjects itself in these recurrent campaigns in pursuit of the quasi-obscene.

The Postmaster General not only makes no serious attempt to meet this requirement, but insists upon the opposite doctrine of administrative finality—probably sensing that his case not only cannot meet the requirement, but is itself in severe need of help. Since no claim of expertise can be made on a subject like quasi-obscenity—and certainly the Post Office could not sustain such a claim on this record—this argument for administrative finality is in effect an argument for the proposition that the Postmaster General's actions are less reviewable in court because he is not a popularly elected but rather an appointive official. This theory will be dealt with in Point V.

Another equally important requirement is even more clearly violated by the *Esquire* order. If statutes or general regulations are worded so broadly that they may be construed to restrict admittedly proper discussion, along with some that is harmful, these regulations are invalid on their face. *Stromberg* v. *California*, 283 U. S. 359; *Lovell* v. *City of Griffin*, 303 U. S. 444; *Thornhill* v. *Alabama*, 310 U. S. 88, 96-98; *Taylor* v. *Mississippi*, 319 U. S. 583. It is here only necessary to compare with this requirement the leeway afforded the Postmaster General in his own interpretation of the statute: the second-class rates, and so free circulation, are in effect restricted to "literature which, in the opinion of the Postmaster General, makes a special contribution to the public welfare".

The third test, the "clear and present danger test" involving the connection between speech and the dangers feared, has to do largely with the effect of speech in advocating revolution or possibly affecting military morale.

The fourth test requires the evils feared to be so serious as to overbalance the public interest in the free

dissemination of ideas. *Near* v. *Minnesota*, 283 U. S. 697; *United States* v. *Carolene Products Co.*, 303 U. S. 144, 152, n. 4; *Schneider* v. *State*, 308 U. S. 147; *Bridges* v. *California*, 314 U. S. 252; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624. Now, as the Postmaster General's ideas on the evils expected from the circulation of *Esquire* have been developed in these proceedings, they have brought together such an extraordinary collection of trivia that it is impossible to choose among them to illustrate the application of this doctrine.

(b) The First Amendment prohibits previous restraints on freedom of the press and of circulation, except in cases of imminent public danger.

To appreciate the actual results of the Post Office Department's practice of suspending the use of second-class mailing rates, it is again necessary to break through the intellectual blind imposed by the "privilege doctrine", and examine the actual effects of the present order. First, it operates directly as a previous restraint against the publication and circulation of a periodical. Second, this restriction is aimed not against one issue, adjudged harmful, but against all future issues, regardless of their content.

Apart from current Post Office practice, almost the only direct previous example of such a censorship was reviewed in *Near* v. *Minnesota*, 283 U. S. 697. There a state statute provided for suppression as a nuisance of any periodical which was obscene or defamatory, and on this the Court's position was strong and clear-cut. In holding the law unconstitutional, Mr. Chief Justice Hughes said:

> "If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or

> publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.
>
> "The question is whether a statute authorizing such proceeding in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication." (283 U. S. at 713.)

Again, in *Grosjean* v. *American Press Co.*, 297 U. S. 233, the late Long regime in Louisiana attempted to restrict the press in that state; and the device used was a tax on all newspapers having a circulation over a certain figure. Recognizing the dangers inherent in any attempt to penalize or restrict circulation, this Court unanimously struck it down, saying:

> "The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers." (297 U. S. at 251.)

More specifically, the Post Office practice of restricting all future issues of a periodical by suspending second-class privileges was cogently discussed in the classic dissents of Mr. Justices Holmes and Brandeis in the *Burleson* cases. As Mr. Justice Brandeis put it:

> "But while he (the Postmaster General) may thus exclude from the mail specific matter which he deems of the kind declared by Congress to be unmailable, he may not, either as a preventive measure or as a punishment, order that in the future issues of a particular paper shall be refused transmission." • • •
>
> • • •
>
> "If such power were possessed by the Postmaster General, he would, in view of the practical finality of his decisions, become the universal censor of publications. For a denial of the use of the mail would be for most of them tantamount to a denial of the right of circulation." (255 U. S. at 421-423.)

And as Mr. Justice Holmes pointed out:

> "On the other hand, the regulation of the right to use the mails by the Espionage Act has no peculiarities as a war measure, but is similar to that in earlier cases, such as obscene documents. Papers that violate the act are declared nonmailable, and the use of the mails for the transmission of them is made criminal. But the only power given to the Postmaster is to refrain from forwarding the papers when received, and to return them to the senders. Act of June 15, 1917, chap. 30, title XII, 40 Stat. at L. 217, 230, Comp. Stat. S. 10,401a, Fed. Stat. Anno. Suppl. 1918, p. 132; Act of May 16, 1918, chap. 75, 40 Stat. at L. 553, 554, Comp. Stat. SS 10,212cc, 10,401d, Fed. Stat. Anno. Suppl. 1918, p. 133. He could not issue a general order that a certain newspaper should not be carried because he

> thought it likely or certain that it would contain treasonable or obscene talk. The United States may give up the Postoffice when it sees fit; but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongue; and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man. There is no pretense that it has done so. Therefore I do not consider the limits of its constitutional power." (255 U. S. at 437.)

In his dissent in the *Leach* case, Mr. Justice Holmes put it briefly:

> "I cannot understand by what authority Congress undertakes to authorize anyone to determine in advance, on the grounds before us, that certain words shall not be uttered. Even those who interpret the (First) Amendment most strictly agree that it was intended to prevent previous restraints." (258 U. S. at 140-141).

The dissenting opinions in the *Burleson* case have been widely quoted with approval. And it seems likely that they were accepted *sub silentio* by this Court in the *Near* and *Grosjean* cases.

(c) The statute, as interpreted by the Postmaster General envisages an unlawful delegation of power, is void for vagueness, and authorizes arbitrary discrimination between individuals in violation of the Fifth Amendment.

The "special contribution" theory makes the Postmaster General's order unconstitutional for three further reasons. First, even in connection with other business, less intimately connected with our fundamental liberties, it has long been held that regulatory legislation must provide some fairly definite standards for administrative action.

Schechter Brothers v. *United States*, 295 U. S. 495. A statute which purports to authorize the Postmaster General to determine what periodicals possess literary merit and contribute to the public welfare, provides no standard at all and is an unconstitutional delegation of legislative power.

Second, a statute must provide some reasonably definite guide for action, to enable the public to obey the law. The interpretation in the order here would make the statute void for vagueness. *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81; *Lanzetta* v. *New Jersey*, 306 U. S. 451.

Thirdly, as is strikingly apparent in the instant case, such an interpretation would permit the Postmaster General to proceed against whomsoever he pleased. Such purely arbitrary discrimination between individuals is forbidden by the Fifth Amendment. Compare *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Consumers Union* v. *Walker*, 145 F. (2d) 33.

It is of course clear that Congress could repeal the statute which permits periodicals to be carried below cost. Such uniform treatment would not deny freedom of the press. But arbitrary discrimination between periodicals is something quite different. As Mr. Justice Brandeis pointed out in his dissenting opinion in the *Burleson* case:

> "The postal power, like all its (Congress') other powers, is subject to the limitation of the Bill of Rights. * * * The Government might, of course, decline altogether to distribute newspapers; or it might decline to carry any at less than the cost of the service; and it would not thereby abridge the freedom of the press, since to all papers other means of transportation would be left open. But to carry newspapers generally at a sixth of the cost of the service and to deny that service to one paper

> of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge seriously freedom of expression." (255 U. S. at 430-431).

We believe that once the Federal Government has undertaken to provide a type of service, its obligation to furnish that service without arbitrary discrimination between users and applicants therefor is as clear as the requirement that such conditions of equality be maintained by private common carriers. See *Mitchell* v. *United States*, 313 U. S. 80.

POINT IV

The order revoking Esquire's second class mailing privilege transcends the authority conferred upon the Postmaster General by the Second Class Mailing Statute.

Apart from questions of constitutionality, the decision below should be affirmed and enforcement of the administrative order of revocation enjoined because the second-class mailing statute, 39 U.S.C.A. Section 226, does not confer on the Postmaster General authority to revoke second-class entries for the reasons stated in his opinion.

The alleged statutory basis for the order of revocation is failure to comply with the fourth requirement of the second class mailing statute. This provides that, in order to be mailable at second class rates, a periodical must "be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry and having a legitimate list of subscribers."

The Postmaster General held that:

> "Whatever the featured and dominant pictures, prose, verse, and systematic innuendoes of this publication may be, they surely are not 'information of a public character' or 'literature, the sciences, arts or some special industry'." (R. 5591)

The Postmaster General based this ultimate finding of non-compliance with the fourth requirement of the statute on two factors:

> (1) He found that *Esquire* contained material "bordering on the obscene" and that its success had led to the initiation of other magazines containing imitative material. (Order No. 23459, p 8.)
>
> (2) He held that the fourth condition placed a periodical "under a positive duty to contribute to the public good and welfare" (R. 5588), and that *Esquire* had failed to make such contribution.

1. We fail to see the legal significance of the Postmaster General's declaration (Order No. 23459, p. 8) that *Esquire* contained pictures and materials which, although not "obscene in a technical sense", were vulgar and indecent. We know of no statute which so much as prohibits the mailing of individual issues of periodicals which are "quasi-obscene".

Moreover, under all the statutory provisions pursuant to which the Postmaster General is authorized to declare unmailable certain specified classes of mail, the authority is limited to exclusion of a specific issue, letter, or circular. See 18 U.S.C.A. Section 334, Information relating to contraceptives; 18 U.S.C.A. Section 338(c), Solicitation of procurement of divorces in foreign countries; 39 U.S.C.A. Section 227, Infringement of the copyright laws; 18 U.S.C.A. Section 336, Lotteries; 18 U.S.C.A. Section 334,

Treasonous material; 18 U.S.C.A. Section 335, Libelous material; 18 U.S.C.A. Section 405, Prizefight films; 39 U.S.C.A. Section 256, Schemes to defraud. (The apparent exception read into the Espionage Act of 1917 by this Court's decision in the *Burleson* case is based, as explained *supra* POINTS I and III, upon a misconception of Congressional intent in that statute.)

The traditional and wise legislative predilection against denying f[illegible]ry to the mails to publications, when individual numbers have contained excluded material, was lucidly explained in District Judge Woolsey's opinion in *Gitlow* v. *Kiely*, 44 F. (2d) 227, aff'd 49 F. (2d) 1077, cert. den. 284 U. S. 648:

> "In the Sixty-third Congress, Third Session (1915) a bill, H.R. 20644, was introduced to deny absolutely the use of the mail to any person who, in the opinion of the Postmaster General, 'is engaged or represents himself as engaged in the business of publishing any books or pamphlets of an indecent, immoral, scurrilous or libellous character.' It was objected: The 'bill would invest one man • • • with the power to destroy the business of a publisher without affording any opportunity for trial by jury, according to regular court practice. The punishment which may be inflicted upon a publisher by the Postmaster General under the provisions of this bill is most severe, absolutely depriving him of the privilege of using the United States mails, even for legitimate purposes. • • • Furthermore, this bill makes it possible for the Postmaster General to inflict what is practically a confiscatory penalty, for an offence not clearly defined. • • • Under such circumstances as these it is not safe to leave to the decision of one man, after an ex parte investigation, a decision which will involve the freedom of the press. Trial by jury and a penalty inflicted for each specified act is the

> only safeguard against an arbitrary and tyrannical power.' The bill failed of passage. Hearings before Committee on Post Office and Post Roads, February 1, 1915, on Exclusion of Certain Publications from the Mails, pp. 38, 39, 63rd Cong. 3d sess."

2. Turning next to the "positive contribution" theory, it is obvious that if the second-class mailing statute imposed any such requirement, the mortality rate of American periodicals would mount sharply. The Postmaster General himself recognized the mortuary consequences of adoption of this construction of the statute, saying:

> "If this theory, ('that a useful public purpose' must be served) is applied, it means that a large number of publications and periodicals of the editorial, fiction and humorous classes, even though educational, innocent, delightful and entertaining, would not be permitted to use the second class mailing privileges because they are neither current newspapers nor are they substantially devoted to literature or art of a classical or high artistic quality." (Order No. 23459, p. 5. See R. 1906.)

However, the Postmaster General seemed convinced that this harsh result flowed ineluctably from "the plain meaning of plain words" of the statute. (Order No. 23459, p. 5). With all due respect to the Postmaster General, we submit that it is clear "the plain meaning of plain words" of the statute makes the "positive contribution" theory wholly untenable.

(a) In Points I, II, and III *supra*, it has been demonstrated that if the statute were to be construed as suggested by the Postmaster General, grave doubts would then arise as to whether the statute was not violative of the First and Fourteenth Amendments. Accordingly in

exposition of the statute, it is essential to follow the rule of *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408:

> "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."

It follows that the administrative order of revocation, which was explicitly predicated upon the infusion into the second-class mailing statute of the "positive contribution" theory, cannot be sustained.[11]

(b) We do not see how a requirement that periodicals contain "information of a public character" or be "devoted to literature, the sciences, arts, or some special industry" can be expanded into a stipulation that, in order to receive the benefit of second-class rates, they are "under a positive duty to contribute to the public good and welfare". (R. 5588). Palpably the statute seeks merely to stipulate the type of subject matter which must be contained in a periodical. It affords no basis for an interpretation that the subject-matter must meet a prescribed test of quality.

Unless it be contended that Congress envisioned the Postmaster General as "the Lord High Guardian" of literary taste in the United States, it is difficult to see how

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11. In its original citation, the Post Office Department took the position that *Esquire* was non-mailable because it contained "obscene, lewd and lascivious matter" (R. 3). Presumably this portion of the citation was predicated on 18 U.S.C.A. Sec. 334, making obscene matter unmailable. However, no declaration, whether in the nature of a formal finding of fact or otherwise, was made in the Postmaster General's order of revocation to the effect that *Esquire* contained obscene material. That order was based solely on the conclusion that *Esquire* did not comply with the fourth condition of the second class mailing statute, 39 U.S.C.A. Sec. 226. Accordingly, the Postmaster General may now seek directly or indirectly to support his order of revocation by recitals or inferences that *Esquire* printed "lewd" material. Cf. *S.E.C.* v. *Chenery Corporation*, 318 U. S. 80.

the administrative interpretation of the statute can survive. In gently interring a somewhat analogous attempt by the Postmaster General to exercise censorial control over the mails in *Consumers Union* v. *Walker*, 145 F. (2d) 33, 34, the Court of Appeals for the District of Columbia recently admonished:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence."

Moreover, the invalidity of attempts to read into the description of necessary subject matter in the second-class mailing statute, any qualitative standards, is indicated by the decision in *Payne* v. *National Railway Publishing Co.*, 20 App. D. C. 581, cert. grant., 189 U. S. 512, writ dismissed on motion of Attorney General, 192 U. S. 602. The Postmaster General had enacted a regulation requiring that a publication to be entitled to second-class privileges must "consist of current news or miscellaneous literary matter, or both (not including advertising)." He thereafter revoked the long-standing second-class entry of "The Railway Guide", which published railroad and steamboat timetables and general information concerning the movements of trains and boats. The Court of Appeals, in holding the order invalid, stated in part:

> "It is very clear that the Congress of the United States has not committed to the Postmaster General, or to any one else, the matter of determining what should be carried in the mails as second-class matter, and what as matter of the third class. It has reserved that power exclusively to itself. It has itself made the classification; and it is not competent for the Postmaster General to add anything to the statute or to take anything from it."

(c) As the Postmaster General conceded in his order revoking Esquire's second-class entry, his interpretation of the second-class mailing statute runs counter to that which was continuously promulgated by his predecessors in office from its enactment in 1879 to date. The traditional administrative construction has been that every genuine periodical comes within the compass of the statute. The question of statutory construction thus posed is very analogous to that presented in *Federal Trade Commission* v. *Bunte Bros. Inc.*, 312 U. S. 349, which involved a belated attempt by the F.T.C. to extend its jurisdiction to intrastate trade practices which affected interstate commerce. On this point, Mr. Justice Frankfurter, speaking for the majority, stated:

> "That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. • • •" (312 U. S. at 351-352).

See also *Norwegian Nitrogen Products Co.* v. *U. S.*, 288 U. S. 294, 313.

Especially in view of the grave doubts to whether the statute, if interpreted as suggested by the Postmaster General, would be constitutional, we respectfully submit that the Postmaster General should not be permitted to read into the statute an enlargement of his own powers, based upon an interpretation contrary to those announced

by his predecessors and contrary to the views of Congress as evidenced by the long series of specific exclusion statutes.

POINT V

This Court has plenary power to review petitioner's construction of the second class mailing statute. Since the controversy at bar involves fundamental individual liberties, petitioner's determinations on questions of fact are not entitled to the presumption of finality usually attached to administrative findings.

In his order of revocation, the Postmaster General repeatedly referred to the fact that the order was appealable to the courts as one justification for the extreme position he had taken. Thus he stated:

> "* * * it is for our courts to say what this statute means and what limits and restrictions there are upon the use of the second-class mail privileges" (Rec. 5582).

Later petitioner postponed the effective date of revocation for the stated purpose of affording an opportunity:

> "* * * to appeal this order to a court of competent jurisdiction to fully review and settle this matter in which the publication, the Post Office Department, and the general public have such a direct and substantial interest" (Rec. 5593).

Between the date of entry of his order and the commencement of the court review he had expressly invited, the Postmaster General appears to have suffered a change of heart. For the first defense pleaded to the present

action was that in revoking the second class privilege, "the exercise of his (the Postmaster General's) judgment and discretion * * * is not subject to review or control by the Court" (Ans., Par. 32).[12]

We think the Postmaster General's present position is entirely incorrect.

(a) No finality attaches to the Postmaster General's construction of the second class mailing statute.

No proposition is better established than the rule that the ultimate interpretation of statutes is a power vested in the courts. While the views of persons charged with the responsibility of administering statutes are of course entitled to great respect, the final voice under Article III of the Constitution of the United States is that of the judiciary. *Federal Trade Commission* v. *Bunte Bros., Inc., supra; S.E.C.* v. *Chenery Corp., supra; U. S.* v. *American Trucking Ass'ns*, 310 U. S. 534; *F.C.C.* v. *Columbia Broadcasting System*, 311 U. S. 132.

This doctrine has repeatedly been reiterated in cases in which past Postmaster Generals have sought to maintain the proposition that their interpretations of the postal statutes were not subject to judicial review. Thus in dealing with a determination of the Postmaster General with regard to second class privileges in *Lewis Pub. Co.* v. *Wyman*, 152 Fed. 787, the Court stated:

> "The contention of counsel for defendant that the courts have no jurisdiction to re-examine the action of the head of one of the executive departments in matters of this kind cannot be sustained, as it is

12. Compare the *Annual Report of the Postmaster General for the Fiscal Year ended January 30, 1943*, in which it is stated, with reference to deprivations of the second class privilege, that: "Cases decided adversely by the Postmaster General are subject to a review by the courts" (p. 8).

well settled that courts have jurisdiction to re-examine the action of the head of one of the executive departments in matters of this kind when he is either acting without authority of law or in excess of the power granted to him by law, has proceeded in violation of an act of Congress, or has misconstrued the legal effect of the statute under which he is acting" (p. 791).

See also: *Milwaukee Publishing Company* v. *Burleson*, *supra*, the majority opinion, at p. 412; *American School of Magnetic Healing* v. *McAnnulty*, *supra*; *Brooklyn Daily Eagle* v. *Voorhies*, 181 Fed. 579; *Pike* v. *Walker*, *supra*.

(b) Since the controversy at bar involves fundamental individual liberties, petitioner's determinations on questions of fact are not entitled to the presumption of finality usually attached to administrative findings.

(1) The Postmaster General's contention that his findings of fact may not be reviewed at all is just another example of an attempt to resuscitate a long overruled principle of administrative absolutism. Even in mail fraud cases, the courts have always held that the Postmaster General's findings are final only under the same conditions when other administrative findings of fact are final, *i.e.*, only when they are supported by substantial evidence. See *American School of Magnetic Healing* v. *McAnnulty*, *supra*; *Hurley* v. *Dolan*, 297 Fed. 825; *Rosenberger* v. *Harris*, 136 Fed. 1001; *Moxie Nerve Food Co.* v. *Holland*, 141 Fed. 202.

(2) In the case at bar, no real issue of fact is involved. For the determination of whether a particular periodical contains "literature" or "information of a public char-

acter" or pertains to the "arts" is a question of "ultimate fact", which under the circumstances is nothing more nor less than a matter of statutory construction. See *Jacksonville Paper Co.* v. *N.L.R.B.*, 137 F. (2d) 148, 150.

The real basis for the doctrine of administrative finality is the judicial recognition of the expert knowledge of administrative agencies in the fields of their special competence. Concededly the Postmaster General has special knowledge in the determination of a question as to whether a given publication is a "periodical" or is "designed primarily for advertising purposes", entitling his views thereon to special weight. But we know of no reason why his views on the subject of whether particular periodicals contain "literature", publish "information of a public character", or are "obscene" should be entitled to any special consideration. We do not conceive that the Postmaster General is uniquely gifted in evaluating the literary or other merits of publications. Cf. *U. S.* v. *One Book Entitled "Ulysses", supra.*

(3) Since the present case involves, as we have shown above, questions of fundamental personal rights, it is our further contention that the administrators' findings of fact are subject to greater judicial scrutiny than in cases involving property rights.

Long ago it was held that, "Though the law itself be fair on its face * * *, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, * * *, the denial of equal justice is still within the prohibition of the Constitution". *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373.

It has been recognized that the task of determining whether in fact, as distinguished from in theory, freedom

of speech and freedom of press were threatened by statutes could not be performed unless the courts had freedom to examine into the facts of their actual administration.[13] *White* v. *Texas*, 310 U. S. 530; *Pierre* v. *Louisiana*, 306 U. S. 353.

This rule which has been applied even in reviewing the administration of justice in the state courts (*Chambers* v. *Florida*, 309 U. S. 227; *Norris* v. *Alabama*, 294 U. S. 587) is equally applicable in reviewing the determinations of federal administrative agencies. Compare *Mitchell* v. *U. S.*, 313 U. S. 80 with *U. S.* v. *Trucking Co.*, 310 U. S. 344 and *National Ry. Co.* v. *Tenn.*, 262 U. S. 318. See also, *N.L.R.B.* v. *Virginia Electric and Power Company*, 319 U. S. 533. Cf. Mr. Justice (then Attorney General) Jackson's book, *The Struggle for Judicial Supremacy* (1941), pp. 284-5.

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13. In the majority opinion in *Smith* v. *Allwright*, 321 U. S. 649, 662, Mr. Justice Reed said in part:

"We are thus brought to an examination of the qualifications for Democratic primary electors in Texas, to determine whether state action or private action has excluded Negroes from participation. Despite Texas' decision that the exclusion is produced by private or party action, *Bell* v. *Hill, supra*, Federal courts must for themselves appraise the facts leading to that conclusion. It is only by the performance of this obligation that a final and uniform interpretation can be given to the Constitution; the 'Supreme Law of the Land.' *Nixon* v. *Condon*, 286 U. S. 73, 88; *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 483; *Bridges* v. *California*, 314 U. S. 252; *Lisenba* v. *California*, 314 U. S. 219, 238; *Union Pacific R. Co.* v. *United States*, 313 U. S. 450, 467; *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287, 294; *Chambers* v. *Florida*, 309 U. S. 227, 228."

CONCLUSION

The decision of the Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

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SUPREME COURT OF THE UNITED STATES.

No. 399.—October Term, 1945.

Robert E. Hannegan, as Postmaster General of the United States, Petitioner, *vs.* Esquire, Inc.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[February 4, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

Congress has made obscene material nonmailable (35 Stat. 1129, 18 U. S. C. § 334), and has applied criminal sanctions for the enforcement of that policy. It has divided mailable matter into four classes, periodical publications constituting the second class.[1] § 7 of the Classification Act of 1879, 20 Stat. 358, 43 Stat. 1067, 39 U. S. C. § 221. And it has specified four conditions upon which a publication shall be admitted to the second-class. § 14 of the Classification Act of 1879, 20 Stat. 358, 48 Stat. 928, 39 U. S. C. § 226. The Fourth condition, which is the only one relevant here,[2] provides:

> "Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second class are as follows . . . Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some

[1] "mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections twelve and fourteen." § 10 of the Classification Act of 1879, 20 Stat. 358, 39 U. S. C. § 224. For other periodical publications which are included in second-class matter, see 37 Stat. 550, 39 U. S. C. § 229; 31 Stat. 660, 39 U. S. C. § 230.

[2] The first three conditions are:

"First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second. It must be issued from a known office of publication. Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications: *Provided*, That publications produced by the stencil, mimeograph, or hectograph process or in imitation of typewriting shall not be regarded as printed within the meaning of this clause."

"special industry, and having a legitimate list of subscribers. Nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

Respondent is the publisher of Esquire Magazine, a monthly periodical which was granted a second-class permit in 1933. In 1943, pursuant to the Act of March 3, 1901, 31 Stat. 1107, 39 U. S. C. § 232, a citation was issued to respondent by the then Postmaster General (for whom the present Postmaster General has now been substituted as petitioner) to show cause why that permit should not be suspended or revoked.[3] A hearing was held before a board designated by the then Postmaster General.[4] The board recommended that the permit not be revoked. Petitioner's predecessor took a different view. He did not find that Esquire Magazine contained obscene material and therefore was nonmailable. He revoked its second-class permit because he found that it did not comply with the Fourth condition. The gist of his holding is contained in the following excerpt from his opinion:

"The plain language of this statute does not assume that a publication must in fact be 'obscene' within the intendment of the postal obscenity statutes before it can be found not to be 'originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry.'

"Writings and pictures may be indecent, vulgar, and risqué and still not be obscene in a technical sense. Such writings and pictures may be in that obscure and treacherous borderland zone where the average person hesitates to find them technically obscene, but still may see ample proof that they are morally improper and not for the public welfare and the public good. When such writings or pictures occur in isolated instances their dangerous tendencies and malignant qualities may be considered of lesser importance.

"When, however, they become a dominant and systematic feature they most certainly cannot be said to be for the public good, and a publication which uses them in that manner is not making the 'special contribution to the public welfare' which Congress intended by the Fourth condition.

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[3] Sec. 1 of that Act provides:

"When any publication has been accorded second-class mail privileges the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested."

[4] See 7 Fed. Reg. 3001.

"A publication to enjoy these unique mail privileges and special preferences is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. It is under a positive duty to contribute to the public good and the public welfare."

Respondent thereupon sued in the District Court for the District of Columbia to enjoin the revocation order. The parties stipulated at a pre-trial conference that the suit would not be defended on the ground that Esquire Magazine was obscene or was for any other reason nonmailable.[5] The District Court denied the injunction and dismissed the complaint. 55 F. Supp. 1015. The Court of Appeals reversed. 151 F. 2d 49. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem in the administration of the postal laws.

The issues of Esquire Magazine under attack are those for January to November inclusive of 1943. The material complained of embraces in bulk only a small percentage of those issues.[6] Regular features of the magazine (called "The Magazine for Men") include articles on topics of current interest, short stories, sports articles or stories, short articles by men prominent in various fields of activities, articles about men prominent in the news, a book review department headed by the late William Lyon Phelps, a theatrical department headed by George Jean Nathan, a department on the lively arts by Gilbert Seldes, a department devoted to men's clothing, and pictorial features, including war action paintings, color photographs of dogs and water colors or etchings of game birds and reproductions of famous paintings, prints and drawings. There was very little in these features which was challenged. But petitioner's predecessor found that the objectionable items, though a small percentage of the total bulk, were regular recurrent features which gave the magazine its dominant tone or characteristic. These include jokes, cartoons, pictures, articles, and poems. They were said to reflect the smoking-room type of humor, featuring, in the main, sex. Some witnesses found the challenged items highly objectionable, calling them salacious and indecent. Others thought they were

[5] It was not contended that Esquire Magazine does not comply with the first three conditions of 39 U. S. C. § 226, set forth in note 2 *supra*.

[6] Items taking up a part or all of 86 pages out of a total of 1072 pages.

only racy and risque. Some condemned them as being merely in poor taste. Other witnesses could find no objection to them.

An examination of the items makes plain, we think, that the controversy is not whether the magazine publishes "information of a public character" or is devoted to "literature" or to the "arts". It is whether the contents are "good" or "bad". To uphold the order of revocation would, therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred.

The second-class privilege is a form of subsidy.[7] From the beginning Congress has allowed special rates to certain classes of publications. The Act of February 20, 1792, 1 Stat. 232, 238, granted newspapers a more favorable rate. These were extended to magazines and pamphlets by the Act of May 8, 1794, 1 Stat. 354, 362. Prior to the Classification Act of 1879, periodicals were put into the second-class,[8] which by the Act of March 2, 1863, 12 Stat. 701, 705, included "all mailable matter exclusively in print, and regularly issued at stated periods, without addition by writing, mark, or sign." That Act plainly adopted a strictly objective test and left no discretion to the postal authorities to withhold the second-class privilege from a mailable newspaper or periodical because it failed to meet some standard of worth or value or propriety. There is nothing in the language or history of the Classification Act of 1879 which suggests that Congress in that law made any basic change in its treatment of second-class mail, let alone such an abrupt and radical change as would be entailed by the inauguration of even a limited form of censorship.

The postal laws make a clear-cut division between mailable and nonmailable material. The four classes of mailable matter are generally described by objective standards which refer in part to their contents, but not to the quality of their contents.[9] The

[7] It was found to be worth $500,000 a year to Esquire Magazine. "A newspaper editor fears being put out of business by the administrative denial of the second-class mailing privilege much more than the prospect of prison subject to a jury trial." Chafee, Freedom of Speech (1920), p. 19[illegible]

[8] Rates on periodicals, designed primarily for advertising purposes or for free circulation, were increased by the Act of July 12, 1876, 19 Stat. 78, [illegible]

[9] Sec. 7 of the Classification Act of 1879, as amended, 39 U. S. C. § 221 provides:

"Mailable matter shall be divided into four classes:

"First, written matter;

"Second, periodical publications;

more particular descriptions of the first,[10] third,[11] and fourth[12] classes follow the same pattern, as do the first three conditions specified for second-class matter.[13] If, therefore, the Fourth condition is read in the context of the postal laws of which it is an integral part, it, too, must be taken to supply standards which relate to the format of the publication and to the nature of its contents, but not to their quality, worth, or value. In that view, "literature" or the "arts" mean no more than productions which convey ideas by words, pictures, or drawings.

If the Fourth condition is read in that way, it is plain that Congress made no radical or basic change in the type of regulation which it adopted for second-class mail in 1879. The inauguration of even a limited type of censorship would have been such a startling change as to have left some traces in the legislative history. But we find none. Congressman Money, a member of the Postal Committee who defended the bill on the floor of the House, stated that it was "nothing but a simplification of the postal code. There are no new powers granted to the Department by this bill, none whatever." 8 Cong. Rec. 2134. The bill contained registration provisions which were opposed on the ground that they might be the inception of a censorship of the press. *Id.*, p. 2137. These

"Third, miscellaneous printed matter and other mailable matter not in the first, second, or fourth classes;

"Fourth, merchandise and other mailable matter weighing not less than eight ounces and not in any other class."

[10] *First class.* "Mailable matter of the first class shall embrace letters, postal cards, and all matters wholly or partly in writing . . ." 39 U. S. C. § 222.

[11] *Third class.* "Mail matter of the third class shall include books, circulars, and other matter wholly in print (except newspapers and other periodicals entered as second-class matter), proof sheets, corrected proof sheets, and manuscript copy accompanying same, merchandise (including farm and factory products) and all other mailable matter not included in the first or second class, or in the fourth class . . ." 39 U. S. C. § 235.

[12] *Fourth class.* "Mail matter of the fourth class shall weigh in excess of eight ounces, and shall include books, circulars, and other matter wholly in print (except newspapers and other periodicals entered as second-class matter), proof sheets, corrected proof sheets and manuscript copy accompanying same, merchandise (including farm and factory products), and all other mailable matter not included in the first or second class, or in the third class as defined in section 235 of this title, not exceeding eleven pounds in weight, nor greater in size than seventy-two inches in length and girth combined, nor in form or kind likely to injure the person of any postal employee or damage the mail equipment or other mail matter and not of a character perishable within a period reasonably required for transportation and delivery." 39 U. S. C. § 240.

[13] See note 2, *supra*.

were deleted. *Id.*, pp. 2137, 2138. It is difficult to imagine that the Congress, having deleted them for fear of censorship, gave the Postmaster General by the Fourth condition discretion to deny periodicals the second-class rate, if in his view they did not contribute to the public good. Congressman Money indeed referred to "the daily newspapers, with their load of gossip and scandal and every-day topics that are floating through the press" as being entitled without question to the second-class privilege. *Id.*, p. 2135. To the charge that the bill imposed a censorship he pointed out that it only withheld the privileged rate from publications "made up simply of advertising concerns not intended for public education"; and added:

> "We know the reason for which papers are allowed to go at a low rate of postage, amounting almost to the franking privilege, is because they are the most efficient educators of our people. It is because they go into general circulation and are intended for the dissemination of useful knowledge such as will promote the prosperity and the best interests of the people all over the country. Then all this vast mass of matter is excluded from that low rate of postage. I say instead of being a censorship upon the press, it is for the protection of the legitimate journals of the country." *Id.*, 2135.

The policy of Congress has been clear. It has been to encourage the distribution of periodicals which disseminated "information of a public character" or which were devoted to "literature, the sciences, arts, or some special industry", because it was thought that those publications as a class contributed to the public good.[14] The standards prescribed in the Fourth condition have been criticized, but not on the ground that they provide for censorship.[15]

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[14] See Lewis Publishing Co. v. Morgan, 229 U. S. 288, 301; Annual Report of Postmaster General (1892), p. 71.

[15] See Report of the Postal Commission of 1906, H. Doc. 608, 59th Cong., 2d Sess., pp. xxxvi-xxxvii:

> "But in what way can it be said that a requirement that a certain printed matter should be 'devoted to literature' serves to mark it off from anything else that can be put into print. There is practically no form of expression of the human mind that can not be brought within the scope of 'public information,' 'literature, the sciences, art, or some special industry.' It would have been just as effective and just as reasonable for the statute to have said, 'devoted to the interests of humanity,' or 'devoted to the development of civilization,' or 'devoted to human intellectual activity.'
>
> "The prime defect in the statute is, then, that it defines not by qualities but by purposes, and the purpose described is so broad as to include everything and exclude nothing.

As stated by the Postal Commission of 1911, H. Doc. 559, 62nd Cong., 2d Sess., p. 142:

> "The original object in placing on second-class matter a rate far below that on any other class of mail was to encourage the dissemination of news and of current literature of educational value. This object has been only in part attained. The low rate has helped to stimulate an enormous mass of periodicals, many of which are of little utility for the cause of popular education. Others are of excellent quality, but the experience of the post office has shown the impossibility of making a satisfactory test based upon literary or educational values. To attempt to do so would be to set up a censorship of the press. Of necessity the words of the statute — 'devoted to literature, the sciences, arts, or some special industry' — must have a broad interpretation."

We may assume that Congress has a broad power of classification and need not open second-class mail to publications of all types. The categories of publication entitled to that classification have indeed varied through the years.[16] And the Court held in *Ex parte Jackson*, 96 U. S. 727, that Congress could constitutionally make it a crime to send fraudulent or obscene material through the mails. But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 421-423, 430-432, 437-438. Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated. The provisions of the Fourth condition would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions[17] and under-

> "With the exception of a few instances where the publication has been excluded because the information was deemed not to be public, no periodical has ever been classified by the application of tests of this kind. Any attempt to apply them generally would simply end in a press censorship."

[16] As we have seen, the Fourth condition bars admission to second-class privileges of publications, "designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates." Publications of state departments of agriculture were not granted the special rate until the Act of June 6, 1900, 31 Stat. 660, 39 U. S. C. § 230. And that was not done for publications of benevolent and fraternal societies, of institutions of learning, trade unions, strictly professional, literary, historical and scientific societies until the Act of August 24, 1912, 37 Stat. 550, 39 U. S. C. § 229.

[17] See Deutsch, Freedom of the Press and of the Mails, 36 Mich. L. Rev. 703, 715-727.

took to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country.[18]

It is plain, as we have said, that the favorable second class rates were granted periodicals meeting the requirements of the Fourth condition, so that the public good might be served through a dissemination of the class of periodicals described. But that is a far cry from assuming that Congress had any idea that each applicant for the second-class rate must convince the Postmaster General that his publication positively contributes to the public good or public welfare. Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is [illegible]

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[18] When Congress has been concerned with the content of matter passing through the mails, it has enacted criminal statutes making, for example, obscene material (35 Stat. 1129, 18 U. S. C. § 344), fraudulent material (35 Stat. 1130, 18 U. S. C. § 338), and seditious literature (40 Stat. 230, 18 U. S. C. § 334) nonmailable in any class. And it has granted the Postmaster General power to refuse to deliver mail for any person whom he finds to be using the mails in conducting lotteries or fraudulent schemes. Rev. Stat. 3929, 39 U. S. C. § 259.

But that power has been zealously watched and strictly confined. See, for example, S. Rep. 118, 24th Cong., 1st Sess., reporting adversely on the recommendation of President Jackson that a law be passed prohibiting the use of the mails for the transmission of publications intended to instigate the slaves to insurrection. It was said, p. 3:

> "But to understand more fully the extent of the control which the right of prohibiting circulation through the mail would give to the Government over the press, it must be borne in mind, that the power of Congress over the Post Office and the mail is an exclusive power. It must also be remembered that Congress, in the exercise of this power, may declare any road or navigable water to be a post road; and that, by the act of 1825, it is provided 'that no stage, or other vehicle which regularly performs trips on a post road, or on a road parallel to it, shall carry letters.' The same provision extends to packets, boats, or other vessels, on navigable waters. Like provision may be extended to newspapers and pamphlets; which, if it be admitted that Congress has the right to discriminate in reference to their character, what papers shall or what shall not be transmitted by the mail, would subject the freedom of the press, on all subjects, political, moral, and religious, completely to its will and pleasure. It would, in fact, in some respects, more effectually control the freedom of the press than any sedition law, however severe its penalties. The mandate of the Government alone would be sufficient to close the door against circulation through the mail, and thus, at its sole will and pleasure, might intercept all communications between the press and the people . . ."

[19] "The foolish judgments of Lord Eldon about one hundred years ago, proscribing the works of Byron and Southey, and the finding by the jury under a charge by Lord Denman that the publication of Shelley's 'Queen Mab' was an indictable offense are a warning to all who have to determine the limits of the field within which authors may exercise themselves." United States v. One Book Entitled Ulysses, 72 F. 2d 705, 708.

fined public information, what is good art, varies with individuals as it does from one generation to another. There doubtless would be a contrariety of views[20] concerning Cervantes' Don Quixote, Shakespeare's Venus & Adonis, or Zola's Nana. But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. The basic values implicit in the requirements of the Fourth condition can be served only by uncensored distribution of literature. From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values. But to withdraw the second-class rate from this publication today because its contents seemed to one official not good for the public would sanction withdrawal of the second-class rate tomorrow from another periodical whose social or economic views seemed harmful to another official. The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted. But Congress has left the Postmaster General with no power to prescribe standards for the literature or the art which a mailable periodical disseminates.

This is not to say that there is nothing left to the Postmaster General under the Fourth condition. It is his duty to "execute all laws relative to the Postal Service." Rev. Stat. § 396, 5 U. S. C. § 369. For example, questions will arise as they did in *Houghton* v. *Payne*, 194 U. S. 88; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, and *Smith* v. *Hitchcock*, 226 U. S. 53, whether the publication which seeks the favorable second-class rate is a periodical as defined in the Fourth condition or a book or other type of publication. And it may appear that the information contained in a periodical may not be of a "public character". But the power to determine whether a periodical which is mailable contains information of a public character, literature or art does not include the further power to determine whether the contents meet some standard of the public good or welfare.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

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[20] In the present case petitioner's predecessor said in his report:

"... when the polls of public opinion submitted by the publication are examined, it is found that these pictures were characterized as obscene or indecent by 19 to 22% of the persons interviewed, and that 20 to 26% of the persons polled would object to having them in their homes."

SUPREME COURT OF THE UNITED STATES.

No. 399.—October Term, 1945.

Robert E. Hannegan, as Postmaster General of the United States, Petitioner, vs. Esquire, Inc.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[February 4, 1946.]

Mr. Justice Frankfurter, concurring.

The case lies within very narrow confines. The publication under scrutiny is a periodical. It is therefore entitled to the special rates accorded by Congress provided it is published "for the dissemination of information of a public character, or devoted to literature, the sciences, art . . . ." If it be devoted to "literature" it becomes unnecessary to consider how small an infusion of "information of a public character" entitles a periodical to the second-class mail rates when the bulk of its contents would not otherwise satisfy the Congressional conditions.

Congress has neither defined its conception of "literature" nor has it authorized the Postmaster General to do so. But it has placed a limitation upon what is to be deemed "literature" for a privilege which the Court rightly calls a form of subsidy. Matters that are declared nonmailable (Criminal Code § 211; 35 Stat. 1129, 36 Stat. 1339; 18 U. S. C. § 334) are of course not "literature" within the scope of the second-class privilege. But the Postmaster General does not contend that the periodical with which we are concerned was nonmailable. He merely contends that it was not devoted to the kind of "literature" or "art" which may claim the subsidy of second-class matter. But since Congress has seen fit to allow "literature" conveyed by periodicals to have the second-class privilege without making any allowable classification of "literature", except only that nonmailable matter as defined by § 211 of the Criminal Code is excluded, the area of "literature, the sciences, arts" includes all composition of words, pictorial representation, or notations that are intelligible to any portion of the population, no matter whether their appeal is ex-

tensive or esoteric. Since the Postmaster General disavows the nonmailability of the issues of the periodical he had before him and since Congress did not qualify "literature, the sciences, arts" by any standards of taste or edification or public elevation, the Postmaster General exceeded his powers in denying this periodical a second-class permit.

It seems to me important strictly to confine discussion in this case because its radiations touch, on the one hand, the very basis of a free society, that of the right of expression beyond the conventions of the day, and, on the other hand, the freedom of society from constitutional compulsion to subsidize enterprise, whether in the world of matter or of mind. While one may entirely agree with Mr. Justice Holmes, in *Leach* v. *Carlile*, 258 U. S. 138, 140, as to the extent to which the First Amendment forbids control of the post so far as sealed letters are concerned, one confronts an entirely different set of questions in considering the basis on which the Government may grant or withhold subsidies through low postal rates, and huge subsidies, if one is to judge by the glimpse afforded by the present case. It will be time enough to consider such questions when the Court cannot escape decision upon them.